

ECONOMIC ANALYSIS OF LAW IN INDIA

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ABSTRACT

Law and Economy individually have immense importance in the development of a Nation. Bentham may have begun the field of Economic analysis of law as it was observed that his writings contain analysis of property law and a treatment of legal process. Economic evidence and principles play a major role while making the law. Primary objective of law is to provide basic rights to human and by Economic Analysis of law. Economics gives a better way to deal with human behaviour and get a good grasp on human behaviour. Economic Laws are beneficial for the nation and is considered to be very important for the development of nation. Without Economic Analysis of law, we cannot make better policies for the citizens of the nation.

KEYWORDS: Law, Economy, Development, Nation, Analysis

INTRODUCTION

The Economic analysis of law focuses on how law and legal rules affect the behavior of individuals and firms, the allocation of risk across individuals, and the distribution of resources in society. It is the application of microeconomic theory to the analysis of law. The field emerged in the United States during the early 1960s, primarily from the work of scholars from the Chicago school of economics such as Aaron Director, George Stigler, and Ronald Coase. The field uses economics concepts to explain the effects of laws, to assess which legal rules are economically efficient, and to predict which legal rules will be promulgated¹.

Experts in the field of political science, sociology, psychology, theology and economics have analysed the merits and demerits, durability and desirability and tenacity and enforceability of legal principles being followed as well as proposed. The study of law, its efficiency and efficacy, is not the exclusive province of lawyers, academicians and practitioners alone. It was explored by other disciplines as well and from different perspectives. Law, far from being a unidisciplinary study has transformed into an interdisciplinary study. One such interdisciplinary study is the Economic Analysis of Law².

Economic Analysis of Law is grounded on the philosophy of “utilitarianism” judged by the consequences. Hence, Utilitarianism focuses on the consequences of either a rule or an action.

¹ David Friedman (1987). "law and economics," The New Palgrave: A Dictionary of Economics, v. 3, p. 144.

²https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P000850/M025708/ET/1513744414/Economicanalysisoflaw.pdf

GENESIS OF ECONOMIC ANALYSIS OF LAW

Economic Analysis of law is laid on the foundation that a human being who is a rational maximizer of his satisfactions in life. Economic Analysis of Law is grounded on the philosophy of “utilitarianism” which was propounded by Jeremy Bentham.

His general view on utilitarianism is “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out

- what we ought to do, as well as to determine what we shall do.
- On the other hand, the standard of right and wrong,
- on the other the chain of causes and effects, are fastened to their throne.

The principle of utility recognises this subjection and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light”³.

The scholars of law and economics support arguments of theories of legal efficiency based on both positive theory and normative theory. The positive theory states that the common law is efficient, while the normative theory states that the law should be efficient. But the two theories remain separate. Most economists accept both.

The economic analysis of law provided a new framework for analysing the assignment of property rights and liabilities in economic terms. It opened a vast field of legal doctrine to fruitful economic analysis. The economic analysis of law can be said to have begun with

- Guido Calabresi’s first article on torts⁴ and
- Ronald Coase’s article on social costs⁵ in the 1960’s.

Till 1960’s economists were occupied with studies relating to antitrust and monopolistic business practices. They studied the economic rationale behind such practices and their consequences and impact on the society. Their findings had considerable influence in determining the legal policy on those matters.

To study the efficacy of law, the common law principles of torts, contracts, restitution and property were subjected to this new approach. The areas covered by legislation such as environmental law, intellectual property were also taken into its fold. Civil law, criminal law, constitutional law, any law for that matter, was explored and exposed through the lens of economic analysis.

³ Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ed. J.H.Burns and H.L.A. Hart Ch 1 Para 1.(London, Athlone Press, 1970)

⁴ GUIDO CALABRESI, “ Some thoughts on Risk Distribution and the Law of Torts”, 70 Yale L.J 499(1961).

⁵ RONALD H. COASE , “The Problem of Social cost”, 3 J.Law & Econ. 1(1960).

The credit of bringing a formal shape and structure to sporadic endeavours by a few economists under the rubric of economic analysis of law is given to Richard A. Posner⁶. Theory of legislation and regulation, besides law enforcement and judicial administration, were subjected to the triple test of utility, optimality and efficiency leading to the message that many doctrines and institutions of any legal system are better understood as efforts to promote efficient allocation of resources.

SALIENT FEATURES OF ECONOMIC ANALYSIS OF LAW

- One significant feature is it possesses exploratory power. It explores the cost effect impact.
- Efficiency as value outcome is an important feature is another important feature
- The legislators think just about solutions but it stimulates lawyers and judges to place an economic value on costs and benefits.
- The economic analysis of law enables the policy maker and legislator to assess whether the means for achieving legislative goals are efficient or inefficient.
- For policy formulation, formalisation and forecasting the economic analysis of law emerged as a useful tool.
- It positively explains the implications of legal rules rather than to change them.
- It provides the necessary empirical data and support for value preference and consequent policy formulation etc⁷.

JUDICIAL ANALYSIS OF ECONOMICS AND LAW

In *Shivashakti Sugar Limited V. Shree Renuka Sugar Limited and others* our Supreme Court held that

“Law is an Interdisciplinary subject and its affiliation with other sciences when comes into play, it is important for a judge to consider the impact of other disciplines in order to reach a judgment. Relations between Law and Economics have become valid as the nation has reached into an era of Economic Liberalisation, also termed as the “Globalisation” of economy.

India is going way fast on the road of Economic growth and the legislature is performing its duty to make the growth easier and achievable. India is working for decades in its plans and strategies to be a developed country. The judiciary also has to perform economic analysis of law to conclude a case in which economical side can impact the decision. There are many branches in law which are directly impacted by Economics and economic considerations play predominant role, which are also recognised as the legal principles.

Economic evidence and principles play a major role while making the law like Environmental law, Bankruptcy law, Monopoly law, Contract law, Tort law, Labour law, tax

⁶ RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW, 2nd ed. (Boston, Mass: Little, Brown & Co. 1977).

⁷https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P000850/M025708/ET/1513744414/Economicanalysisoflaw.pdf

law, Corporate and other laws. For a reference, the Court must have primary knowledge of economic to decide the amount of damages; guilty party has to pay to compensate the victim or the aggrieved party.”

In *Kirti Ravinder Dhawan & ANR. V. M/S. Kashish Developers Ltd. And 2 ORS.* National Consumer Disputes Redressal Commission stated that

“In a case, primary duty of the court is to decide with the help of statutory law. But if a situation arise where following statutory law would affect the economic interest of the nation, the court should prefer the latter.

Specifically, the Court needs to avoid a decision which would have an unfavourable effect on employment, growth of infrastructure or revenue of the State. This is why, the economic analysis of the effect of the decision become critical.”⁸

ECONOMICS ANALYSIS OF JURISPRUDENCE

- The science of wealth is defined as Economics on the other hand Jurisprudence is defined as the science of law
- Economics identifies the important factors of production as the source of wealth creation on the other hand Jurisprudence deals with making of the law, mechanisms for its enforcement and maximisation of justice.
- Economics explains the necessity and hurdles faced in the society in the proper distribution of wealth on the parameters of utility, optimality and efficiency. Jurisprudence identifies the important sources of law, and examines their relative merits and demerits, the role played and being played by the different sources of law and compares with the reality in the contemporary society.
- The ultimate result of economics is promoting maximisation of satisfaction. The ultimate objects of jurisprudence is ensuring justice in the society.
- Finally the ultimate aim of both economics and jurisprudence is welfare of the society⁹.

ECONIMICS ANALYSIS OF TORTS

In torts economics analysis deals in the cases of negligence. The compensation will be paid by analysing the cost of prevention. If cost of prevention is more than the compensation payable, the wrongdoer will prefer to pay the compensation. On the other hand if the cost of prevention is lesser than the compensation to be paid in the event of an accident, the wrongdoer would adopt the preventive measures.

The economic analysis of tort law has stressed issues such as the distinction between negligence and strict liability. Strict liability is important when the issue is not only the care

⁸ <https://www.linkedin.com/pulse/relation-between-law-economy-edge-law-partners/>

⁹ https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P000850/M025708/ET/1513744414/Economicanalysisoflaw.pdf

used in undertaking the activity, but also whether the activity is done at all and the extent to which it is done that is the level of the activity including highly dangerous activities.

Two factors have caused the major expansion of product liability law. One was finding relatively strict liability for “design defects” in addition to “manufacturing defects.” The other was expansion of liability for “failure to warn.”¹⁰

ECONOMICS ANALYSIS OF CONTRACT

Economic analysis of contract is a concomitant because contract involves economic activity. A rich field for economic analysis of law is Contract Rights and Remedies. The doctrines of contract law seem consistent with economic efficiency. It is natural for a party to calculate the cost of performance along with the cost of breach of contract and the consequential liability to pay damages to the other party to the contract. Cost of performance being lesser than the damages is the incentive for performance. If more, breach is preferred, generally, to performance.

Law and economics study of contract law has shown that, in general, it is efficient for parties to be allowed to write their own contracts, and under normal circumstances, for courts to enforce the agreed-on terms, including the agreed-on price. The courts will generally not enforce contracts if performance would be inefficient, but, rather, will allow payment of damages. However, not all doctrines are efficient. Contracting parties will sometimes specify if there is a breach, damages called “liquidated damages” to be paid.

If the courts decide that these liquidated damages are too high—that they are a penalty rather than true damages—they will not enforce the amount of contractual liquidated damages. This failure to enforce agreed-on terms is a major puzzle to law and economics scholars; it appears that the courts would do better to enforce the parties’ agreement, just as they do with respect to price and other terms of a contract which leads to violation of positive law¹¹.

ECONOMIC ANALYSIS OF LITIGATION

Crucial decisions relating to litigation are taken at individual level by a litigant. The individual litigant takes into account the cost of litigation versus the cost of non-litigation before deciding to go ahead with litigation. If litigation falls below the cost of litigation, a prudent litigant would rather prefer to forego his right than to pursue the same in a court of law.

A litigant may weigh in balance the adjudicatory outcome versus negotiated outcome. If the negotiatory outcome is more than the adjudicatory outcome, it would be to opt for negotiation. The cost of litigation, the time expected to take result of the pursuit of litigation

¹⁰ <https://www.econlib.org/library/Enc/LawandEconomics.html>

¹¹ <https://www.econlib.org/library/Enc/LawandEconomics.html>

are the factors considered for reaching a conclusion on the question is it worthwhile to pursue any dispute in a court of law¹².

CONCLUSION

Economic Laws are beneficial and very important for the development of nation. We cannot make better policies for the citizens of the nation without economic analysis of law. The Lawmakers can fail to recall the development of the nation without economics and lead to the laws which affect the employment and livelihood of the citizens, especially impacting the underprivileged. With the help of Law and economics we are taking a step closer to the goal to be a developed nation.

¹²https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000020LA/P000850/M025708/ET/1513744414Economicanalysisoflaw.pdf