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ECONOMIC ANALYSIS OF LAW WITH INDIAN CHARACTERISTICS: SHIVA SHAKTI SUGARS LTD. V SHREE RENUKA SUGAR LTD. [2017]

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I. INTRODUCTION

In the landmark case of *Shivashakti Sugars Ltd. v Shree Renuka Sugar Ltd.*[1] [*Shiva Shakti*], the Supreme Court of India opined that the "economic analysis of law" ought to be broadly received into India, and serve as a guide to statutory interpretation. This article primarily focuses on how the Court has defined the "economic analysis of law" as it ought to be applied within India, since it differs radically from the original (American) conception of such an analysis. A brief critique of the means-ends rationality[2] of the Court's construction of the Indian "economic analysis of law" is laid out towards the end of the article.

II. BACKGROUND

A. Facts and Procedural History

The plaintiff, Shri Renuka Sugar Mills Ltd, brought a suit in the High Court of Karnataka against the defendant, Shiva Shakthi Sugar Ltd. The plaintiff argued that since the place where the defendant had set up its sugarcane-crushing factory was within 15 kilometres of its own, "as per the provisions of clause 6A of Sugarcane (Control) Amendment Order, 2006, no permission could have been given to the appellant to start its factory".[3] The High Court ruled in favour of the

[1] [2017] 7 SCC 729

[2] Means-ends rationality is an assessment of the extent to which a course of action pursued by an agent is useful in helping it achieve its goals.

[3] *Supra* note 1.

plaintiff and ordered that the defendant cease its sugar-cane crushing operations. The Court held that since the factory operated by the plaintiff was an "existing sugar factory" when the defendant had applied to set up a factory by means of an Industrial Entrepreneurs' Memorandum ("IEM"), Clause 6A's prohibition was attracted.[4] Further, the two extensions to the defendant's IEM, made in August and December 2010 respectively, were found to be invalid since the defendant had not taken "effective steps" to justify the extensions, as per the requirements of Clause 6C. The defendant appealed to the Supreme Court of India.

B. Decision of the Supreme Court

The Supreme Court allowed the defendant's appeal. The Court identified seven legal issues raised by the appeal, alphabetically enumerated (a) to (g),[5] but only addressed two of the seven aforementioned issues, (b) and (g). It opined that the case would be satisfactorily disposed upon answering (b) and (g).[6]

Issue (b) pertained to whether the respondent's factory could be brought within the ambit of Clause 6A's prohibition as an "existing sugar factory". This relied on a construction of Clause 6A in relation to Explanation 1 of the Sugarcane (Control) Amendment Order ("SCAO"), and an assumption that Clause 6A applies to an IEM holder retrospectively. The Supreme Court determined that the respondent's factory was not an "existing sugar factory". It held that the High Court had erred in recording that the requirement in Explanation 1 of Clause 6A could be met if sugarcane-crushing had occurred in any one of the five seasons. Instead, the SCAO required factories to crush sugar for five consecutive years before they qualified as "existing sugar factories".[7]

Even if the High Court had not erred, there was an antecedent Issue (g) – whether the appellant's factory should be allowed to continue its business in the interests of justice. The court deliberated on Issue (g) in light of the subsequent establishment and operation of the appellant's factory, but declined to consider whether "effective steps" were taken as required by Clauses 6A, 6B and 6C of the Sugarcane Control order. Given that the appellants had spent 3 billion rupees (over 62 million Singapore dollars) on setting up the factory, provided direct employment to

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[4] Interestingly, explanation 2 of Clause 6A defines a "new sugar factory" as one that is not operational, but has filed an IEM.
[5] *Supra* note 1 at para 22.
[6] *Ibid* at para 23.
[7] *Ibid* at para 28.

roughly 700 workers etc., the Supreme Court held that the appellant's factory should be permitted to continue operating even if the lower Court had not erred and the respondent was operating an "existing sugar factory".[8]

The Supreme Court's finding on Issue (g) was grounded on a liberal approach to statutory interpretation. Although the general preference is to give effect to the plain meaning of a statutory provision, the Court retained discretion to construe the provision flexibly, where there was ambiguity as to the meaning of the words in the statute, or if the legislature had delegated discretion. If so, the provision would be interpreted in a way that would promote an outcome which was beneficial *from an economic perspective*.[9]

In exercising its discretion in constructing the provision, the Supreme Court relied on three separate, but inter-connected justifications. It first remarked that it had the duty to support the liberalisation of India's economy and promote economic growth alongside the other branches of Government.[10] Additionally, the Supreme Court opined that the "economic analysis of law" was a valid jurisprudential approach to interpretation, and noted its far-reaching influence in the United States. Even if there was a "technical violation", the Supreme Court asserted that it had both the power and responsibility under article 142 of the Indian Constitution to bypass the strict requirements of the statute, as long as it was in the *economic interests of the nation*.[11]

III. COMMENTARY

A. Comparing Indian and American Understandings of Economic Analysis of Law

The Supreme Court observed that American courts have utilised economic analysis in multiple areas of law.[12] However, American sources, notably those of Richard Posner, were only used in support of the general proposition that the potential economic effects of rulings ought to be taken into account during a court's deliberations. Indeed, the Supreme Court categorically stated that it was not discussing the acceptability of the normative and positive theories of "economic analysis of law".[13] In referring to the terms "positive" and "normative", the Court clearly distinguished its position from that in American nomenclature.

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[8] *Ibid* at [34].
[9] *Ibid* at [37].
[10] *Ibid.*
[11] *Ibid* at [40].
[12] *Ibid* at [37].
[13] *Ibid* at [51].

What then are the differences between the Indian and American understandings of economic analysis of law? Two observations can be gleamed from the judgement.

First, the Indian approach to economic analysis of law extends readily to statutory interpretation, whereas such had been mostly limited to common law decision-making in the United States. American Courts have only ventilated their adoption of economic analysis where statutes concerned were open-textured, and if it was within reasonable contemplation that the legislature had delegated law-making power to the courts. These statutes are known as "common-law statutes", as they implicitly permit judges to develop a common-law around the statute or its particular provisions.[14] An appropriate example will help bring the difference into sharp focus – Section 1 of the United States' Sherman Act regulating anti-competitive behaviour states that any "contract, combination . . . or conspiracy . . . in restraint of trade"[15] is unlawful. Such a statute would require economic analysis, because plain reading offers no guidance as to whether a specific business practice violated section 1. It would be necessary for the Court to provide further qualitative judgement as to how the section ought to apply. On the other hand, Clause 6A of the Sugarcane (Control) Amendment Order (2006) would not require economic analysis under the American approach. Where it states "…no new sugar factory shall be set up within the radius of 15 km of any existing sugar factory or another new sugar factory in a State or two or more States"[16]; it is evident that not much interpretation is required to understand the clause's substantive meaning.

The second difference between American and Indian "economic analysis of law" is that in the former, the methodology of neo-classical microeconomic theory is applied in analysing and developing legal rules, and the ends sought are welfare maximization and economic efficiency. In the latter, the individual's strict legal rights have to be balanced against the need to guarantee distributive justice through the promotion of the nation's economic development. This is evident from the Supreme Court's consideration of a broad range of factors including job opportunities created, the executive branch's approval of the business venture and the large costs already incurred in coming to its decision.[17] Further support for the author's framing of the Indian approach is that the Supreme Court also remarked that "Even in those cases where economic

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[14] Margaret H. Lemos, "Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?", in Shyam Balganesh ed, *Intellectual Property and the Common Law* (New York: Cambridge University Press, 2011) 89 at 90.
[15] *The Sherman Antitrust Act*, USC 15 §1(1890).
[16] *Supra* note 1 at [22].
[17] *Ibid* at [36].

interest competes with the rights of other persons, [the] need is to strike a balance between the two competing interests and have a balanced approach".[18]

B. A Critique of the Decision's Means-Ends Rationality

The aversion of Commonwealth and American courts towards interfering with economic policy-making by the elected branches of Government[19] might not make sense in India from a legal (as opposed to ethical or political) perspective. This is because the preamble of India's constitution describes the country as a "sovereign, socialist secular democratic republic". Holmes' sweeping dictum in *New York v Lochner*, that a "constitution is not meant to embody a particular economic theory", does not necessarily apply in India.[20]

In any case, how the preamble ought to influence judicial decision-making is a matter of constitutional interpretation, which lies beyond the scope of this article. The author is content with answering a more modest inquiry, namely, "how well does the Indian approach to economic analysis of law as articulated in *Shiva Shakti* support the judiciary's goal of promoting the growth and liberalisation of the economy?" In brief, because the Indian approach to economic analysis incorporates distributive justice concerns, there will necessarily be a great tension in the law when there is no confluence between the nation's economic interest and distributive justice. In *Shiva Shakti*, no issue in this respect arose. Allowing the appeal maximized allocative and productive efficiency since more than enough sugarcanes were available for crushing in the area. Distributive justice was also preserved because the presumably low-income factory workers retained their jobs. But it is not difficult to imagine situations under which the Court will find itself hard pressed to sacrifice one for the other.[21]

Moreover, there is a real risk of a great flood of litigation swamping the courts. This is because an absence of a finer balancing test to guide lower courts in applying the "economic analysis of law" and the assertion that courts can rule contrary to the express dictates of statute will make it difficult to predict whether one's actions are lawful in a particular factual circumstance. The author foresees that there will be an increase in litigation brought to the courts to clarify *Shiva Shakti*. As

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[18] *Ibid* at [38].
[19] See *R v Director of Public Prosecutions, ex parte Kebilene* [1999] 2 AC 326 at 380; *Lochner v New York* [1905] 198 US 45 at 75; *Galstaun v Attorney-General* [1981] 1 MLJ 9 (HC).
[20] *Lochner v New York* [1905] 198 US 45 at 75.
[21] For instance, consider whether the Court would permit the privatization of a state-owned enterprise, knowing full well that the disabled at that company will be laid off, even though the current management of the state-owned enterprise have done a terrible job in increasing the company's profits.

the Indian court system is already over-burdened by a backlog of cases,[22] it is hard to see how the nation's economic growth and liberalisation will be better promoted by a crudely fashioned approach to "economic analysis of law". India's Chief Justice T.S. Thakur's observation in 2016 that foreign investors and manufacturers are rightly concerned about the ability of the Indian judicial system to deal with disputes efficiently is apposite here.[23]

IV. CONCLUSION

The decision in *Shiva Shakti* accords with the Indian Supreme Court's activist character, and reflects the court's desire to promote India's economic development. However, it is doubtful that the Court's assumption of a larger role in economic policy-making would be an effective means of achieving that goal. This is because judges are largely appointed from legal practice or academia, and therefore lack professional training to engage in economic analysis. Additionally, no clear legal test has been set out in *Shiva Shakti* to balance between an individual's strict rights under law and the nation's economic interest. Increased litigation is expected due to the uncertainties introduced by *Shiva Shakti*, and this will hinder economic development. It is respectfully submitted that the judiciary's promotion of economic growth and liberalisation in India might be better achieved by overhauling the operation of the court system instead.[24]

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[22] Nirmala Ganapathy, "33 million cases waiting to be heard in Indian courts" *The Straits Times* (28 April 2016), online: <http://www.straitstimes.com/asia/south-asia/33-million-cases-waiting-to-be-heard-in-indian-courts>.

[23] *Ibid.*

[24] As Mr Lee Kuan Yew remarked in his speech delivered at the University of Singapore Law Society's annual dinner in 1962, "The acid test of any legal system is not the greatness or grandeur of its ideal concepts, but whether in fact it is able to produce order and justice in the relationships between man and man and between man and the State".