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The Way Ahead: Towards a Social Economics?

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1.

The IIT, Kanpur, the NLUG, and IIM, Ahmedabad have made notable Indian contributions to the understanding of the difficult relationship between law and economics. My disappointment at not being with you today is not compensated fully, if at all, by sharing these inaugural notes.

The conference themes are indeed wide ranging: they cover almost all the important themes in constitution, law, and jurisprudence in their current development. I wish you well, although I think you will run out of time in every one of these. I wish you a lot of moral luck in your deliberations.

Even as I express my gratitude at your kindly inviting me on this occasion, I salute your determination to explore the dynamic relation between law and economics. I have read with a lot of learning experience the fine book *Economic Analysis of Law: An Indian Perspective*.[1]

I hope you will want to agree with me that the work is a fine blend of student and faculty effort and brings to bear the importance of a distinctively economic analysis and understanding of law in action (the daily diet - and practice- of both Indian legislation and adjudication). Of particular importance is the principal text to each chapter which gives an overview of law and economic themes, issues, and literature in Euro-American theory and a micro-study of Indian cases or legislations. At times, there is innovation through specific Indian examples, as in Chapter 18 deploying Kaushik Basu's theories about sexual harassment, Chapter 12 on the proposed GST, or Chapter 16 offering an 'economic analysis of crime and punishment.

The question one has to ask, with the book, is whether economic theory is universal in its scope and method or is culturally specific. I think that the book beautifully evades this intransigent question by talking about Indian 'perspectives', which seems to suggest that while theory is 'universal', perspectives have to be' cultural' and local. Or, perhaps, the juxtaposed

[1] Edited by Drs. Bimal Patel, Ranita Nagar, and Hitehshkumar Thakkar (Delhi, LexisNexis,2014); hereafter referred to as *EAOL.*

'perspectives' interrogate the idea of a meta-theory. I hope that this Conference will give a thought to what is generally understood to be a law (in the sense of invariability, and vulnerability to the local) and 'reconceptualization of lawhood' entailed by *ceteris paribus law*.[2] The latter (by now an inarticulate premise of economic theory) in any event leans more towards "explanatory generalizations" than towards the prescriptive ones (the sate-law combinatory specializes in these).

11.

It is all for the good that Dr. Ranita Nagar and you all pursue the famous prophecy of Justice Oliver Wendell Holmes, Jr., in 1897 that:' For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics'.[3]

Holmes did not say what he meant by the term 'economics' but we all know that he thought. For example, in his famous dissent in *Lochner* he ruled that: '…a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. …It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States'.[4] In other words, judicial self-restraint in matters of micro and macroeconomic and development matters was to be a rule, not an exception—this is also the view that the Supreme Court of

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[2] See, for example. James Woodward., 'Explanation and Invariance in the Special Sciences", British *Journal for the Philosophy of Science*, 51: 197–254.(2000); 'There is no Such Thing as a Ceteris Paribus Law", in *Ceteris Paribus law*s*,, Erkenntnis*, 52 (Special Issue): 303–328(2002); *,.*, *Making Things Happen:* Id: *A Theory of Causal Explanation* (Oxford University Press, 2003); Id., 'Causation in Biology: Stability, Specificity, and the Choice of Levels of Explanation", *Biology and Philosophy*, 25: 287–318 (2010); and the extremely valuable discussion in James Woodward, and Christopher Hitchcock, 'Explanatory Generalizations, Part I: A Counterfactual Account", *Noûs*, 37:1: 1–24 (2003). But for a historical approach, see Toni Vogel Carey, 'Always or Never: Two Approaches to "Ceteris Paribus" *'Erkenntnis* 77: 3, 317-333 (2012).

[3] 'The Path of Law*' Harvard Law Revie*w 10:457 (1897).

[4] *Lochner v. New York*, 198 US 45 (1905). See also Jack M. Balkin, ' "Wrong The Day It Was Decided": *Lochner* And Constitutional Historicism ', *Boston University Law Review*,.85:677 -725 (2005).

India has generally followed, despite an impressive edifice of administrative jurisprudence and demosprudential judicial leadership.[5]

This faith in legisprudence (the prudence and the wisdom of the legislatures) is quite touching until we recall the famous dictum of Lord Keynes: 'The ideas of economists and political philosophers, both when they are right and when they are wrong are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually slaves of some defunct economist.'[6] Incidentally, the last phrase has the flavour of arrogance that only economic theory as a social science discourse can bring to us; when we see the neoliberal world consensus before us it would seem that economic theorists are more like 'defunct,' beings led by a globalizing universal middle class in quest of security and welfare within a political- industrial-military complex!

Despite this observation, what is named as 'social economics' has developed as a master narrative frame, and it is more conducive to legal theory and movement than some other law and economic frames (such as the 'neoclassical'. 'rational choice', 'welfare', 'development'. 'comparative' and 'institutional' approaches)[7]. Of what 'social economics' may consist in is an issue much debated—at least ever since in 1993 when Steven Medema published his classic article' "Is There Life beyond Efficiency?... [8] wherein he articulated the ways in which social economics

[5] Upendra Baxi, 'Demosprudence and Socially Responsible/Response-Able Criticism: The NJAC Decision and Beyond' WBNUJS Law Rev. (forthcoming 2016).

[6] As cited by Robert Skidelsky, *Keynes: The Return of the Master* 88 (London, Allen Lane, 2009).

[7] See Upendra Baxi, 'Global Development and Impoverishment' in Mark Tushnet and Peter Cane (ed.) *The Oxford Handbook of Legal Studies*, DOI: 10.1093/oxfordhb/9780199248179.013.0022; Id., 'International development, global impoverishment and human rights' in Scott Sheeran and Sir Nigel Rodley(ed.) *Routledge Handbook of International Human Rights Law* 597-614(2013); Id.,

[8] Steven G. Medema, 'Is There Life Beyond Efficiency? Elements of a Social Law and Economics, *Review of Social Economy*, 51:2, 1 a, 38-153 (208). See also, Nicholas Mercuro and Steven Medema, 'The Jurisprudential Niche of Law and Economics' (being Chapter 1 of *Economics and the Law: from Posner to Postmodernism and Beyond*) http://ssrn.com/abstract=889641; and further, Mark D. White (ed.), *Law and Social Economics: Essays in Ethical Values, Theory, Practice, and Policy* (New York, Palgrave Macmillan, 2015).

may make a vanguard contribution to the economic analysis of law. Yet, the situation has not noticeably improved. We ought to ask 'Why?'

Social economy appears as a strange idea that stresses that both law and economics are human artefacts and inescapably linked to each other. This is an insight that Max Weber (1864–1920) fully developed, but Weber is of course of no interest to economy theorist or economistic policy discourse.[9] In this zodiac, one has to fall back on more recent thinkers who reiterate Weber's central insights. Thus, Medema recalls Samuels who speaks of the 'the numerous attributes of the legal-economic nexus' as 'the social process in which are (re)worked out power structure, law, distribution, and societal values and definitions' and 'in which government operates to (re)define and (re)create the economy, and in which nominally private interests, perhaps especially economic interests, operate to (re)define and (re)channel government, given the dominant belief system, which is itself reformulated and rechannelled through the uses selectively imposed upon or made of it'.[10] This, as you may agree, is a rather complex description but the focus on 'socio-economic nexus' is quite central to social economics; equally crucial is the invitation to 'create', 'redefine' and 'recrate' the economy. These processes remain bidirectional: even as economy gets transformed, the governance processes are also themselves changed. Law and economics shape, as well are shaped, by governance processes and social change. Perhaps, then we may (even ought?) speak not of law *and* economics but law *as* economics and economics *as* law. Max Weber, we should remind ourselves, accomplished this a long time ago.[11]

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[9] Max Weber, *Max Weber on Law in Economy and Society* (Harvard University Press; Edited and translated by Max Rheinstein, 1954). See the interesting analysis in Max L. Stackhouse 'Weber, Theology, and Economics', *The Oxford Handbook of Christianity and Economics* (Oxford University Press, Paul Islington, ed, 2014; DOI: 10.1093/oxfordhb/9780199729715.013.017); David M. Trubeck, 'Max Weber's Tragic Modernism and the Study of Law in Society', *Law and Society Review* 40:4, 573- 603 (1996); Id., 'Complexity and Contradiction in Legal Order: Balbus and the Challenge of Critical Social Thought About Law '*Law and Society Review* 11:529-568(1977).

[10] Supra note 8 at 143. See also, Mark Lutz and Kenneth Lux*, Humanistic Economics: The New Challenge* (New York, Rowman & Littlefield Publishers / Apex, 1988).

[11]A useful beginning in this interface has been recently made by Catherine L. Fisk and Robert W. Gordon: see their 'Foreword: " Law As . . .": Theory and Method in Legal History' *UC Irvine Law Review* 1:3, 519-541(2011).

As against the neo-classical economists, 'social economics' views persons as complex entities; they are not just simple ('barebones') utility -maximizing individuals but are 'unique, socially-oriented persons, and… [they] make-up … socially-oriented persons …, encompassing numerous cultural, moral, and ideological forces, of which Catholic solidarist man, Kantian man with his corpus of binding duties, Marxian man, and humanistic man are particular manifestations'.[12] Not merely does this confront the notion of *homo economicus* as proselytized by high economic theory but it also confronts possessive individualism as the sole basis of describing human species itself. The consuming self of course matters but does not exhaust human beings as constitutionally sincere citizens, moral agents, and spiritual beings.

The other theme relates to efficiency as justice and justice as efficiency plus. The notions of economic efficiency vary widely.[13] Efficiency plus is an ethical conception that may not be derived from the 'morals free' zones of market institutions and processes. While high economic theory defines and measures market efficiency, discourse on justice is non-quantitative.

Social economics follows and develops the distinction between 'static' and 'dynamic' efficiency. The latter is considered essential to social justice tasks. In contrast, the standard economic way of thinking about efficiency is provided by the rational actor model thus: "rational agents are self-interested maximisers of utility; . . . utility can be best understood . . . as a single item varying only in quantity; . . . utility is best analysed in terms of preferences; . . . preferences are . . . not significantly shaped by law and institutions; and . . . ends adopted by an agent cannot be the subject of rational deliberation, although agents may deliberate about instrumental means to ends'.[14] Put another way, efficiency

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[12] Id.at 144.

[13] Se the brief but pointed discussion mapping the difference between the Paretian optimality and Kaldor- Hicks formula, *EAOL* Chapter 8 (in the context of FDI policies in India). See also, Upendra Baxi, 'Introduction' to Massey's *Administrative Law* LI-LVI (Lucknow, Eastern Law Book Co., 2013); Id., 'Notes on Constitutional and Legal Aspects of Rehabilitation and Replacement' on W. Fernandes & E. G. Thukral, (ed.). Development, Displacement and Rehabilitation, 164-170. (New Delhi: Indian Social Institute (1989); Id., 'Development, Displacement, and Resettlement: A Human Rights Perspective' http://csdindia.org/publications/social-development-report/2008-social-development-report/ (visited 15 August 2016).

[14] Martha Nussbaum, 'Flawed Foundations: The Philosophical Critique of (A Particular Kind of) Economics', *University of Chicago Law Review,* 66: 197-214 (1997).

consists in the means-ends relationship; once you decide the ends or purposes, the question is how to achieve these best by rational means and those means are rational which involve the least transaction costs. However, as John Rawls has notably demonstrated what an actor considers as rational may not always be reasonable.[15]

Efficiency is also important for justice. If efficiency plus is to amount to justice, how does one define and measure it? Are we to think of justice according to its forms or types (of justice as social, political, distributive, commutative, restorative, and corrective justice? Or, as a first virtue of social institutions and outcomes? Or, in terms of good order that respects humane governance and actualities and aspirations of human rights, providing at once both morality of duty as well as an ethic of aspiration? Are there spheres of justice resting on different principles (as Michael Walzer notably argues)[16] for market and nonmarket institutions or are we to regard these differences as immaterial to law as economics and economics as law?

But of course conceptions of justice, or even morality, may not apply at all if, as David Gauthier maintains, perfectly competitive markets (PCM) are 'morally free zones'. By definition a PCM is conceived as a state of pure freedom:' ...no one is subject to any form of compulsion, or to any type of limitation not already

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[15] John Rawls, (*Political Liberalism* New York, Columbia University Press, 1993) has consistently guided us to think this difference. Reason signifies relating means to an end. But not every decision or choice that is rational remains reasonable. Rational actors chose to maximize their power, influence, or authority but doing so may not always be reasonable. Colonialism was rational this ay but surely not reasonable. The Bhopal settlement orders were rational in this sense but they were not reasonable. The decision in *Shiv Kant Shukla* denying habeas corpus even on grounds of mistaken identity was "rational" in terms of the furthering the ends of Emergency Rule but was not reasonable. It would be interesting to study the jurisprudence of the duty to give reason from this perspective. See further the interesting discussion, concerning 'legality' and 'legitimacy', the contributions in David Dyszenhaus (ed.), *The Unity of Public Law* (2004, Oxford, Hart Publishing).

[16] *Spheres of Justice: A Defense of Pluralism and Equality* (New York, Basic Books, 1984).

affecting her actions as a solitary individual'[17]: a PCM rules out decisions based on force and fraud. Postulating of course the enormous advantages of methodological individualism, and assuming that all forms of PCM are thus, what may we say then when come to the real world where they are flawed? Are actual market forms free of 'force' and 'fraud'? And, to raise another related large question. what theory about the' 'politics 'of regulation/deregulation may be adopted?[18]

Widely conceived, the social economics is 'primarily concerned with prescribing what should and should not be done; with passing value judgments upon economic ends, institutions, behaviour, etc. . . . If used in this sense economics patently cannot be divorced from ethics'.[19] The question, of course, is how far one is to convert core (neoclassical) economic theory into social ethics. Adjudicatory discourse must necessarily do this as it has to make behaviour consistent with moral and ethical values in the constitution and the law. However, very often justices and courts counsel that they stay away from the task of macroeconomic management. Listen to what the Supreme Court of India most recently said in 2G decisions: 'as far as "trusteeship" is concerned, there is no cavail that the State holds all natural resources as a trustee of the public and must deal with them in a manner that is consistent with the nature of such a trust but it simultaneously holds that the ' public trust doctrine is a specific doctrine with a particular domain and has to be applied carefully'.[20] What may the caveat signify- is good law always poor economics or good economic theory is always good law?

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[17] David Gauthier, *Morals by Agreement*, (Oxford, Oxford University Press, 1986 at 96. See also, 123: *Ethics*: A Symposium: David Gauthier's *Morals by Agreement* (2013). And see also, Gauthier, *Limits of Liberty* (Chicago: University of Chicago Press, 1975).

[18] See, for example, Mercruro and Madema, *supra* note 8; Peter Shuck, *The Limits of Law: Essays on Democratic Governance*167-138 (Boulder, Colorado, 2000); Michel Aglietta, 'Capitalism at the Turn of the Century: Regulation Theory and the Challenge of Social Change', *New Left Review*, 232 (1998); Andrei Shleifer, 'Understanding Regulation', *Financial Management* 11:4, 439-451(2005); Hertog, J.A. den, 'General Theories of Regulation', *Encyclopaedia of Law and Economics*, 223 – 270 (1999).

[19] William R. Waters. Evolution of Social Economics in America in Mark Lutz, (ed.), *Social Economics: Retrospect and Prospect*' 91-117 (Boston: Kluwer Academic Publishers, 1990).

[20] RE: SPECIAL REFERENCE NO.1 OF 2012 [Under Article 143(1) of the Constitution of India], per D.K. Jain, J. [For S.H. Kapadia, CJI, Dipak Misran and Ranjan Gogoi, JJ., with an additional concurring opinion by Jagdish Singh Khehar J.]

To make a major but brief detour, the theme of environment justice as developed in the recent decades by the High Courts and the Supreme Court of India, and now notably by the National Green Tribunal, lends itself a great deal to social economics. This arena is underdeveloped in India, particularly in terms of environmental economics and green political theory. I suppose that the environmental economics that may fully develop will stress sustainable development, with 'developmental' aspect more fully accentuated. However, social economics will reinforce 'sustainability'. What urgently matters are not even states of 'sustainability' but just sustainabilites at local, regional, national, supranational, and global levels . In the Anthropocene era what matters decisively are the levels of reversal of present day environmental and economic harms and a near-future extinction of humans (and many other species and ecology on planet earth); we urgently need theories of global climate change justice.[21]

What we call environmental jurisprudence and justice also aggravates inequality and injustice in India. A careful study by Geetanjoy Sahu demonstrates that the Court's invigorating 'pro-environment approach has largely 'upheld the concerns of middle-class environmentalism' and it has failed to recognize' the strong linkages between livelihood and environmental protection in India. And in matters of infrastructure projects it has yielded to 'public purpose' as defined by the executive and privileged development over rights and justice.[22] Would economics of environment also adopt the same approach, or is there evidence elsewhere that social economics has, or could, make a difference.

For social economics theory the deeper question is: How do we distinguish between the rhetoric and reality of dispossession? Rhetorically, natural resources are said to 'belong to the people' but the Court immediately adds that 'the State legally owns them on behalf of its people'.[23] How are justices and legislators to prescribe norms or structures of normative discursivity? Are they in devising

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[21] Upendra Baxi, 'Towards a Climate Change Justice Theory?' *Journal of Human Rights and the Environment*, 7: 1. 7–31 (2016).

[22] See Geetanjoy Sahu, *Environmental Jurisprudence in India,* at 67—68 (Delhi, Oreint Blakswan, 2014).. I hope that the authors of *EAOL* would incorporate environmental dimensions of development in the second edition.

[23] See also, Paras 75-76 of the 2G Reference.

norms to follow free market institutions or are they to avoid 'unconstitutional economics'?[24] Whether or not that latter term articulates a viable concept, it remains apt for social economics theory if only because it redirects attention to the need for a constitutional theory of state and the place of adjudicatory law and policy making within that realm. Should Justices only (in a rich phrase of Judge Richard Posner) 'mimic the market' or shape/reshape market institutions in the name, and power, of 'justice'? [25] There is a great contention (and even strife) among ethical philosophers and interpreters (as well as makers) of the constitution, concerning whether justice is an individual, social, or political virtue and in what the 'justice' may consist of [26] but one thing is clear: while economic theory and thought are necessary for doing the tasks of law and justice, these are not sufficient. Social economics may not perform these tasks without a theory of, and about, justice. That truism remains poignantly articulated by social economics perhaps best serving the objectives of law and economics?

May I extend to you all felicitations and offer a secular prayer for the very best in this endeavour?

[24] Kishen Mahajan embryonically formulated this fecund notion in his essay 'Law and Developments' in Upendra Baxi (ed.) *Law and Poverty: Critical Essays* 438-439 (Bombay, Tripathi, 1988).

[25] Richard Schamelbeck, 'The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal' scholarship.law.duke.edu/cgi/viewcontent.cgi? article=2449&context (visited 15 August 2016).

[26] See, for example, John Mukum Mbaku, 'Preparing Africa for the Twenty-first Century: Lessons from Constitutional Economics' *Constitutional Political Economy*, 6:139-160 (1995).