

Criticisms of Law & Economics Approach: The Perils of Indian Reality

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Abstract

This paper critically examines the application of Economic Analysis of Law (EAL) in the Indian legal context, focusing on two main criticisms: the reliance on market practices and the limitations of empirical and rational analysis. EAL, popularized by Richard Posner, emphasizes the efficiency of legal rules and institutions through economic theories. However, the paper argues that market-driven solutions can deepen societal divides, especially in a country like India with significant economic disparities. Drawing on Michael Sandel's critique, the paper questions the appropriateness of applying market incentives to social issues and highlights the potential negative consequences, such as reinforcing class divisions. Additionally, the paper challenges the exclusive reliance on empiricism and rationalism in EAL, asserting that data and figures may oversimplify complex social realities. Using examples like reservation policies and the Sardar Sarovar Dam, the paper illustrates how purely economic analysis may overlook historical injustices and systemic discrimination faced by marginalized groups. The conclusion emphasizes the need for a balanced approach that considers socio-cultural factors and recognizes the limitations of market-driven solutions. The paper contends that while EAL offers valuable insights, its application in India requires a more nuanced understanding of the socio-economic landscape, cultural diversity, and historical context to ensure legal solutions align with principles of justice and inclusivity.

Keywords: *Empiricism, Rationalism, Market Economy, Market Society, Incentives.*

Introduction

Economic analysis of law (EAL hereon) as an aspect of legal studies has existed since the early years of the 20th century, however it was Richard Posner who by the means of his works in the this field brought it to popularity in late 1970s. The basic proposition of EAL is that, it is the application of the economics theories and idea to the analysis of legal rules and institutions.ⁱ It is not uncommon not to link the economic principles and theories to legal postulates and problems. EAL makes an attempt to come up with answers for two basic question about legal rules and institutions. First, what are the effects of legal rules on the behavior of the concerned individuals? And secondly, are these effects of legal rules socially desirable? These questions are both positive and normative in nature, the approach employed in economic analysis of law is that used in economic analysis generally. It positively helps in explaining the implications of legal rules as they are rather than to change them. It also performs a normative function in that it can be used for establishing that it would be inefficient to apply a legal principle.ⁱⁱ EAL is laid on the foundation that human beings are rational maximiser of their end and that they act in their self-interest.ⁱⁱⁱ It is somewhat similar to Bentham's idea of "utilitarianism", hence most academics use the term utility here. EAL engages in a cost-effect impact analysis of legal rules and institutions in order to determine the efficiency of law. If the whole approach of EAL is to be crunched into one word it would be efficiency. To put it simply, a legal situation is said to be efficient if a right is given to the party who would be willing to pay for the most for it. The positivist perspective says, common law (judge-made law) is more efficient, while the normative perspective says, that the law should be efficient.^{iv} While the two theories are very different and separate, many economists and jurists accept both.

According to EAL, in an economic sense, markets are more efficient than courts. To put this further into context the premise of EAL focuses on incentives and people's responses to these incentives. For example, the purpose of damage payments in accident (tort) law is not to compensate injured parties, but rather to provide an incentive for potential injurers to take efficient (cost-justified) precautions to avoid causing the accident. This is where the assumptions EAL makes that human beings are rational and self-interested that comes into play. When penalties for an action increase, people have a tendency to undertake less of an

action. EAL lets market based variables influence the legal rules and courts decisions for it provide the best possible way to achieve efficiency.

EAL also hinges on empiricism and statistics. Empiricism basically maintains that, experience is the sole source and the sole guarantee of knowledge. It heavily relies on sense observation, laboratory techniques and inductive generalization.^v The emphasis on data, figures and information is heavy when it comes to empiricism. Aristotle and John Locke are few prominent empiricists. Opposed to this, going back to one of the assumptions of EAL of human being are rational, Rationalism is one other aspect of EAL. Rationalism is a view that regards reason as the chief source and test of knowledge. Holding reality itself has an inherently logical structure, the rationalist asserts that a class of truths exists that the intellect can grasp directly.^{vi} Plato, Rene Descartes and Noam Chomsky are few prominent rationalists. EAL does not categorically employ just empiricism or rationalism, it in a unique manner is a culmination of both of these philosophical schools. The best way to understand this is to enquire through Emmanuel Kant's position of empiricism and rationalism. He settled the debate between the two philosophies, by concluding that, instead of choosing sides in a rationalism/empiricism debate, Kant worked to show that knowledge comes from the use of reason and our experience, synthesized together.^{vii} He called it transcendental idealism, which in my opinion fits perfectly to EAL. In this paper I shall, against this backdrop, on basis of criticism of EAL, highlight the why EAL cannot bring about desirable outcome in India.

Criticisms of EAL

To come to the main objective of this paper, as to a critique of EAL and why it fails to fit into India legal rules and institutions, there are two main grounds for criticism, firstly, the marketization of legal and social issues, and secondly, how experience (empiricism) and reason (rationalism) ignores certain obvious ground realities which quite often cannot be deduced through innate ideas and portrayed through data.

The criticisms of Economic Analysis of Law (EAL) in the paper effectively highlight its limitations in addressing India's socio-economic realities. However, strengthening the critique requires acknowledging arguments advanced by EAL proponents while presenting counterarguments. EAL advocates argue that market mechanisms enhance efficiency by

incentivizing optimal resource allocation. They claim that integrating economic incentives can address governance gaps, particularly in sectors like education, healthcare, and infrastructure.

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However, such claims often overlook India's systemic inequalities. For instance, while proponents may argue that market-driven educational policies encourage excellence, they ignore that unequal access to resources severely limits marginalized communities from competing on equal footing. Cash-for-grades experiments, as critiqued by Michael Sandel, demonstrate how market incentives can distort intrinsic motivations, reducing education to transactional outcomes. In India, such policies would likely exacerbate disparities in an already stratified education system, leaving underprivileged students further behind.^{ix}

Additionally, EAL proponents stress the universality of rationality in human decision-making. Counterarguments must emphasize that this assumption does not hold universally, particularly in diverse societies like India, where cultural, social, and historical factors significantly influence behavior. The disproportionate impact of policies like reservation reforms on marginalized communities underscores the limitations of EAL's purely empirical approach. While data may suggest inefficiencies in reservation policies, it fails to capture the systemic oppression and social barriers that perpetuate inequality.^x

Markets & Morals

Market Economy v. Market Society

Michael Sandel his book *What Money Can't Buy*, makes an important observation, in his critique of EAL that, one cannot expect solve social issues by the means of market incentives^{xi}. It is good to have a market economy but not a market society. A market economy is where, the whole of any region in which buyers and sellers are in such free intercourse with one another, that the prices of the same goods tend to equality easily and quickly.^{xii} While market society is a place; it's a way of life where market relations and market incentives and market values come to dominate all aspects of life.^{xiii} The reason I say it's good to have a market economy is because A market economy is an economic system controlled, regulated, and directed by markets alone; order in the production and distribution of goods is entrusted to this self-

regulating mechanism. While in market societies the commodification of non-commodities takes place. This commodification of non-commodities obscures the varied social relations and institutions constituting social organizations of commodity exchange.^{xiv}

When we let marketization of almost every other thing, we give a free hand for anything to be sold at a price.^{xv} The person willing to pay the most will always come on top. Given the fact in India there is a huge parity when it comes to financial capabilities. According to Oxfam's "Survival of the Richest" report published on the opening day of the 2023 World Economic Forum at Davos, the top one percent in India owned more than 40.5 percent of total wealth in 2021 while the bottom 50 percent of the population (700 million) had around three percent of total wealth.^{xvi} If everything is available at a price then only 50% of India's population may not have access to it, this is on the backdrop that discrimination on basis of caste, community and religion itself handicaps individuals from access to multiple resources. Just because an individual has more money to pay for something does not necessarily mean that they value it more than the person who cannot afford it, it may be the case that person who cannot afford may be in immediate need of it^{xvii}.

Cash for Good Grades

One of the real life examples he provides in the book, is the case of incentivising good grades for money. The experiment itself brought about mixed results. In New York, money for scoring good grades, did absolutely nothing and brought no change in grade of the students, while in Dallas money for reading books, increased the number of book read by student, but it led to decreased in the size of the books they read, i.e., they read shorter books.^{xviii} Strictly speaking while it is important to inculcate reading habits in students for overall growth and development, given not everything can be taught within the confines of the classroom. The problem here is it deviates from the main objective of what books are supposed to do. Now students rather than reading to learn something would only read to earn some cash. Certain intrinsic moral values that are necessary for developing children are lost the moment we incentivise them with money, because now they will only attribute them incentives they earn in exchange rather than learn anything useful. In a country like India would this system of cash for good grades work? India already provides a variety of incentives to students, but not for good grade but to just pass the exams. The Bihar government in 2022 announced free

laptops for students passing their 10th and 12th board exams.^{xix} As far as good grades go, again in Bihar, parents and family members of the students were clinging to the windows of the examination halls, passing cheat sheets to the student giving 10th board exams.^{xx} To be able to provide market incentives to improve a social issue such as literacy, you would need proper functional institutions and systems, which India is far from having. However this does not change the fact that the moment we deviate from the objective of education from gaining knowledge and values to earning cash incentives, it takes matter from bad to worse. India where educating the masses is a hefty task, the issues being, huge population, broken and corrupt institutions, if we go ahead incentivise education, a developing country which needs educated students, will just have hustling student who hustle their way through exams without actually learning anything and failing to contribute to the society.

Division of Class

Consider, in a IPL match cricket on one hand we have the normal seat with nominal price, where everyone from all kinds of background sit together. Then we have the box seats which come at a higher price which only rich and elite can afford. If only nominally prices seat where to be availed at a stadium, everyone regardless of their background will sit together, they enjoy the match together, they will sit in rain together. On the other hand if there are expensive seats available then, the rich will only be able to buy them all these possible share experience will be lost and only deepen the class divide. Nothing more harmful for a democracy than a society divided in class, that doesn't interact with each other. Without shared experience the people in different class will never be able to sympathize with each other and in the end will deteriorate the social fabric.^{xxi} This is why one cannot aim to solve social issues by means of market based decisions. This makes EAL biased towards free-market economy and a 'laissez-faire state' in preference to 'welfare state'.

Numbers Often Deceive

Now, in this part I shall deal with the second grounds for my criticism, i.e., how experience (empiricism) and reason (rationalism) ignores certain obvious ground realities which quite often cannot be deduced through innate ideas and portrayed through data. Now Empiricism, in philosophy, the view that all concepts originate in experience, that all concepts are about

or applicable to things that can be experienced, or that all rationally acceptable beliefs or propositions are justifiable or knowable only through experience.^{xxii} On the other hand, Rationalism, in Western philosophy, the view that regards reason as the chief source and test of knowledge. Holding that reality itself has an inherently logical structure, the rationalist asserts that a class of truths exists that the intellect can grasp directly.^{xxiii} What has made rationalism so dangerous is the fact that its fundamental errors did not remain restricted to its own school; that its principal opponent, empiricism, was infected by the same kind of error; and that empiricist philosophy was to end in failure because it did not overcome the very mistake which made rationalism incompatible with science - the mistake of identifying knowledge with mathematical knowledge.^{xxiv} These philosophical schools, rely on data, figures and reason so much that they fail to identify certain aspects of reality.

The Case of Reservation

Consider the case on reservation in India, which draws heavy criticism from the members of upper castes who argue in the favour of meritocracy than affirmative action. The general feeling among them is the by the means of reservation deserving candidates miss out on seats at top government funded institutions and government jobs. If we look at the statistics based on 2011 census (the recent most census data available) 30.74% of the country's population falls in General Category, 44% in Other Backward Classes Category, 16.63% in Scheduled Caste and 8.63% in Scheduled Tribes.^{xxv} This is one of the point of criticism, as to why, when these groups constitute more than 50% of the country's population, we need to reserves seats for them at educational institutions and governmental jobs. To counter this ironically there is another set of data whose key finding from a set of most recent data obtained by The Indian Express under the Right to Information (RTI) Act from the Department of Personnel and Training (DoPT), UGC and the HRD Ministry. The figures are stark when it comes to the 40 central universities, where OBC reservation is applicable only up to the level of Assistant Professor – but here, too, their share is almost half (14.38 per cent) of their legal entitlement. Significantly, the number of Professors and Associate Professors in central universities appointed under OBC reservation: zero. They show that 95.2 per cent of Professors, 92.9 per cent of Associate Professors and 66.27 per cent of Assistant Professors are from the general category, which may also include SCs, STs and OBCs who have not availed the benefits of reservation. In SC/ST, too, the numbers are telling; of the 1,125 Professors, there are only 39

(3.47 percent) from SC and just 8 (0.7 percent) from ST. Among 2,620 Associate Professors, only 130 (4.96 per cent) are from SC and just 34 (1.3 per cent) from ST. Of the 7,741 Assistant Professors, 931 (12.02 per cent) are from SC, 423 (5.46 per cent) from ST and 1,113 (14.38 per cent) from OBC. Even among non-teaching staff, only 8.96 per cent are SC, 4.25 per cent ST and 10.17 per cent OBCs. Data show that 76.14 per cent in this segment belong to the general category.^{xxvi} It is pertinent to note here that, as we go up the hierarchy of posts at the 40 central institutions only until certain level of positions have reservation. Top most positions do not have reservations at all. Even after more half a century of affirmative action for upliftment of underprivileged, them being more 50% of our population they are still under represented.^{xxvii} It highlights the unfortunate reality of inequality and discrimination. Even after the presence of such constitutionally guaranteed rights, minorities still do not have access to resources to uplift themselves. The upper castes still hold majority of power and influence in the society and dictate the norm at their terms. No matter how progressive the government's policies get, until and unless the society's norms do not change, all is in vain. Based on the data on the population make-up an economist, reasonably, would argue against reservation and allocate those resources to more desirable and efficient activities, however those data sets and figures fail to show underlying discrimination faced by the minorities and prejudices of the majorities.

The Economics of a Dam

Let's take another example, with project beginning in 1961, Sardar Sarovar Dam in Gujarat is one of the biggest dams on the Narmada river. The Sardar Sarovar Project is a comprehensive initiative providing irrigation to 18.45 lac ha. of land in Gujarat, Rajasthan, and Maharashtra. It combats drought in Gujarat's 73 talukas and ensures water supply to strategic desert districts in Rajasthan and tribal hilly tracts in Maharashtra. Allocating 0.86 MAF for drinking water benefits 173 urban centres and 9490 villages in Gujarat, addressing current and future population needs. Industries receive water support, fostering production. With powerhouses sharing 1200 MW and 250 MW among Madhya Pradesh, Maharashtra, and Gujarat, the project contributes valuable peaking power to the western grid. Flood protection covers 30,000 ha., benefiting 210 villages and Bharuch city in Gujarat.^{xxviii} The data and economic front gives a reasonable argument for the project, however, "The social characteristics of those displaced by the Sardar Sarovar Dam are not unique, either to India or to the rest of the world. Of the 200,000 to 250,000 who have been displaced by the Sardar Sarovar Dam, 60-70 per cent, are

the Scheduled Tribe populations, i.e., those defined by the Indian Constitution to live primarily by pastoralism, subsistence-oriented slash and burn agriculture, and/or hunting and gathering. [...]. Those displaced, who are the Scheduled Tribes, belong to the **Bhil, Bhilala, Pavra, Tadvi, and Vassawa** ethnic groups and are located at the boundaries between the three states of **Gujarat, Madhya Pradesh, and Maharashtra**. Their rates of education and literacy are low by the all-India standards. Although Scheduled Tribes make up 8 per cent of India's population, they constitute between 40–50 per cent of those whose lands have faced submergence in the post-Independence period. **Reliable estimates of the numbers displaced in India are between 20–38 million people of whom, nearly half belong to the Scheduled Tribes.**^{xxix} Now the majority benefits from the project and cost-benefit analysis also favours the dam, bringing out the maximum benefit, but the social cost of minority who had their livelihood, homes, cultural practices and their entire history attached to the land have to be at short end of the deal. EAL pitches the wants of majority against the needs of the minorities and under garb of efficiency carry out huge injustice.^{xxx} EAL disregards the such affected minorities and their right and creates a class divide, when they are under protection of the Constitution of India and fundamental rights enshrined under the Part III. It is dangerous for constitutional democracy when plight of minorities are ignored in the name economic benefits.

Policy Recommendations for Adapting EAL to India

To make EAL relevant to India's context, its framework must accommodate socio-cultural and historical nuances. Policymakers should adopt a hybrid approach, combining economic efficiency with equity and justice. Below are key policy recommendations:

1. Context-Sensitive Legal Design :

Legal policies informed by EAL should incorporate equity considerations. For example, reservation policies should be supported by affirmative action measures beyond quotas, such as targeted skill development programs and access to quality education. This ensures economic outcomes align with broader social objectives.

2. Localized Empirical Analysis :

While EAL heavily relies on data, such data must be localized and contextualized to reflect India's realities. For instance, when assessing infrastructure projects like the Sardar Sarovar Dam, the analysis should include both economic benefits and social costs, particularly those borne by tribal and marginalized communities. Policymakers should mandate impact assessments that prioritize the voices of affected populations.

3. Strengthening Institutional Capacity :

Effective implementation of market-based solutions necessitates robust institutions. India's bureaucratic inefficiencies and governance challenges must be addressed through capacity-building initiatives. For example, incentive-driven educational reforms can succeed only if accompanied by investments in teacher training, curriculum development, and infrastructure.

4. Participatory Decision-Making :

Integrating participatory mechanisms into the policymaking process ensures marginalized voices are heard. EAL can adopt frameworks like deliberative democracy to assess legal and economic policies through the lens of public engagement, fostering inclusivity and transparency.

5. Ethical Guardrails :

EAL's market-centric logic should be tempered with ethical considerations. Policies that commodify essential rights or services – such as education, healthcare, or access to justice – must undergo rigorous ethical scrutiny to prevent exacerbating inequalities.

Conclusion

In conclusion, while Economic Analysis of Law (EAL) offers a valuable perspective by applying economic theories to legal rules and institutions, it faces significant challenges in the Indian context. Two primary criticisms undermine its applicability in the Indian legal system: the reliance on market practices and the limitations of empirical and rational analysis. Firstly, EAL's strong emphasis on market-driven solutions raises concerns, as it tends to prioritize economic efficiency over social justice. The marketization of legal and social issues, as

highlighted by Michael Sandel, can deepen societal divides and lead to unequal access to resources and opportunities. In a country like India, with vast economic disparities and social complexities, relying solely on market incentives can exacerbate existing inequalities. The emphasis on efficiency may neglect the ethical dimensions of legal decisions, particularly in a country striving to uplift marginalized communities.

Secondly, the exclusive reliance on empiricism and rationalism in EAL may oversimplify the complex social realities of India. While data and figures provide valuable insights, they may not capture the nuanced experiences and historical injustices faced by certain communities. For instance, the critique of reservation policies in India based on population statistics overlooks the systemic discrimination and historical disadvantages faced by marginalized groups. Similarly, in large infrastructure projects like the Sardar Sarovar Dam, the economic benefits may overshadow the social costs incurred by displaced tribal populations.

The challenge lies in balancing economic efficiency with social justice, considering the diverse and complex nature of the Indian society. EAL's narrow focus on efficiency, derived from market principles, may not adequately address the intricate social, cultural, and historical aspects of legal issues in India. A more holistic approach, incorporating socio-cultural considerations and recognizing the limitations of market-driven solutions, is essential for shaping legal policies that align with the principles of justice and inclusivity. While EAL provides valuable insights, its application in India requires careful consideration of the unique socio-economic landscape, cultural diversity, and historical context. A nuanced approach that combines economic analysis with a broader understanding of social dynamics is crucial for crafting legal solutions that promote both efficiency and justice in the Indian legal system.

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