EXPLORING SOME NUANCED APPROACHES IN THE ECONOMIC ANALYSIS OF LAW

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ABSTRACT

Hon'ble Justice AK Sikri, in his address analyses the necessity of integrating economic analysis into judicial decision-making for balanced and effective legal reforms in India. He advocates for nuanced approaches, such as incorporating human rights and the doctrine of proportionality, to enrich legal jurisprudence. Highlighting the interdisciplinary evolution of law and economics, Justice Sikri underscores the importance of judicial awareness of economic impacts of judicial decisions and the potential of alternative dispute resolution methods to enhance legal efficiency.

Keywords: *Right to Privacy, Data Protection, Sri Krishna Committee, Coase theorem, game theory, costs and incentives*

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1. INTRODUCTION

It is my pleasure to deliver this keynote address on a very interesting and somewhat emerging topic. As India looks to enhance economic growth, with the target of 5 trillion economy, legislative and judicial reforms (apart from many other steps that may be required) become paramount. Here, my attempt is to limit the discussion to judicial approach in decision making. The responsibility of the judiciary is humungous as the courts play the role of balancing priorities in deciding legal issues which have economic repercussions. For this, traditional thinking has to be replaced with nuanced approaches in the field of law and economics which lead to the evolution of a jurisprudence that takes care of the legality requirements while keeping in mind the business interests.

The fact that imbuing economic jurisprudence in decision-making is the need of the hour reminds me of what the great Justice Oliver Wendell Holmes had said in his famous paper entitled *The Path of the Law*[2] that, "***For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics… We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.***"

These lines of Justice Holmes eloquently provide the roadmap of the time where various advances in social sciences are shaping some of the most successful approaches that were arising out of the cross-pollination of key models from different fields or were an intersection of philosophies between disciplines. All this postulated an exceptionally fertile place for the emergence of ideas in the fields of Law and Economics, thereby exemplifying not only the significance of its increased meticulousness but also the power of interdisciplinary thinking.

In its earlier phase, law confined the use of economics to antitrust, regulated industries, tax and some special topics like determining monetary damages. In these areas, law needed economics to find an answer to the questions which were the subject matter of the disputes.[3] But in the latter half of the 19th century, this limited interaction changed dramatically when the economic analysis of law expanded into the more traditional areas of the law, such as property, contracts,

[2] Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 469, 474 (1897).
[3] *See* Jules L. Coleman, *The Economic Analysis of Torts, in* RISKS AND WRONGS (Oxford University Press 2002).

torts, criminal law & procedure and constitutional law.[4] This new trend uses tools from economics to enrich our understanding of the laws and studies the role of law in the marketplace.

So, it would not be an exaggeration to say that economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions and even the practice of law. Economics generally provides a behavioural theory to predict how people respond to laws and this surpasses intuition just as science surpasses common sense.[5] The response of people is always relevant to making, revising, repealing, and interpreting laws. A famous essay in law and economics describes the law as a cathedral—a large, ancient, complex, beautiful, mysterious, and sacred building.[6] Behavioural science resembles the mortar between the cathedral's stones, which support the structure everywhere.

The idea behind having this conference is to eulogize upon how law is not just a mortar between public policy and economics but also a balancing instrument for multiple considerations. Public policy, economics and law interact to create the ideal balance that fosters equality and efficiency. With the aid of numerous theories and frameworks, the ever-expanding fields of law and economics give us the means to comprehend the formulation, operation and outcomes of public policies, enabling a thorough examination that probes the core of a policy.

The field of law and economics employs a complex interplay between quantitative and qualitative analysis techniques to identify policy gaps and provide robust policy suggestions. We have to use the lenses of both law and economics to examine and offer fresh viewpoints on current public policy challenges and choices. Here we should appreciate the need for such an analysis. Let us take an example of the concept of opportunity cost, which *prima facie* embodies the core ideas of economic reasoning. Now, policy decisions are made keeping in mind the fact that how a particular scheme will improve or advance the existing state of affairs.

Every decision made by the policymakers eliminates alternative possibilities as money cannot be spent in two different ways once it has been spent in one. An increase in a product's price indicates a rise in the opportunity cost associated with consuming it. People respond to

[4] The modern field is said to have begun with the publication of two landmark articles—Ronald H. Coase, *The Problem of Social Cost,* 3 JOURNAL OF LAW & ECONOMICS 1 (1960); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE LAW JOURNAL 499 (1961).

[5] Cass R. Sunstein, Christine Jolls & Richard H. Thaler, *A Behavioral Approach to Law and Economics,* 50 STANFORD LAW REVIEW 1471 (1998).

[6] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW 1089 (1972).

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economic incentives even though individual preferences influence how they use the limited resources that they have and how strongly they react to price fluctuations. Behaviour can be altered by changes in opportunity costs without affecting an individual's underlying psyche. This is where the economic analysis of law enters.[7]

Laws establish a framework within which individuals and organizations can function. Changes in the law affect behaviour and alter the opportunity costs of different activities.[8] For example, a higher overtime parking fine encourages more individuals to top off their parking meters. There is an increase in caretaking when tort law's standards for negligence are strengthened. Businesses invest more in pollution control as a result of stricter environmental restrictions.

On the other hand, how people react to current rules can vary depending on how the world changes. By decreasing the incentive to seek out lawful work, a rise in unemployment may lead to an increase in crime. Variations in the economy can affect the parties' bargaining power, which can have a systematic effect on the terms of the contract.[9] As a result, the way law functions in the world depends on both the law itself and the circumstances surrounding it. A law in South Africa could be very different from one in India in terms of its effects. This conference is a comprehensive exploration of these multifaceted issues in the world of law and economics where we will deliberate upon the intersection of legal principles and financial responsibilities.

In this spirit, my objective in the present address is to shed some light upon the nuanced approaches which can consolidate the symbiosis of law and economics in an era of multilateralism. To facilitate analysis, I have bifurcated this address into three parts.

1.1 I will initiate my discussion in **Part I** by emphasizing upon the epistemology of *'Law and Economics'*. Here we will see how the economic analysis of law can broadly be of two types viz., descriptive and normative, depending upon the question it tries to address. Then, in **Part II**, we will explore the role of the judiciary in increasing the importance of marrying *'Law and Economics'* by discussing some transformative judgements. Here, I will discuss

[7] William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 JOURNAL OF LAW & ECONOMICS 385 (1993).
[8] For a detailed discussion of cost-benefit analysis *see*, AA Schmid, *Benefit-Cost Analysis: A Political Economy Approach*, WESTVIEW PRESS, BOULDER CO (1989).
[9] Susan Rose-Ackerman, *Economics, Public Policy and Law*, 26 VICTORIA UNIVERSITY WELLINGTON LAW REVIEW 1 (1996).

how the court should strive to balance 'law and economics' and in doing so must go by scientific evidence and not general notions.

1.2 In **Part III** of the address, I will eulogize upon some nuanced approaches which can be adopted by the judiciary in its decision-making to deal with specific issues in law and economics. I will also illustrate how we can employ the doctrine of proportionality which acts as a methodical tool in balancing the various juxtapositions of commercial laws. I will then highlight how using methods of ADR and especially Mediation increases the economic efficacy of dispute resolution practice leading to amplified rewards for both the disputants and the economy. I intend to conclude with a message that we should work on using the analytical strengths of economics in conjunction with the empirical data that law furnishes, which would enrich both fields.

2. PART I:

2.1 The Epistemology of Law and Economics

Although the seeds of contemporary Law and Economics go back at least a century[10], it is only in the past five decades that it has emerged as a substantial and important body of thought within both economics and law. During this time, Law and Economics have developed within, and in part because of, a somewhat uncertain and unsettled atmosphere within jurisprudence. What once existed as prevailing legal doctrine derived from conventional political and legal theory still exists, but law no longer develops in a self-contained, autonomous manner.

Rather, most scholars now recognize the law as "a multidimensional phenomenon—historical, philosophic, psychological, social, political, economic and religious" in its inspiration and implications.[11] Furthermore, almost all contemporary legal scholars, judges, and lawyers hold an instrumental view of the law—instrumental in the sense that legal rules are adopted so as to promote some goal, be it equality, justice, fairness, or efficiency. Regardless of whether one believes law is used to promote these goals, it *does* have a wide-ranging impact, and the

[10] In fact, one can go back much further than this, to Adam Smith, whose work *Lectures on Jurisprudence* (1978 reprint) and *The Wealth of Nations* (1937 reprint), is in some respects, well within the tradition of Law and Economics.
[11] Herbert L. Packer and Thomas Erlich, *New Directions in Legal Education*, 71 MICH. L. REV. 866 (1973).

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assessment of these impacts necessitates the use of tools and ideas from disciplines outside of legal theory proper.

Today, the law is being analysed from an incredibly diverse set of perspectives, including Law and Economics, critical legal studies, rights-based theory, feminist jurisprudence, and critical race theory, all of which claim to have something worthwhile to say as to the origin, legitimacy, and development of the law. The outward turn of law thus far has generated no consensus-type movement toward a new and stable foundation for the law.[12] We now stand at a point where legal study embodies a plethora of competing and often mutually exclusive points of view. To use Alan Hunt's metaphor, "**[T]he glacier that is law has fractured into numerous pieces, and its replacement (if there is to be one) remains to be determined.**"[13] Perhaps the present situation is best summed up in the comment that legal scholarship has been "left with a plethora of explanatory frameworks, [and] a dearth of criteria for choice among them".

Adverting to the theme of this conference, I may say that the unsettled nature of legal theory and the relationship of law to economics did not arise in a vacuum. Rather, it is partially the outcome of **1)** the development of Law and Economics—in particular, the various evolving perspectives from which one can analyse the prevailing legal relations governing society—and **2)** the development of the *Economics* of Law and Economics—particularly as embodied in the work of neoclassical macroeconomists since Alfred Marshall. While Law and Economics have had an impact on both the legal and economic disciplines, there is no doubt that it "was institutionalized as a discipline in law schools rather than in economics departments," where it is just another branch of applied microeconomic theory rather than a disciplinary philosophy as it is in law.[14]

Taking this debate forward, public policy debates typically revolve around the question, ***In what direction shall we change the law?*** Law and Economics provide a systematic way to think about this question. The underlying logic inherent in this conceptual model is that much of public policy involves altering the *law*, for example, through **(i)** a constitutional amendment, **(ii)** a change in a working rule that alters the decision-making process by which judicial,

[12] Martha Minow, *Law Turning Outward*, TELOS 73, 79-100 (1987).
[13] Alan Hunt, *The Critique of Law: What is 'Critical' about Critical Legal Studies?*, 14 JOURNAL OF LAW AND SOCIETY 7, 5-19 (1987).
[14] Ron Harris, *The Uses of History in Law and Economics*, 4 THEORETICAL INQUIRIES IN LAW 664, 659-696 (2003).

administrative, or legislative decisions are reached; **(iii)** a change in a legal doctrine within common law adjudication; **(iv)** a change in the definition or assignment of private property rights; **(v)** the altering of a status right (i.e., an administrative eligibility requirement) by the executive branch, the legislature, or some government agency or department; **(vi)** expanding or diminishing the scope of communal rights; or **(vii)** transferring rights to resources heretofore held as open access to either private, status or communal property. The belief is that the goals of public policy will not be realized by changing the law *willy-nilly* or in an ad hoc manner, but by structuring and adopting those laws, rights, rules, and doctrines for which there is a known nexus between the said change in law and the desired outcome.

The view that public policy has no singular origin is reflected in Judge Rendlen's statement in ***Eyerman v. Mercantile Trust Co.,***[15] "**Public policy may be found in the Constitution, statutes, [working rules], and judicial decisions of this state or the nation.**" From the vantage point of Law and Economics, one must understand that a change in the law will alter the incentive structure confronting individuals and groups in society. This change in incentives will alter behaviour, and that new behaviour will ultimately and systematically affect economic performance. Much of positive Law and Economics tries to describe the exact nexus between policy options and their outcomes, with economic performance being measured or evaluated in terms of Pareto efficiency in exchange and production, and Kaldor-Hicks efficiency.[16] That nexus is captured in what has been termed the legal-centralist approach, which focuses on the central role of law in making policy. With this let us now discuss the role played by the judiciary in marrying *'Law and Economics'.*

3. PART II:

3.1 Imbibing Economic Principles in Judicial Decision Making

To me, the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific

[15] Eyerman v. Mercantile Trust Co., 524 S.W. 2d 210, 217 (1975).
[16] This approach, being quite systematic as compared to what lawyers "do" led Bruce Ackerman (1984, p. 22) to ask, "When they speak so resonantly of 'public policy,' do lawyers have the slightest idea what they're talking about?".

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study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully.[17]

The economic analysis of law concerns itself with the application of macroeconomic theory to the analysis of legal rules and institutions.[18] As an analytical framework, law and economics have had a significant influence on scholarly writing for a long time now. However, it was only in the early 1960s that economic analysis began to be applied rigorously to broad non-economic legal problems.[19]

Although 'law and economics' have often been promoted as a tool to be used by policymakers, several scholars have argued that judges either are or should be guided by economic principles when deciding cases. It was in 1947 that Judge Learned Hand formulated a new approach to judicial decision-making by using an algebraic cost-benefit[20] test for determining negligence.[21] For instance, Judge Richard Posner argued that judges should consider wealth maximisation as a guiding value in deciding common law cases.[22] To the extent that economic analysis helps identify which rules maximise wealth, the use of such analysis would be an important tool for judges. Judge Guido Calabresi has also argued that efficiency is a component of justice and therefore, judges should concern themselves with efficiency as they decide cases.[23]

Similarly, Edward Yorio has also argued that judges deciding tax cases should adopt efficiency rules whenever possible.[24] Over the past few decades, several of the most vocal advocates of 'law and economics' have ascended to the bench, including Richard Posner, Frank Easterbrook, and Guido Calabresi. Not surprisingly, they have to a lesser extent or greater degree used economic analysis to help them decide the issues they confront as jurists.

In the case of India, which is a constitutional welfare state where one of our most important goals is social welfare. Since our country is on the road to economic growth, economic welfare

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[17] Richard A. Posner, *Foreword*, in ESSAYS IN LAW AND ECONOMICS: CORPORATIONS, ACCIDENT PREVENTION AND COMPENSATION FOR LOSSES, Michael Faure, Richard A. Posner & Roger van den Bergh eds. (Maklu, 1989).
[18] Lewis Kornhauser, *The Economic Analysis of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (17 July 2017), https://plato.stanford.edu/entries/legal-econanalysis/.
[19] Guido Calabresi, *About Law and Economics: A letter to Ronald Dworkin*, 8 HOFSTRA LAW REVIEW 553 (1980).
[20] The Learned Hand formula is an algebraic formula used to ascertain liability in negligence cases. According to the formula, when the probability (P) and magnitude (L) of harm resulting from the accident exceeds the investment in precaution (B), the defendant should be held liable. However, if B equals or exceeds PL, the defendant should not be held liable.
[21] United States v. United Shoe Mach. Corp., 110 F. Supp 295.
[22] Richar Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUDIES 103 (1979).
[23] Peter Yorio, *Federal Income Tax Rulemaking, An Economic Perspective*, 51 FORDHAM L. REV. 1, 48-9 (1982).
[24] Edward Yorio, *Federal Income Tax Rulemaking, An Economic Perspective*, 51 FORDHAM L. REV. 1, 48-9 (1982).

and well-being of the citizens, especially the most vulnerable sections of the society, is an indispensable part of social welfare. All the wings of the State – the legislature, executive and judiciary– should take measures to ensure that this goal is achieved in the most efficient way possible, by the use of instruments such as laws, policies and judicial decisions. The legal regime in our country is already moving in the direction of economic welfare and efficiency, with recent laws such as the Insolvency and Bankruptcy Code and the Real Estate Regulation and Development Act and Constitutional amendments such as the ones made to incorporate the Goods and Services Tax.

The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction. The judiciary carries out the role of interpreting the law and it should harmonize its interpretation, wherever possible, with our social goal of economic development. The Supreme Court of India faced such a task in ***Shivashakti Sugars Ltd v. Shree Reguna Sugar***.[25] The law required that there must be a distance of at least 15 kilometres between two existing sugar factories. Due to the peculiar fact scenario, the question that arose was whether Shivashakti Sugar, which had not carried out crushing operations in the last five sugar seasons, was an existing sugar factory. Now, the company had undergone an expenditure of approximately INR 300 crore in establishing the factory with loans raised to the tune of Rs. 237 crore and operational cost of INR 150 crores. It had also employed 377 persons on a regular basis and indirect employment was more than 7000 persons. It was imperative that, in a case with such large economic stakes, economic considerations should not be overlooked while making a decision. Public purpose demanded that the factory remains in operation and both equitable and economic factors tilted in its favour. Moreover, no other purpose would be served if thousands lost their employment.

As a result, the court held in favour of the continuation of the factory, constructively interpreting the law to hold that the factory was not a continuing one. In the judgment, while citing Richard Posner and Ronald Coase and highlighting the importance of the economic analysis law, we observed that:

"**43.**.....The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction. It calls for an economic analysis of the law approach, most commonly referred to as "Law and Economics".

[25] Shivashakti Sugars Ltd v. Shree Reguna Sugar Ltd., (2017) 7 SCC 729.

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44...... The first duty of the Court is to decide the case by applying the statutory provisions. However, on the application of law and while interpreting a particular provision, the economic impact/effect of a decision, wherever warranted, has to be kept in mind. Likewise, in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves the economic interest of the nation. Conversely, the Court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State."

In cases where economic interest competes with the rights of other persons, courts need to strike a balance between the two competing interests and have a balanced approach. This aspect of competing interest has been dealt with in the famous case of ***Raunaq International Limited v. IVR Construction Ltd. & Ors.***[26], where Justice Manohar and Justice Kirpal, in their judgment, did not grant an ***interim stay*** in favour of the petitioner, who challenged the process of government auction, on the ground that the grant of such a stay and the delay involved may escalate cost and this may be in contravention of public interest. The bench observed that, "***The court must take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost***."

Another case that comes to my mind is an intellectual property case that came before the Delhi High Court. There was an alleged infringement of the Trademark by Pearl Pet, a manufacturer of plastic containers. The petitioner sought an injunction to cease Pearl Pet's production until resolution of the case. Since Pearl Pet was employing hundreds of employees in its factories, granting an injunction to cease production would cause irreparable damage. Therefore, the balance of convenience and public interest necessitated that I refuse to grant such an injunction as the economic interest of individuals is a crucial part of public interest.[27]

It is imperative, now more than ever, that the inter-discipline of economics and law should be considered by the courts of the country, not on an ad-hoc basis as has been done till now, but on a continued and sustainable basis. Judges ought to consider the economic analysis of the law before giving their decisions because public interest and social good are inextricably linked to the economic welfare of the citizens. Supreme Court judges as the final adjudicators and

[26] Raunaq International Limited v. I.V.R. Construction Ltd. & Ors., (1999) 1 SCC 492.
[27] *See*, Shamnad Basheer, *Report on NUJS Event: "Injunctions v. Damages in IP Cases by Justice Sikri"*, SPICYIP (Feb. 25, 2009), https://spicyip.com/2009/02/report-on-nujs-event-injunctions-v.html.

interpreters of law, carry the responsibility to bear in mind the economic impact of their decisions. The plenary powers under Article 142 of the Constitution of India provide one such avenue for judges to ensure economic welfare through fair and equitable means.

3.2 How Economic Approach in Law Ensures Growth

It is necessary that while exercising their functions, the lawmakers and judges not only achieve the desired social goal of welfare but also attain it in the most efficient manner possible. As I have highlighted before, efficiency is a foundational element of the economic analysis of law. A normative analysis of law entails finding the most efficient method to attain the desired social goal; and law, policy and judicial decisions can act as a vehicle to attain such efficient outcomes.

However, finding the most efficient outcome is not an easy task, it requires complicated and protracted calculations and wide variables which need to be considered. A commonly acknowledged fact by economists is that markets, in their ordinary state, are more efficient than regulations. They must therefore be allowed to function as independently as possible. When possible, the legal system will force a transaction into the market. When this is impossible, the legal system attempts to *"mimic a market"* and guess what the parties would have desired if markets had been feasible.

In order to mimic the market and improve efficiency, law and economics stresses that transaction costs should be as little as possible. The private legal system must facilitate this by performing three functions, all related to property. ***First,*** the system must define property rights; this is the task of property law itself. ***Second,*** the system must allow for the transfer of property; this is the role of contract law. ***Finally,*** the system must protect property rights; this is the function of tort law and criminal law. These set the foundations for individuals to interact freely.

Laws regulating market behaviour allow free market dynamics to play out between individuals, to the maximum extent possible, and interfere in the limited situations of market failure or violation of rights. One example of market failure is the existence of monopolies; a situation where one party can extract more profit from a good than a healthy market would allow. Laws, such as antimonopoly and competition laws, can be used as a tool to ensure that monopoly situations are hard to bring about and maintain. Similarly, Insolvency and Bankruptcy Laws[28],

[28] *See,* Ian F. Fletcher, *Law of Bankruptcy (Legal topics series),* MACDONALD & EVANS (1978).

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laws of corporate finance, and other similar market laws endeavour to address situations of market failure.

In cases where transaction costs such as information cost, opportunity and administrative costs are high, the law plays a greater role in efficient exchanges by enforcing and allocating legal entitlements. One such example was given by Ronald Coase in his paper, ***The Problem of Social Cost***, where he observed that scholars have also been effective in extending the tools of economic analysis into areas of law that do not regulate the market behaviour of individuals. These include rules of evidence, environmental law, family law, the legislative and administrative processes, constitutional law and so on. Economic analysis has also been used to evaluate esoteric and amorphous concepts such as justice. '***The Economics of Justice***' undertakes a positive analysis of justice as wealth maximization, at length. In such areas, where markets do not play a role, the only way to assess the law is to make economic studies of non-market behaviour and evaluate the results.[29] Let us now delve into the most intriguing part of this discussion where I shall shed some light on the need for nuanced approaches for the holistic confluence of law and economics.

4. PART III

4.1 Need for Nuanced Approaches in the Field

I had said a few years ago that ***law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully***. Though, there have been a few judgements of the higher courts which endorse this view, but still a lot has to be done to fully imbue an economic approach in judicial pronouncements. The Courts have to adapt to the nuanced approaches to overcome the many hurdles that come in their way. Some of the obstacles are jurisprudential, hence an answer which fulfils the legality requirement has to be devised.

[29] R. H. Coase, *The Problem of Social Cost*, 3 THE JOURNAL OF LAW & ECONOMICS 1-44 (1960), http://www.jstor.org/stable/724810.

For example, in an adversarial system, the approach of the courts is primarily binary, where they are adjudicating cases in favour of or against something, and thus have the negative power to strike down what is wrong, but not create something positive. This causes a vacuum as a result of their decision-making. But the Indian Supreme Court can very well fill this vacuum by applying the power of substantive justice under Article 142 of the Constitution of India. The court can resort to this power, especially in cases where the interface between 'law and economics' is concerned. The courts should also examine alternatives thus avoiding the vacuum that can be created due to its narrow approach.

The fact that the decisions of courts enforcing laws, even in the case of non-economic laws, have an economic impact means that there can be such a thing as an economic perspective on law enforcement. This economic perspective can deal with the substance or the interpretation of the law (for example by pointing out the economic implications of some interpretations of ambiguous laws) or the process of law enforcement (for example by pointing out how the efficiency of the judicial proceedings could be improved while guaranteeing due process and the protection of the rights of defendants). There is also a need to build a post-judgment audit system in the judiciary whereby the court will assess its judgments after a few years of implementing its directions. This would create a corrective mechanism within the judiciary in future cases while undertaking judicial decision-making on highly sensitive economic and antitrust matters.

As most judges throughout the world have not been trained in economics, one of the questions raised has been the extent to which they should rely on court-appointed economic experts to help them discharge their duties. A related and complex question is what should the role of economic experts working for the court be in judicial proceedings. Whereas economic experts can usefully inform judges on some of the complex technical issues raised by the cases, in the end, it is the courts which must pass judgment on those cases. For this process to run smoothly, however, judges must be able to precisely define which questions they want economic experts to answer. This, in turn, means that judges must understand enough economics to be able to be precise in formulating the questions they want experts to investigate.

Although there may be many subsets of nuanced approaches but I am highlighting the three most important ones, which are:

a) Human Rights in the economic analysis of law, where we will see the intrinsic linkage of economics and human rights.

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b) Secondly, we will explore how the doctrine of proportionality can be used as a methodical tool in balancing 'law and economics'. Proportionality helps in appreciating the scientific evidence and preventing the court from following general notions.

c) Thirdly, I would narrate how the use of Alternate Dispute Resolution and particularly Mediation increases the economic efficiency of law.

4.2 Human Rights and Economic Analysis of Law

Human rights and economics are concepts that are intrinsically linked to each other. It can be cooperative and in some situations, competitive. On the one hand, one must admit that asserting human rights demands economic means, and on the other hand, the efficacy and efficiency of the agent's economic decisions presupposes a significant degree of liberties. There is, therefore, an economic dimension to human rights as much as a human rights dimension to economics. At the same time, they often have conflicting language. Economics is characterized by its goals of the pursuit of isolated individual's personal interests leading to social welfare from that perspective. It often reduces society's complexity to scientific laws and is reluctant to include human rights into its equation.

Human Rights on the other hand, bolstered by international instruments and constitutional principles, are intrinsic and indivisible entitlements which cannot be given an economic measure. They are inalienable rights which must not be sacrificed at the altar of any amount of social good, efficiency or compensation. One of the first persons to have pointed out the conflicting logic of economics and human rights is Noam Chomsky in his two-volume work on the ***Political Economy of Human Rights***.[30]

The human rights exception to economic analysis of law was co-opted into its conceptual foundations and technical apparatus by scholars like Amartya Sen and Martha Nussbaum. They critiqued the centrality of individual and social utility in welfare economics and argued for individual entitlements, opportunities, capabilities, freedoms, and basic human rights, especially rights to be free from government interference in certain areas of choice. Amartya Sen through his ground-breaking works on the '**capabilities approach**' emphasizes that

[30] EDWARD S. HERMAN AND NOAM CHOMSKY, THE POLITICAL ECONOMY OF HUMAN RIGHTS (South End Press 1979).

"entitlements, capabilities and functioning" of individuals are better predictors of individual and social behaviour than self-interested utilized maximization.[31]

Nussbaum says that these capabilities include "***legal guarantees of freedom of expression....and of freedom of religious exercise***" as aspects of the general capability to use one's mind and one's senses in a way directed by one's own practical reason.[32] They also include guarantees of non-interference with certain choices that are especially personal and definitive of selfhood and of the freedoms of assembly and political speech.

Equality and inequality are best assessed in terms of capabilities – rather than in terms of GDP, consumption or utility – while poverty may be best characterized in terms of the absence of deprivation of certain basic capabilities to do this or to be that. In the words of Amartya Sen: "***The available data regarding the realization of disease, hunger, and early mortality tell us a great deal about the presence or absence of certain central basic freedoms***".[33] Therefore, human rights and capabilities are at least as important as utility in the economic analysis of law and should be given the greatest importance while analysing or modelling law and policy.

4.3 A Sentinel's toil in the balancing of approaches: The doctrine of Proportionality

The '*Economic analysis of law*' explicitly pegs the effectiveness of a law on tangible measures such as its social efficiency and the social goals of laws. The most desirable law is the one which is the most efficient in achieving its objective. This is unlike other approaches of analysing law which often leave the criterion of the social good unclear or substantially implicit. However, if the courts are totally influenced by the human rights approach or in contrast the economic approach to arrive at a conclusion in a particular case, then the outcome would be disproportionate. Let us understand this with two examples.

For instance, in the *Emission Standard case*[34], if the court's decision intended to stop more polluting vehicles from plying on the road in the interest of public health which is a facet of the right to life under Article 21, then the court achieved little by banning those vehicles. This

[31] *See* generally, Robeyns, Ingrid and Morten Fibieger Byskov, *The Capability Approach*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/capability-approach/.
[32] *See* Amartya Sen, *Equality of what?*, in 1 TANNER LECTURES ON HUMAN VALUES (SM McMurring ed., 1980); Amartya Sen, *Capability and Well-being* in THE QUALITY OF LIFE (Sen and Nussbaum, 1993).
[33] Amartya Sen, *Freedom, Agency and Well-Being, in* INEQUALITY RE-EXAMINED (Oxford, 1995), https://doi.org/10.1093/0198289286.003.0005.
[34] M. C. Mehta v. UOI, AIR 2017 SC 2430.

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is because the banned vehicles were eventually sold at discounted rates before the cut-off date set by the court, resulting in significant losses to the auto industry. This not only defeated the purpose of the ban but also caused a great deal of financial agony to the auto sector which is known to have one of the highest multiplier effects on the economy.

In fact, such a decision is a classic example of what **American legal philosopher Lon Luvois Fuller** in his paper titled "***The Forms and Limits of Adjudication***"[35] had called problems of polycentricity, which is a more theorised description of the intuition that implementing social welfare rights called for a kind of policy analysis, that is different from that associated with classical civil and political rights. Fuller compared polycentricity with a spider's web— a pull on one strand will distribute the tension throughout the web as a whole in a complicated pattern.[36] When applied to adjudication, polycentric problems normally involve many affected parties and a somewhat fluid state of affairs. As a result, the adjudicator is inadequately informed and cannot determine the complex repercussions of a proposed solution.

In the emission standard case, the analysis of the court suffered from the problem of polycentricity when the court went by the intent of the Auto Fuel Policy which meant to ensure the induction of lesser polluting vehicles in a phased manner. While this policy laid out clear timelines for new standards to become applicable, a precedent existed where the auto industry on an earlier occasion was allowed to clear old inventories with some relaxations to enable the transition to new emission norms in a smooth manner. Therefore, the benefit of the doubt could have been given to the auto sector by allowing them reasonable time to dispose-off the old inventory of vehicles. This could have been done with a warning to both government and the industry that in the future such exemptions cannot be expected. This would not have hampered justice particularly because the availability of compliant/ suitable fuel was not uniform all across the country. There were other factors too which led to automobile pollution; fuel is not the only one.

Similarly in **the *Liquor Ban case***[37], the gaping hole was with regard to enforceability. The judgment was pronounced to rein in road accidents due to drunken driving and the court passed an order prohibiting the sale of alcohol within a distance of 500 metres from the national and state highways in the country. However, the Supreme Court did not provide any empirical

[35] Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARVARD LAW REVIEW 353-409 (1978).
[36] Balram Pandey, *The Supreme Court and The Constitution: An Indian Discourse*, ILI LAW REVIEW (Winter Issue 2020).
[37] State of Tamil Nadu v. K Balu & Anr., Civil Appeal Nos. 12164-12166, 2016.

rationale for prescribing a specific distance of 500 metres for the ban on liquor sales on highways. Many studies conducted after the judgement was pronounced showcase that there was no decrease in the number of road accidents.

Overall, the evidence suggests (based on official data as well as a primary survey) that there was no significant reduction in drunken driving cases after the judgment. On the other hand, the evidence also suggests that only policing is an ineffective mechanism to rein in drunken driving incidences. These facts raise a serious question about the effective enforceability of the judgment and therefore the courts in India will do well to assess the impact ***ex-ante***, especially when an issue concerns substantive economic and technical dimensions.

The solution lies in the *normative* analysis, which is useful to organize, design and reform the legal architecture in such a way that it ensures the most efficient outcome possible. It is a potent tool at the disposal of legislators and judges, who enact and interpret the law, to improve the quality of our laws and legal rules. As Judge Richard A. Posner pointed out in his book *Frontiers of Legal Theory*[38] that "***in its normative aspect, law and economics advice judges and other policymakers on the most efficient methods of regulating conduct through law.***"

In my opinion, the tool of this normative analysis is employing the doctrine of proportionality which can be used as a methodical tool in balancing both the legality requirements and the economic impact of the judgement. Proportionality helps in appreciating the scientific evidence and preventing the court from following general notions.

In fact, the doctrine of proportionality can also be employed by the courts in large-stake competition law matters. Since, the role and scope of modern economic analysis in competition policy have been changing, thus, characterizing this change as one towards a "***more economic approach***" is the need of the hour. Indeed, antitrust and merger analysis has always been based on economic principles. The question for effective enforcement is not one of "**more**" or "**less**" economics, but rather what kind of economics and especially how the economic analysis is used – or indeed sometimes may be abused – in the context of guidelines or cases.

The change in the practice of Indian competition policy is all about the way in which economic principles and economic evidence are brought to bear in the context of decision-making. The assessment of decision-making in light of modern economic principles that are robust and empirically tested, as well as the reliance on a number of empirical methodologies that help

[38] RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (Harvard University Press 2004).

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identify a theory of harm, is at the core of this trend. However, there are also non-significant dangers and there is a clear potential to abuse economics, not least by various special interests. As a result, the proper and professional interpretation and generation of economic evidence are essential for the credibility of the process to work towards better decision-making.

In this context, it is interesting to recall that there seems to be a substantial increase in the use of economics in antitrust. But what still lacks is the use of a methodological tool which has to potential to assist in balancing the approaches, which is, primarily the role of the adjudicators. Let me illustrate this with a real-life example. In the year 2018, an appeal came before a bench comprising myself and Justice Ashok Bhushan in the Supreme Court against the orders passed by the Competition Appellate Tribunal ("**COMPAT**"), which found that suppliers of liquefied petroleum gas cylinders were in contravention of Section 3(3)(d) of the Competition Act of 2002, for rigging their bids in the tender floated by Indian Oil Corporation Limited ("**IOCL**"), in relation to the supply of 105 lakh cylinders between the years 2010 and 2011.

The COMPAT, by the said order, (a) upheld the findings of the Competition Commission of India ("**CCI**"), insofar as it found the suppliers guilty of contravening Section 3(3)(d) of the Act; and (b) reduced the amount of penalty imposed on the suppliers. As a result, the suppliers filed instant appeals on the ground that there was no cartelization and that they had not contravened Section 3(3)(d) of the Act. On the other hand, the CCI challenged the latter part of the order whereby the penalties imposed on the suppliers were reduced.

Before this, the CCI had concluded that the suppliers colluded and formed a cartel, which led to bid rigging, based on the following factors:

(a) Existence of an active trade association in which many of the suppliers are members. The primary interest of the trade association, it was concluded, is to ensure that no new entrants are able to join. Further, the trade association also ensures that all the members are able to receive a portion of the order. The CCI concluded that it is for this reason that the bids submitted in various standards which are floated by IOCL at different places are almost identical despite varying costs;

(b) CCI inferred this from the fact that 2 (two) days prior to the submission of bids, the association conducted a meeting which most of the suppliers attended. Further, six common agents were appointed who submitted the bids on behalf of these suppliers;

(c) IOCL requires gas cylinders of a particular specification and in large numbers, every year. Further, there are very few manufacturers and suppliers of this product to IOCL and two other buyers. For this identical product which is to be supplied by all the suppliers, there is no substitute and no significant technology change.

Now, the economic analysis of law comes in full sway as the nature of the market was to be determined in order to decide the issue of cartelization. We looked into the economic principles of monopsony and oligopsony and found that **monopsony consists of a market with a single buyer. When there are only few buyers the market is described as an oligopsony.** In the instant case, it was emphasised by the Regulator-CCI that in such a situation a manufacturer with no buyers will have to exit from the trade. Therefore, the first condition of oligopsony stands fulfilled. The other condition for the existence of oligopsony is whether the buyers have some influence over the price of their inputs. It is also to be seen as to whether the seller has any ability to raise prices or it stood reduced/eliminated by the aforesaid buyers.[39]

At this juncture, the proportionality test can be used to balance the interest of law and economics in determining the influence of buyer over the price of their inputs while corroborating the credibility of evidence which is led. Proportionality acts as a methodological tool in carrying out this exercise as it aids in determining the **relationship between the benefit obtained from accomplishing the proper purpose and the harm caused to the statutory limitation viz., Section 3(3)d.**

The **proportionality *stricto sensu* test** aids the adjudicator in the assessment of the anti-competitive effects generated by business behaviour and gives him choices – among all those means that may advance the purpose of the limiting law – while balancing the economics of scale. Balancing is central to the life of law and in the jurisprudence of antitrust, it is central to the relationship between contractual rights/ commercial autonomy and the public interest, since the purpose of competition law is ensuring a fair marketplace for consumers and producers by prohibiting unethical practices designed to garner greater market share than what could be realized through honest competition.

Balancing reflects the multi-faceted nature of the business and it is an expression of the understanding that the law is not "all or nothing." Law is a complex framework of values and

[39] RICHARD WISH, COMPETITION LAW (5th ed. Oxford University Press, 2003).

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principles, which in certain cases are all congruent and lead to one conclusion, while in other situations are in direct conflict and require resolution.

Given the evolvement of competition law and policy towards a more effects-based analysis, the proportionality principle becomes increasingly significant. Moreover, the application of the rules of competition increasingly requires not only a full proportionality test (*i.e.* looking also or mainly at proportionality *stricto sensu*) but a full substantive cross-proportionality test in order to assess and balance the pro- and anti-competitive effects of agreements and practices.[40]

The fact that the application of the rules of competition is increasingly governed by a full substantive proportionality test, with the resulting impact on the scope of judicial control, shows how profoundly the gradual switch from a more form-based to a more effects-based assessment of market behaviour affects the legal nature of competition law and policy.[41] There are a lot of advantages of applying proportionality in antitrust cases as it impacts the application of the principles of equal treatment and legal certainty. Equal treatment requires an effects-based analysis more than a mere comparison of clauses and forms. It requires a comparative analysis of the impact of corporate or government behaviour, and the rather more difficult concept of material discrimination becomes more important than formal discrimination.[42]

4.4 Using Mediation to Increase the Economic Efficacy of Law

Before concluding this address, it would be trite to discuss the advantages of imbuing ADR and in particular Mediation in the dispute settlement practice. ADR not only aims to restore or preserve the dynamics of the contract but also encourages the resumption of dialogue between the parties, which is why ADR has become the ***de facto*** choice of the parties for resolving commercial disputes. This was aptly highlighted by the great Justice V. R. Krishna Iyer in his eloquent remark that "***Commercial causes, we may observe in prolegomenary fashion, should as far as possible be adjusted by non-litigative mechanisms of dispute resolution, since***

[40] *See* e.g. E. ELLIS, THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 187 (Hart Publishing, 1999); N. EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW 288 (Kluwer Law International, 1996).
[41] J.H. Jans, *Evenredigheid revisited*, SOCIAAL ECONOMISCHE WETGEVING: TIJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT 270-282 (2000); *See* RICHARD WISH, COMPETITION LAW 157, 207, 231, 440, 663 (5th ed. Oxford University Press, 2003).
[42] *See* e.g. FAULL & NIKPAY, THE EC LAW OF COMPETITION para. 3.210 (Oxford University Press, 2nd ed., 2007); L.RITTER AND W.D.BRAUN, EUROPEAN COMPETITION LAW 153 (Kluwer Law International, 3rd ed., 2005).

forensic process, dilatory and contentious, hamper the flow of trade and harm both sides, whoever wins or loses the lis."[43]

The use of Mediation in commercial as well as matrimonial cases increases the economic efficacy of the legal process as mediation relies on a rationalist paradigm, which takes us towards an '***interest-based***' model of dispute resolution rather than the *'position-based'*. Many negotiation specialists believe that this is the most effective technique for shifting the focus of conflict from personal hostility to '***the problem***'.[44] Mediation as a form of ADR has also gained popularity because it acts as a means of resolving a variety of disputes, ranging from routine personal and family conflicts to high-value commercial disagreements. The cost of litigation and the amount of time lost in court proceedings while resolving commercial disputes shows us that there are many reasons to choose mediation which is not just mutually beneficial but also economically viable.

The practice of mediation decreases the ***opportunity cost*** of resolving a dispute which leads to an increased reward for the parties. Because of its unique and unmatched qualities, which no other system possesses, mediation ropes conciliation of both dispute and relationship. The policymakers should emphasize upon these qualities of mediation not only in statutes and other rules but also in a wide range of non-regulatory approaches such as training for disputants and professionals, technical assistance for ADR organizations and in grievance redressal mechanisms for parties regarding the mediation process. These efforts of the policymakers will encourage the use of mediation in resolving disputes and will thus increase the economic efficiency of the legal process.

5. CONCLUSION

It is commendable to see that the movement which was founded by a handful of scholars has assumed a gigantic force today. The discipline of '*law and economics'* is now well established, with numerous associations and several journals across the world specifically dedicated to this

[43] Agarwal Engineering Co. v Technoimpex Hungarian Machine Industries, (1977) 4 SCC 367, ¶1.
[44] The pioneering text espousing this view of interest-based bargaining, first published in 1981, is ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, (2nd ed., 1991).

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discipline. In India, Gujarat National Law University and its Centre for Law and Economics have significantly contributed to the development of jurisprudence in this field.

Here, I would like to add that as we make progress in the field, we must be careful about not making law the handmaiden of economic theory, but rather using the analytical strengths of economics in conjunction with the empirical data that law furnishes, thus enriching both fields. A century and a half ago, John Stuart Mill said of English philosopher and political radical Jeremy Bentham, that he approached the world as a stranger. And, if the world did not fit his theory, utilitarianism, he dismissed what the world did as nonsense. Mill then said that what Bentham did not realize was that often that nonsense reflected the unanalysed experience of the human race.

The future of *"law and economics"* lies in this sort of a mutual relationship. Also, the discipline has expanded its understanding by leaps and bounds, but much is yet to be discovered. There are relevant legal issues that are not adequately explained in the current economic theory. The book entitled ***The Future of Law and Economics***[45] by Judge Calibresi recognizes a few such legal issues. Judge Calibresi attempts to expand the scope of *'law and economics'* by establishing a bilateral relationship between both disciplines. The constant assumptions in economics, like the rational actor model, are also being challenged. New areas such as ***behavioural economics*** and ***neuro-economics*** are being explored as tools to analyse law and account for human subjectivity and psychology. As the great Greek polymath Socrates had famously said that "***the only true wisdom is in knowing you know nothing***", therefore we as practitioners and students of law and economics need to keep our curiosity alive and our reasoning sharp, so that we venture further than ever before.

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[45] GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS – ESSAYS IN REFORM AND RECOLLECTION (Yale University Press, 2016).

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