MARXIST ECONOMIC THEORY OF LAW

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INTRODUCTION

The economic approach may be considered as a variant of the historical approach in so far as it has sought to unfold a pattern of evolution. To some extent, it is sociological because it concerns the part which law has played, and is playing in society. Yet it differs from both historical and sociological approaches in that its main concern is with the content of law, the nature of which is regarded as a reflex of economic substrata. Another point is that the original Marxist interpretation challenged the indispensability of law and foreshadowed its eventual disappearance. 'Law' in Marxist theory lumps together laws and their administration and it is in this sense that the term will be employed herein.

The economic approach of law can be traced to manifold factors and circumstances. The modern spirit of critical challenge initiated by the positivist school of jurisprudence provides the first impetus. Advances in contemporary science, technology and organization flooded their influence in the same direction. The decline of religious ideals and values to stand upto the critical inquiry led to the substitution of materialist ideals in their place. The movement had as its object of improvement of the condition of poor and working people, who found in it a new hope and encouragement. Formal positivism was sufficiently indifferent to the justice or injustice of existing conditions of life. Though Bentham was more concerned with reform than with formal analysis, his successors, notably Austin, concerned themselves with the law as laid down and not with efforts to improve it. As a result, positivism fell into dis-use with those who were dissatisfied with the existing conditions and was thus considered as casting a cloak of legality around injustices. The new movement was nonetheless iconoclastic and was able to expose those injustices which were hidden behind traditional facades. It accordingly appealed to a certain type of mind which felt for the first time enlightened and

emancipated. But unfortunately, the enthusiasm which it aroused hindered its own assumptions from being subjected to similar iconoclastic scrutiny. It called for action and change and was revolutionary in object and so appealed to all who felt inclined to rebel against complacency and monotony.[1]

Interpretation of law as a part of an economic interpretation of social evolution is a byproduct of the social and political theories of thinkers like Marx and Engels. We do not find any specific definition of law in the writing Marx and Engels. Their views on law are not set out separately in any treatise, but lie scattered in their writings. The approach in these writings, which we may call Marxism, reveals a system of sociology, a philosophy of man and society, and a political doctrine. In order to understand the Marxist approach of law, which is often described as an economic theory of law and state, it is necessary to consider at least some aspects of Marxist ideology because law is treated as a manifestation of that ideology.

Like Hegel, Marx and Engels visualized history as an unfolding and dynamic phenomenon according to the recurrent conflict between a thesis and anti-thesis. Hegel considered ideas as the determinant factor of development. This was substituted with material and economic forces by Marx and Engels. According to Hegel, 'reality is but a reflection of an idea.' However, to Marx, 'ideas are reflections of reality'.

[1] Dias, Jurisprudence, 4th ed, p 543.

MARXIST THEORY

The primitive tribal society, according to Marx, contained no anti-thesis in itself as long as there was equal distribution of commodities. When distribution became unequal, the society was split into classes patterned by the division of capital and labor. Value of commodities, thus, came to be governed by the cost of labor required to produce them. The place of the tribal society was taken by the state, which became the instrument of the stronger class. The modern capitalist state necessarily involves the domination of the laboring majority by a minority which controls the economic resources of the country. Law is an instrument by which this minority exploits the working class. The tension between capital and labor will eventually break into conflict, a revolt of the majority against the minority. Ultimately, the majority will gain control of the economic resources, eliminate the minority, and establish a dictatorship of the proletariat. This will lead to communism or classless society. Domination will cease, inequalities will vanish and eventually, the state and superstructure in the form of law will disappear as well.

Marx supposed that the defects and inequalities in human society were due to factors that lay in production and economic conditions and outside the nature of Man. This assumes that Man is by nature equal and free, and that only in the communist society would he be able to realize his true self. For, as both Lenin and Stalin asserted, the individual will only be liberated when the mass is liberated. 'Everything' said Stalin 'for the masses'.[2]

Marxist theory conceived law as an instrument of government policy. Traditional doctrines such as separation of powers, rule of law, and judicial independence were meaningless. Marxist theory asserts that judges, like law itself, are instruments of state policy.

[2] Stalin 'Anarchism or Socialism' I Collected Works (1946) p295; Lenin 24 Collected Works (4th edn 1935) p 241.

Pursuant to Marxist theory, the following four doctrines as to the nature of law may be formulated:

(1) Doctrines of Economic Determination of Law

According to this doctrine, law is a superstructure on an economic system. Economic facts are independent of, and antecedent even of law. Bourgeois theories of law which present it differently are mere distortions. There may be other superstructures and ideologies, e.g. Religion, but they all have their ultimate reality in the background of economic.

(2) Doctrine of Class Character of Law

The doctrine postulates that law is an instrument used by the rulers to keep the masses in subjugation. Even after the establishment of proletarian dictatorship, law will continue to be used as the instrument by which the working class majority can crush and eliminate the capitalist minority. Law is, thus, an instrument of domination.

(3) Doctrine of Identity of Law and State

The state came into existence as soon as there was unequal distribution of commodities and subsequent development of class distinctions. Law was one of the means whereby the capitalist minority sought to preserve and increase its power. Those who had property used the legal system to protect it against those who did not have property. The law and the state in capitalist societies together form an apparatus of compulsion and domination.

(4)Doctrine of Withering Away of Law and State

This doctrine states that when the communist or the classless society is established, there will no longer be any domination or inequality. Therefore, the two instruments of domination, i.e., the law and the state, will wither away.

The Marxist theory draws attention explicitly to the coercive and repressive features of law. Law is seen as a means of domination, oppression, and desolation. The focus of attention is on the law–state relationship. Law is reduced to a position where it is presented as a simple instrument or mechanism wielded by the dominant socio-economic class. This is sometimes called the instrumentalist view of law. While explaining the class content of law, DN Pritt observes that a class holding state power is the maker of law, and it makes it in accordance with its class interest. Law is successful because it disseminates a false consciousness, spreading the illusion of neutrality and impartiality. The greater the functionality of law, the greater is the domination of law over people's lives. Law has been compared to an 'iron fist in the velvet glove'.

Attempts have been made by modern jurists to present modified versions of the Marxist theory of law. Before examining them, we will briefly consider the major criticisms of the theory. While agreeing with the fact that law has been used as an instrument for the repression of one class by another, some critics point out that this has not been the sole function of law. Regulation, and even coercion, is unavoidable in order to enable any society to function effectively. Law gives practical expression to the balance that has to be struck between competing interests. It ceases to be merely an instrument of domination, and becomes a means of adjusting interests; an independent judiciary plays a major role in this process. Critics attack the Marxist theory for its failure to recognize the role of law as a means of preserving security and moral standards, and also as a means of restraining

oppression by classes of individuals. According to them, law satisfies the ineradicable human craving for justice.

Other features of the conceptualization of law which run counter to the Marxist theory are:-

(1) Law represents the value of consensus of society.
(2) The law represents those value and perspective which are fundamental to social order and deserve protection in public interest.
(3) The state has to be presented in the legal system is value – neutral; and
(4) In plurastic societies the law represents the interest of the society at large by mediating between competing interest group.

The conceptualization of law as an agency of integration which we find as a basic postulate in the critique of the Marxist theory, and that of law as an instrument of oppression and protector of the dominant economic interest, which is the basic tenet of the Marxist theory seem to represent to extreme position. Marxism challenges assumption of desirability and naturalness of law of the essentiality of law as a necessary expression of a well balanced and integrated society.

There are other thinkers who have expressed doubts about the validity of the basic superstructure metaphor and the economic determinism prominent in the Marxist theory of law. Marx Weber feels that the law might after the economic. ***Hartwell*** argues that the legal institution has autonomy on their own which in varying degrees makes them exogenous variables in any process of the economic changes. ***Horowitz*** who studied the relationship between the law and the economy in the American contest traces the influence of economy on the law and also shows how the law helped to forge major changes and the economy. It is interesting to note that Horowitz's identified an alliance between the legal profession and mercantile class. It shows the manner in which law actively participated in economic growth

and demonstrated the role it played in the capitalist accumulation and redistribution of wealth and political power this study provides a new insight into the relationship between basic and superstructure by revealing the active role played by the superstructure in re-designing the economic base.

Marxist theory has generated a greater deal of discussion in various discipline sum of which have a bearing on law also although it is not possible to touch even the fringe of all modern writings on the subject, we will briefly refer to a few of them. ***Sumner*** observes that the legal ideology contain more than just capitalist economic ideology. Law reflects the ideologies of different fraction within the bourgeoisie, and the ideologies of other classes. It also reflects the ideologies of the occupational groups, minorities groups and ideologies related to family structure, political representation etc. Law is an ideological form of the fullest complexity, but it is not equally pluralistic. Sumner says that it is basically a reflection of class inequality expressing the ideologies of the dominant class. According to him, 'the legal system is first and foremost a means of exercising political control available to the propertied, the powerful and the highly educated. It is the weapon and toy of the hegemonic bloc of classes and class fractions whose rough consensus it sustains.'

Poulantzas explores the concept of autonomy of state, and that of law. He uses the expression 'relative autonomy of state' to express the idea that whatever autonomy the state might have, it remained, for all practical purposes, the state of the ruling class. Deviating from this view, ***Theda Skocpol*** argues that the state is 'an autonomous structure, a structure with a logic and interests of its logic and interests of its own, not necessarily equivalent to, or fused with, the interests of the dominant class in society.' The degree of autonomy enjoyed by the state is dependent on the hegemony of the dominant class. Where the dominant class is truly all powerful in economic, political, social and cultural terms and free from effective challenge, the state will be subject to its hegemony. Where such hegemony is strongly

challenged, the autonomy of the state is likely to be substantial. ***Upendra Baxi***,[3] an Indian jurist, after analyzing Poulantza's concept of relative autonomy of state and law, observes that modern law performs distinct and separate functions against the dominating class, and for the dominated. He accepts the reality of the notion of relative autonomy of legis;ation, adjudication, administration, and enforcement.

Karl Renner is another important jurist who attempted to construct a theory of law using the Marxist sociology. Renner noted that infrastructure and superstructure were metaphors which served only to illustrate the connection, not to define in exact terms. He made a deep analysis of the relationship of property and society.[4] His thesis is that inspite of the stability of legal concepts like property and contract; their social functions had undergone profound transformation. While agreeing with the view that in order to understand a legal concept one had to penetrate its economic base, Renner deviated from the Marxist approach in recognizing that law might itself become an active agent in reshaping social conditions. The importance of Renner's work lies in demonstrating that part of law which has shaped the economic development.

Gramsci widened the Marxist focus on economic relations in society to embrace politics, culture, and ideology. He believed that class domination resulted as much from popular consensus engineered in a civil society as from physical coercion or its threat by the state apparatus. This was particularly the case in advanced capitalist societies where the media, mass culture, education, and law and assumed new roles.

A critical school of Marxism, known as the ***Frankfurt school***, attempted to link Marxism to social psychology. The school draws our attention to the oppressive complexity of advanced technological society, which is increasingly subjected to the control of technocrats.

[3] Marx, Law and justice, 1993
[4] Institute of private law and their social functions,1949.

Technology and science create a specific type of knowledge which is utilized to maintain domination and repression. Marcuse, who belongs to the Frankfurt school, expressed doubts about the revolutionary potential of a working class dominated by the impact of technocratic ideology.

While trying to understand law from a Marxist perspective, one question that may arise in our minds is about laws which restrain oppression, or laws which are against the interests of the ruling class. ***Chambliss*** asserts that laws are passed which reflect the interests of the general population and which are antithetical to the interests of those in power. Marxists would argue that such laws are a bribe, a small concession to buy off the demand for more fundamental changes. Another problem that we face while applying the Marxist theory to contemporary pluralist societies is the difficulty in identifying the ruling class. The power structure in such societies is a complex arrangement of power centers, which makes shifting compromises and accommodations. ***Robert Dahl*** points out the difficulties in identifying monolithic, all powerful ruling elite. Modern developments also show a decomposition of capital and a separation of ownership of means of production from their control, as a result of the managerial revolution and growth of corporatism. ***Dahrendorf,*** who raised these issues, also referred to the decomposition of labour, division between skilled and unskilled workers, indigenous workers and immigrants, and the emergence of middle class. When we try to develop a theory of law from the Marxian perspective, these developments must also be taken into account.

In the Marxist analysis, the judiciary is as much a part of the centralized state power as the executive, legislature, civil service, military, and the police. ***JAG Griffith***[5] asserts that the judiciary supports the status quo. It is interesting to recall how a criticism of the judiciary in the Marxist ideological perspective led to contempt of court proceedings before the Supreme

[5] Politics of the judiciary 1991

Court of India. In the year 1967, the then ***Marxist Chief Minister of Kerala, EMS Namboordiripad,*** made the following observations in après interview:

Marx and Engels considered the judiciary as an instrument of oppression… Judges are dominated by class hatred, class interests and class prejudices. When evidence is balanced between a well dressed pots bellied rich man and a poor, ill dressed and illiterate person, a judge instinctively favors the former… the Judiciary is weighted against workers, peasants and other sections of the working classes and the law and the system of the judiciary essentially serve the exploiting classes… Even when the judiciary is separated from the executive it is still subject to the influence and the pressure of the executive.

The Kerala High Court convicted Namboodiripad for contempt of court, inspite of the dissent by KK Mathew J who held that the right to freedom of speech and expression guaranteed by the Constitution protected Namboodiripad's observations. The Supreme Court also upheld the conviction, but reduced the fine from Rs 1000 to Rs50.[6]

The principle difficulty in the way of assessing the doctrines of Marx and Engels lies in shifting the parts that are valuable from irrelevancies. In the first place, causation is no longer the inexorable principle governing the material world. This is similar to the erroneous assumption made by the Historical School. In social phenomena Marx and Engels sought to discover in the economic principle the counterpart of causation. Towards the end of his life Engels admitted that both he and Marx had exaggerated the economic influence and that it was not the sole motivating factor in human society.[7] What they would say, then, is that it is the ultimate or most important factor. That depends on the criterion of 'ultimate' and 'most important'. It ceases to be objective and becomes a matter of personal evaluation. The

[6] EMS Namboodirupad v/s T.N. Nambiar AIR1970 SC 2015

[7] Engels, letter to J Bloch, September 21/22/1890, and to H Starkenburg, January 25 1894: Marx-Engels selected correspondence.

economic factor is undoubtedly important, but other factors have also to be reckoned with. Traffic law, for example, and large parts of criminal law are not based on economics. Indeed, the law which has to deal with violence to the person has been brought about by weakness in human nature. It is a wishful pretence to say that impulses such as anger, lust, revenge and jealousy, to mention but a few are always rooted in economics.

This leads to another point. Both Marx and Engels purported to be ‘scientific’ and to expel ideologies. They found the cause of existing ills in economic conditions and suggested that the cure lies in a rectification of the economic system. So far as the economic factor is not the only one underlying law and society, the picture they drew of these in the light of the economic factor alone is incomplete; it is , in other words, a distortion is proportionate to the importance of the factors omitted. Marx seems to have confused legal theory, which may be described as an ‘ideology’ in his sense of the term in that it reflects reality and actual laws, which are an integral part of the economic infrastructure of society, i.e. part of the ‘reality’ itself. The classless society which he envisaged is the end which he wanted to bring about, and in this is a distortion of another kind, the introduction of a teleological consideration, of politics into science, carrying with it a moral obligation to further this end; which is why Marxists try to force the pace of events, said to be evolutionary, by fostering revolutions in other countries. The ideological character of Marxism is likewise evidenced by the fact that the Soviet authorities dare not admit that there are flaws in the basic thesis. Their attitude has been that the ‘truth’ is there if only the correct interpretation can be found, or else to ignore or minimize awkward facts, thereby making the doctrine a religion.

Marx explained the evolution of society on the basis of the class struggle, the struggle between capitalists and workers. It is undeniable that there has been considerable friction between them, but generalizations should only be made with the utmost circumspection. ‘The’ class struggle is an abstract and misleading expression. ‘The’ class struggle, or any

class struggle, should always be related to the place where it occurred, the period, the persons involved, and other circumstances.[8] It is a shortcoming in this respect that leaves Marx's handling of historical facts open to doubt. There have been many class struggles in the course of human history, all of which have influenced the development of law and society, e.g. religious struggles and not least between Trotskyists, Leninists and Chinese communists. It is also clear why 'the class struggle' has to culminate in violence.[9] It may be that human nature being what it is, capitalists will not relinquish their position without force. Against that, Great Britain and the Scandinavian countries have shown a peaceful road to socialism. Although a recurrent pattern of conflict between workers and capitalists can be detected, the danger of erecting it into a principle and of arguing mechanically from it can be seen in the following fact. According to Marx, the tension between workers and capitalists grows more acute with the development of capital. This will tend to become more and more international, and hence the famous call to the workers of the world to unite. This led to the conclusion that the conflict will be precipitated in those countries where capitalism is most developed. Instead, it occurred in Russia, which was at that date semi feudal and had only the rudiments of capitalism. This was why some orthodox Marxists at the time wondered whether they would not be better engaged in promoting a capitalist revolution instead. For a quarter of a century Russia remained alone, and the next country in which the conflict occurred was China, another backward country, and cuba. The countries of eastern Europe, which turned over to socialism at the end of the 1939-45 war, are scarcely examples, since, with the possible exception of Yugoslavia, the presence in those countries of the Russian armed forces at the critical time was no small factor. The other prediction that capitalism will become more and more international has been fulfilled up to a point. It fails, however to

[8] See Corbin's appreciation of this in 'Jural Relations and their Classification (1920-21) 30 Yale Law Journal at 227 n 2, quoted p6 ante.

[9] 'Evolutionists' maintain that socialism would evolve without the need for a violent revolution, e.g. the views of the French and Italian delegations to the XXV Communist Party Congress, February 1976; Solzhenistskyn August 1914.

take account of the strong sentiments of nationalism aroused by two world wars. It will thus be evident that there are dangers in erecting ‘the class struggle’ into a principle for the purpose of drawing the sweeping deductions that Marx sought to make.

Finally the maxim, which embodies the goal towards which all this endeavour is directed, namely, ‘from each according to his capacity, to each according to his needs, suffers from the weakness that it is difficult to see how needs are to be measured and what checks there will be on exorbitant demands. One wonders whether there ever will be abundance, for the more people have the more are their appetites likely to be whetted.

MARXISM IN RUSSIA

In Russia the proletarian dictatorship was established along Marxist lines between the years 1918 and 1920. The period from 1921 to 1937, as already pointed out, can be divided into two parts. The first, which lasted till about 1929, may conveniently be described as the period of the New Economic Policy, the NEP, while the second from 1930 onwards,, marks a departure from the NEP and the construction of socialism.

The feature of NEP, was that it constituted a partial compromise between Marxist ideas and capitalism under the strict supervision of the state. The NEP has been happily described as 'state- controlled private enterprise.' It was necessary in the interest of the nation to give scope to private enterprise and at the same time to prevent an abuse of it. Private enterprise and private rights were subordinate to the national interest, and were deemed to be forbidden unless expressly permitted. Alongside this, in the interests of efficiency, Lenin introduced the concept of 'one men management'.

To meet the new situation a theory of law was evolved. The principle contribution of this period was that of Pashukanis (1891-1937)[10] who was strongly influenced by the two German Writers, Jellinek and Laband. He developed what is known as 'commodity exchange theory'. All law, he maintained, was built up relations between individuals. He followed Marx in believing that was a reflection of economic conditions, but departed from Marx in supposing it to consist of the exchange of commodities between individuals.[11] Pashukanis maintained that law presupposes theoretical equality, not subjection. Law is the peaceful means of settling conflicting interests of persons, who are treated as being on an equal footing however much they may be unequal in fact. In the ultimate perfect society individual interests will not conflict, for there will then be unity of purpose. Therefore there will be no need for

[10] Pashukanis 'General Theory of Law and Marxism' in soviet legal philosophy p 111.
[11] Anthropologically the commodity exchange idea is only partially true of primitive societies.

law. Following from the last point, Pashukanis maintained that once the perfect society is reached the national economy will pass wholly into the hands of the state. Law however which presupposes conflict of individual interests will come to an end.

It is obvious that this theory was adapted only to the peculiar situation during the NEP. By about 1930 the position had altered. The concession made of necessity to private enterprise was withdrawn. The Second Revolution took place to eliminate the capitalists, a 'revolution from above' this time, i.e. by those in power to exterminate the minority whom they had hitherto permitted to exist. Private capital and private enterprise now became illegal, and the change was justified on the ground that the ultimate interest of the proletarian dictatorship rose superior to the sanctity of its own prior laws. Moreover, it was clear by 1930 that the long waited revolutions in other countries would not materialize and that Russia would have to wait a long time in the midst of her enemies. The state and its apparatus were a guarantee of defense and were necessary until all, or most, other countries had turned socialist. The withering away of the state was postponed until the remote future and less was said about it. Finally, in December 1936 a constitution was promulgated and acclaimed as the triumph of socialism. Strict observance of laws was insisted on. 'We need the stability of laws now more than ever' said Stalin.[12]

The period from 1938 to the present

This period falls into two parts from 1938 until the death of Stalin in 1953, and the post-Stalin era from 1953 onwards.

The first part witnessed the consolidation of socialism in the form of a monolithic state with complete subordination of legal theory to political expediency. This was also the period of

[12] Stalin ' on the Draft Constitution of the USSR 1936' Leninism p 402

the ‘personality cult’, fostered by Stalin. The doctrine of the ‘classless state’, previously mentioned, was propounded, and the state, represented by the Supreme Soviet, was held to be superior to all its laws. A more interesting development was the Yugoslav attack on the Staline regime as a counter-revolutionary dictatorship. In 1948 Yugoslavia under Marshal Tito, insisted that each country should be left to interpret Marxism in its own way, and denounced the soviet model under Stalin as a betrayal of Marxist – Leninism. It was alleged to be nothing but a form of capitalism exploited by a new ruling class of bureaucrats, who have merely substituted a bureaucratic state in place of a bourgeois state.[13]

After the death of Stalin there was a relaxation of centralization; Stalin had been a firm believer in it. Krushchev introduced decentralization in this administrative reform of 1957, which were criticized as too localized and uncoordinated. Accordingly, in 1965 centralization was reintroduced with minor modifications towards giving state enterprises wider powers.

It has already been pointed out that Krushchev emphasized the classless character of the soviet society where there is now a ‘state of the whole people’, that the Communist Party is a ‘party of the people’ and one of two friendly partners in the ‘all people’s state’. These are all contrary to strict Marxism and only reconcilable with a revised version of it to the effect that a state, differing from the bourgeois state, can and should survive of it to the effect that a state, differing from the bourgeois state, can and should survive under socialism as the ‘first stage of communism.’ This is the period of the ‘construction of communism.’[14], for although socialism has won in Russia, the goal of communism is still a far. Three conditions remain to be fulfilled before its advent. (A) the menace of capitalist encirclement has to be removed , which calls for strict protective measures, within and without; (b) the masses need to be completely re-educated; and (c) economic abundance has to be secured, which necessitates

[13] Cf Djilas The New Class
[14] 1977 Constitution, Preamble

experiments. 1980 was set as a vague, tentative date for the dawn of the New Age; but nothing has happened. The problem is to know who decides, and on what criteria, that the time has arrived. Unless some clear indication of this is forthcoming, the vision of a state free and law free society must remain no severer treatment, but the doctrine of the state of the whole people remains.[15]

In so far as laws serve the socialist economy they are just and deserve obedience from all bodies and persons; but they are just and deserve obedience from all bodies and persons; but they are still only instruments policy, not objects of veneration in doctrine such as the 'rule of law' is still incomprehensible to Soviet jurists. So 'due process' now tends to be insisted on. Moreover, it was felt to be expedient to incorporate in the 1936constitution which was hailed as the final victory of socialism in Russia and 1977 Constitution a bill of fundamental rights.[16]

Moreover in this event if Russia stood alone, makes one wonder what is to be made of the familiar and apparently serious charges continuing to be made of Western 'imperialism' and 'aggression'. Secondly, even in relation to capitalist countries, the policy of 'peaceful co-existence',[17] if seriously pursued, should bring about a different attitude towards international law, accentuated perhaps by the realization of the economic and political inter-dependence of states. Instead two systems of international law, one for socialist states and another for no socialist states, there may be only one system after all; but the ingrained Marxist dialectic sees this as a kind of synthesis produced by the economic and political competition between all states. Whether the type of international law, the underlying question is: Does the Soviet Union regard it as binding and, if so, in what basis? The answer that seems to be given is:

[15] 1977 Constitution, Preamble
[16] 1936 Constitution art 122-135
[17] 1977 Constitution , art 28

agreement. This cannot stand up to analysis, but since it is part of a wider question concerning international law in general, it will be postponed until later.

ECONOMIC ANALYSIS OF LAW

As distinct from the Marxist approach, which denies law any autonomy and considers it as an element of superstructure and as an instrument of class domination, there is another approach rooted in economics which is found in the works of Ronald Coase, Guide Calabresi and Richard Posner. This school of thought advocates that law ought to be concerned with economic efficiency. It claims to put forward a descriptive theory of law in which law is simply concerned with promotion of economic efficiency, and the protection of wealth as a value. Wealth, the economist's sense, is not a simple monetary measure, but refers to the sum of all tangible goods and services.

The economic school makes the assumption that human beings are rational. In other words, the man is a rational maximizer of his satisfactions. The economic approach argues that people are rationally self-interested. What they do shows what they value, and their willingness to pay for what they value is the ultimate proof of their rational self interest.

The rational man in the economist's assumption is not the same as the reasonable man according to this legal doctrine. The reasonable man will ordinarily behave in a reasonable, prudent manner. Thus, he will act with fair regard to the welfare of others. The rational man, on the other hand, seeks to maximize his own self interest. He shows only limited concern for the well being of others.

One significant contribution to the economic approach was made by Ronald Coase. His theory is widely known as the 'Coase theorem.' We will explain the Coase Theorem with an example. Suppose a factory is emitting smoke, and thereby, damaging the clothes hung out for drying on the terrace of five neighboring houses. In legal terms, the question is whether the residents have a right to clear air or whether the factory has a right to pollute. The answer that immediately comes to your minds may be to assert the right of the residents to the clean

air. We may also add that they have a right to be compensated because the factory is causing damage. However, for the economists the issue is not one of causation, in that although the factory has caused the damage, that damage would not have occurred if the houses were not so close to the factory. According to Coase, 'both parties cause the damage'. For him it is not an issue of causation or justice, but of efficiency.

The question which arises is as to how do us measure efficiency in this situation? Suppose the damage suffered by each resident is Rs 750, it makes a total of Rs 3,750. The smoke pollution can be eliminated either by installing a smokescreen in the chimney of the factory at a cost of Rs.1,500, or by providing each resident with a tumble dryer to dry the clothes at a cost of Rs 500 per resident, which will cost Rs 2500 for the neighborhood. The efficient solution is clearly to install the smokescreen since it costs only Rs 1,500, and is cheaper than purchasing five dryers for Rs 2500. However, the question now is who must purchase the smokescreen? We may say, on the basis of a well accepted principle of environmental law, viz the polluter pays, that the factory must purchase the smokescreen. The answer is not dictated by efficiency, but by our own instinct for justice which is embodied in the 'polluter pays' principle.

The efficient solution depends on whether there are transaction costs. Transaction costs include the costs of identifying the parties with whom one has to bargain, the costs of getting together with them, the costs of the bargaining process itself, and the costs of enforcing the bargain reached. If the transaction costs are zero, then for an efficient solution it does not matter whether we have legal rule (polluter pays), or a legal rule allowing the right to pollute. In conditions of zero transaction costs, the judge may impose a rule based on notions of justice apart from the requirements of efficiency. However, in actual practice zero transaction costs rarely exist. If there are positive transaction costs, the efficient outcome

may not occur under every legal rule. In such circumstances, the preferred legal rule is the rule that minimizes the effects of transaction costs.

Calabresi argues for a wider approach. In situations where transaction costs are not zero, not merely the narrow issue of efficiency, but the nature of the right and the issue of its distribution also become relevant. The society has to make 'first order legal decisions', ie, which entitlements prevail over others. In our example, the decision whether the right to clean air or the right to pollute must prevail is a 'first order legal decision'. According to Calabresi, those decisions must be taken on consideration of economics efficiency, distributional preferences, and other justice considerations.

Richard Posner, another leading exponent of the economic school, is of the view that the whole process of legislation is based on the fundamental assumption that legislators are rational maximisers of their satisfactions like anyone else. The desire for getting elected leads legislators in striking deals with organized interest groups for votes, the bargain being that the interest groups will provide votes and money for the campaign in return for favorable legislation. According to Posner judges have a dual role: to interpret the interest group deals embodied in legislation, and to provide the basic public service of authoritative dispute resolution. Judges are also driven to be efficient by the fact that inefficient decisions will impose greater social costs than efficient ones. Litigants losing from an inefficient judicial decision will have much greater incentive to appeal than those who lose by reason of an efficient decision. The proliferation of appeals and subsequent legal costs act as a distinctive for the judge to act beyond the confines of efficiency. However, Posner admits that although wealth maximization is built into the law, yet due to the independence of the judiciary the law does not achieve perfect efficiency. The judicial preference for basing decisions on precedents rather than on economic considerations is another factor.

Criminal law may appear to be outside the boundaries of economic analysis of the efficiency principle. In fact, it is not so. The economic rationale behind criminal law views crime, with the exception of crimes of passion, as an economic activity with rational participants. WZ Hirsch explains it in following words:[18]

A person commits a criminal offence if his expected utility exceeds the level of utility he could derive from alternative (legal) activities. He may choose to be a criminal, therefore, not because his basic motivation differs from that of other persons, but because his options and the valuation of their benefits and costs differ. The criminal law seeks to influence human behavior by imposing costs on criminal activities, thereby providing the individual with an economic incentive to choose not to commit a criminal offence, that is, a deterrent incentive.

In criminal law, as we know, the right of action is taken over by the state from individual victims. This moves the law away from the economics of the market place, where the principles of law, as in the case of contract and tort, mimic the response of individuals as rational maximisers. The economic school does not seem to provide any satisfactory explanation for this. Another related question is about a substantial overlap between tort and criminal law. The question is whether it is better, in the interest of efficiency, to leave most of the acts currently categorized as crimes, to the law of tort. Posner thins that most of the common law crimes are intentional torts which represent ‘a pure coercive transfer either of wealth or utility from victim to the wrongdoer’. His commitment to economic analysis takes Posner to the extent of saying that ‘the prevention of rape is essential to protect the marriage market.’

Now that we have examined the Marxist approach and the economic analysis of law, the question arises whether we find anything common to both. The economic analysis recognizes

[18] Law and Economics 1979, p.200

that a legal system reflects the economic system. For instance, an economic system, which is based on free market principles with the aim of wealth maximization, will have a legal system which reflects this. To this extent the economic analysis recognizes the correctness of the Marxist approach.

It is generally agreed that the economic analysis can be a useful tool in explaining the working of law, especially some branches of law. However, the problem with the economic school is that its proponents converted it into a straitjacket into which every aspect of law is forced. In the process, they have also ignored many other factors which shape law. Moreover, the two assumptions they make, viz, that wealth maximization is the sole social value, and that individuals are all rational maximisers, rest on shaky and unproven foundations. The edifice built in these foundations, though looks impressive suffers from many imperfections and weaknesses.

CONCLUSION

When considering the nature of law from an economic point of view two questions have to be distinguished. One is the extent of the economic influence on the content of the law. In so far as it has been demonstrated that a great rules have been shaped by economic factors, perhaps more than had been suspected, this can be accommodated within traditional concepts of law. The other question is what kind of a concept of law would be appropriate for Marxism as practiced in contemporary Russia. This would have to be a functional concept, but one that would need to be sharpened with reference to the re-education of the people and the ushering in of a better society. As such, it would be an instrument of executive, rather than class, policy and would centre on the executive rather than on the courts. A concept focused on the latter will unfold a far from satisfactory picture of law as it operates in Russia. For the decisions of Soviet courts can never be fully understood except in the light of the theoretical and ideological background of the principles that are being applied: all of which are dictated by policy. However, at bottom the idea of law still remains very much the expression of an 'ought'.

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