SUPREME COURT AND THE INDIAN ECONOMY

A STORY OF ECONOMIC IMPACT OF SIX LANDMARK CASES OF THE SUPREME COURT

PRADEEP S. MEHTA

Supreme Court and the Indian Economy

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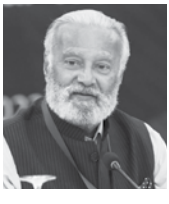

Pradeep S. Mehta is the founder Secretary General of CUTS International, a renowned public policy research, advocacy, and networking NGO established in 1983 in India with centres in Nairobi, Lusaka, Hanoi, Accra, Geneva and Washington DC. He is serving on the WTO DG's NGO Advisory Board for the third time and the G20/B20's Council on Africa's Economic Integration. He has held positions on advisory boards like CII's International Trade Policy Council and GoI's Board of Trade. Notably, he has advised the Commerce Ministers of India and Zambia. He is a recipient of the MR Pai Award; the SKOCH Excellence Award; the Scindia School's Madhav Award as an Old Boy of Eminence; and the Businessworld Social Impact Award for promoting competition and consumer protection globally.

Mehta is a prolific writer, speaker, trainer, and organiser in social science, recognised among India's top 30 columnists. He has authored and edited numerous books and papers on trade, investment, competition, law, and development.

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by Pradeep S. Mehta

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To my four grandchildren

Aman, Aanya, Chirmi and Chirag

with the prayer that they also grow up and
become questioning citizens and not remain just individuals.

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Foreword

It is particularly heartening that the author has chosen the theme captured in this book. The irony struck me when I picked up the book summary upon being asked to write this Foreword. I then discovered that I had not only had the privilege of being the lead counsel for at least one of the main parties in five of the six cases dissected here, but had, over the years, repeatedly lamented that while judges and lawyers like us come and go, an institutional, scholarly and statistical analysis of the cost benefit ratio of such cases still largely eludes us, amidst otherwise proliferating literature. That searing gap has been filled admirably by this timely and much needed publication.

That India has the most remarkable, dynamic and comprehensive public law system compared to any other country in the world is almost axiomatic. We are the proud inventors of avant garde legal doctrines like public interest litigation and basic structure theory, our pride and the world's envy. Imagine a system which invented the nuanced theory that nothing is exempt from judicial review, that even a constitutional amendment can be unconstitutional if it infringes the basic structure of the Constitution. We, the judges, and we alone, decide on a case by case basis what may or may not be part of the basic structure!

There is virtually no nook and cranny of human existence not subjected to the penetrating judicial gaze in the name of judicial review. It is humongous and all enveloping, especially in its PIL avatar, and would make Marbury v Madison, the supposed source of judicial review in USA three centuries ago, blush. From high value defence contracts to garbage disposal, from judicial appointments to political ones, from corruption scams to diverse methodologies of removal of state largesse, from school admissions to medical and

engineering college entries, from whether banks should or should not give waivers during Covid to the adequacy of welfare measures for migrants during the pandemic, from the recognition of same sex marriages to striking down the adultery provision, the list is endless, its length matched only by its bewildering diversity.

To make sense out of this seemingly chaotic landscape, and to draw consistent, generic and statistical conclusions therefrom, should be a researcher's delight as well as his nightmare. That is why this book should only be the beginning of such endeavours, followed by many others covering different slots of this puzzle, hopefully by the same author, but by others as well, creating a harmonious pattern illumining different facets of the issue.

The lament I mentioned above centred on various issues. *Firstly,* in the above diverse jurisprudential journeys, the superior Indian courts have consistently considered consistency a virtue of fools. They have celebrated the ethic that they have to get the job at hand done, the problem solved and judicial consistency, be it inter or intra institution, state, court or issue based, to be wholly dispensable. Though there is a definite method to the madness, it needs solid and painstaking research to discover it and set it out simply and transparently.

Secondly, Indian superior courts have only recently started being aware, as a calculative factor, of the huge intersection between law and economics. Posner has remained in the higher shelves of snooty academia: even Indian law schools have started studying this subject relatively late. Courts have no tools and mechanisms to initiate pre and post decisional audits. Even more lamentably, independent and high level objective institutions specialising in such studies have not been born or allowed to grow even near the 75th birthday of the Republic. Whatever be the transparency index and progressive leanings of a few individual judges, institutionally, the Indian superior courts do not take kindly to external audits of their decisions. More intellectual humility is required in such matters whereas, institutionally, our system is intrinsically pompous and insular. The liquor shop distance and the so called coal-gate cases are examples in point.

Thirdly, for the same reasons, mid-course or post decisional course correction is not something inbuilt into the judicial system. Once launched, the PIL takes its trajectory, its speed and vortex, a virtual life of its own. Sometimes even the judges riding this unruly horse barely hang on to the reins without being able to control its momentum, pace or direction.

Fourthly, the judicial approach is necessarily micro, in praesenti, bilateral, lis focused and hence, very narrow. For example, if a homebuyers association has to be given a healing touch. In that case, it matters little how much the palliative may decimate the lenders to that project or even the significant conflicts and contradictions between different homebuyers e.g., those who want refunds and those who want possession after expeditious completion. Similarly, what havoc the integrity and purity of the entire banking system may suffer if general waivers or moratoria are court mandated becomes a secondary consideration in the altruistic and noble journey of doing public good amidst the era's worst pandemic. That is why, that famous saying goes: "The path to hell (could be)/is paved with good intentions."

Merely making courts and the body politic aware of such issues, educating the citizenry in non-jargon language about the nuts and bolts of such jurisprudence, and simply flagging such issues, irrespective of the merits or otherwise of such writing, constitutes a service to society, to the judiciary and to our body politic. The book carries the fragrance of my home state and author's reputation with a Ralph Nader lifetime contribution to such issues—and it makes for compelling reading. Add further the association of Jindal Global University, whose Distinguished Fellow award I cherish. I commend this and warmly compliment and congratulate Pradeep Mehta, the author, on his initiative which, I hope, will be the first of many on such themes.

— (Dr) Abhishek Singhvi
BA (Hons), MA (Cantab); PhD (Cantab); PIL (Harvard)
Third term senior sitting MP; former Chairman, Parliamentary Standing Committee on Law; eminent jurist; National Spokesperson, Congress Party; former Additional Solicitor General, India and Senior Advocate, Supreme Court of India.

Foreword

As India looks to reopen and enhance economic recovery and growth, reforms are needed. In the post pandemic era, the economy and its constituents will need special attention, including from the courts. The Supreme Court has stepped up innovation, and the progressive approach overall is notable. By introducing e-filing, broadening the scope of technology in virtual courtrooms and remote hearings, and perhaps looking at additional opportunities for Artificial Intelligence to help the judiciary in non-decision making aspects, Indian courts are quickly adopting leading practices. And, extremely progressive decisions on a technology are helping the Court on-board future reform.

One of the most forward thinking judgments that showcase the importance of balancing priorities is the Shivshakti Sugars Limited judgment of 2017. Justices A.K. Sikri and A.M. Sapre in the judgment observed that 'economic evidence plays a big role even while deciding environmental issues', further adding that the economic impact and effect of a decision ought to be kept in mind. Critically, the Court needed to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy or the revenue of the State. The justices' observation that the economic impact and effect should be considered as it is going to be vitally and critically important in India's response to economic recovery.

The Shivshakti judgment if made a standard operating procedure of analysis for decisions involving economic implications would allow industry and market force to adapt and stabilise. In the post pandemic times, such a move would be able to save and create

lakhs of jobs, and help put in lakhs of crores of rupees in enhanced economic growth back into India's economy.

In a watershed moment like this, a progressive move of this magnitude by the Courts could forever alter India's perception without circumventing the independence of the judiciary or its role in ensuring the rights of citizens are met for the best possible public good. In a post COVID 19 world, structural reform will determine how well the world copes with systemic change. There could be no better reform than adopting an Economic Impact Assessment system by the Courts. It could be a beacon of hope for sustained economic growth in the wake of an unprecedented global crisis.

This book is a timely and topical work on an increasingly relevant area of research and analysis. It will lay the foundation for future discussions on the economic impact of judicial decisions.

— Amitabh Kant
Former Chief Executive Officer,
NITI Aayog, New Delhi
Currently G20 Sherpa of India

Foreword

A market economy is based on exchanges between consumers and suppliers, owners of capital and businesses, individuals seeking employment and employers etc. This means that individual contracts are at the heart of the economic system. The micro and macroeconomic results of this myriad of contracts will depend on the design and the implementation of the legal infrastructure underlying those contracts. This legal infrastructure determines the conditions under which parties can contract and under which contracts can be enforced.

From the economic standpoint, a good legal infrastructure should not only channel the incentives of parties to contracts in such a way that their private interest will be consistent with public interest but will also provide a relatively inexpensive way to solve contractual disputes. Thus property law, contract law, commercial law, bankruptcy law, labour law, trade law, as well as criminal law shape the economic performance of a country. This, of course, does not mean that the only function of the law is economic. Laws are often the result of social or cultural choices which have little to do with economic considerations. But economists can argue that the design and the enforcement of those laws should meet the criteria of predictability and cost minimisation of disputes for society.

The fact that the decisions of courts enforcing laws, even in the case of non-economic laws, have an economic impact means that there can be such a thing as an economic perspective on law enforcement. This economic perspective can deal with the substance or the interpretation of the law (for example by pointing out the economic implications of some interpretations of ambiguous laws)

or the process of law enforcement (for example by pointing out how the efficiency of the judicial proceedings could be improved while guaranteeing due process and the protection of the rights of defendants). This economic approach to the law has gained ground in most jurisdictions over the last two decades and has influenced the thinking of judges on adjudicating the cases.

As most judges throughout the world have not been trained in economics, one of the questions raised has been the extent to which they should rely on court appointed economic experts to help them discharge their duties. A related and complex question is what should the role of economic experts working for the court be in judicial proceedings. Whereas economic experts can usefully inform judges on some of the complex technical issues raised by the cases, in the end it is the courts which must pass judgment on those cases. For this process to run smoothly, however, judges must be able to precisely define which questions they want economic experts to answer. This, in turn means that judges must understand enough economics to be able to be precise in formulating the questions they want experts to investigate.

This book is a path breaking and innovative attempt to evaluate the economic impact of several important decisions of the Indian Supreme Court dealing with economic issues. It considers the direct impact of those decisions on the economic sectors concerned. It concludes that, in several instances, the Indian Supreme Court could have achieved the same results at a lower cost to society and the Indian economy. In the process the author suggests that relying on the opinion of expert bodies could have helped the Supreme Court achieve an economically more satisfactory resolution. The book also points out approvingly to one case where the Supreme Court of India adopted a forward looking holistic interpretation of the law.

The line of research initiated by this book is an important one which should be encouraged and developed. It compels us to reconsider the role of judges and courts in our societies and to reflect on the legitimacy of the judicial system.

— Frederic Jenny
Emeritus Professor of Economics and
Co-Director, Centre for Law & Economics,
Essec School of Business, Paris
Chairman, OECD Committee on Competition
Judge, French Supreme Court (2004-2012)

Reflections/Endorsements[1]

I have great pleasure in presenting reflections from many distinguished persons, many of whom have known me for long. These reflections, more than forty in number, not only emphasise the importance of this book but can also be seen as its overwhelming endorsement.

With such a body of eminent endorsements, it will be unjust rather impossible to list them in any order of hierarchy. Therefore, they have been placed in alphabetical order.

Fortuitously, the first one is from Justice (Retired) A. K. Sikri, whose judgment along with his fellow Judge A M Sapre on the interstice of law and economics is a milestone judgment (Shivshakti Sugar case). One sincerely hopes that it becomes the guiding principle to follow in all cases involving economic impact of any adjudicatory outcomes. This is what even the dynamic Amitabh Kant says in his Foreword for this book. Invariably all comments/reflections, in one way or the other second this sentiment and indicate that such an analysis is most welcome and should become part of the operating system in our higher judicial system. It has verily become a colloquium of sorts while presenting a similar view.

Former Supreme Court of India's Justice B. N. Srikrishna writes:

"Legal scholarship in India shies away from a principled critique of judgments of the Supreme Court. Perhaps, the lurking fear of falling foul of contempt law inhibits such an exercise. Consequently, the court has been denied access to a potent source of analytical thinking. Pradeep

1. This section is updated as of May 2021.

Mehta, a well-known scholar on law, economy and public policy, attempts to fill the void".

Pertinent to mention here that Justice Srikrishna has done a huge amount of work on economic governance in India as head of various government committees and thus is uniquely placed to offer such a viewpoint on the subject.

Another supporting comment came from one of the leading econocrats in India, Montek Singh Ahluwalia. However, he did sound a bit concerned that law is always black and white and thus it cannot be comfortable in economic analysis. Besides this, the parties involved always knew the bounds of law and hence it remains their responsibility to adhere to the letter of the contract, rather than look beyond it.

Going abroad, former Judge of the Supreme Court of Ghana, Justice Kofi Date-Bah, who has had much experience of the international scenario having worked at the Commonwealth Secretariat, London, says: *"This is a brilliant and incisive contribution to scholarship on the Supreme Court of India as a public institution and as an arbiter of justice. The impact on the economy and society of judicial decision-making in an apex court is a fertile area for insightful analysis and Pradeep Mehta, with his rich and varied practical experience of studying the interrelationship between law and economics, executes the needed task of analysis with aplomb and great skill".*

Noted senior advocate, Rajeev Dhawan writes: *"Pradeep Mehta's unique scholarship on the impact of Supreme Court on economic affairs is exemplary – an exercise rarely taken".*

In addition, one also sees a strong bipartisan support towards this project. This comes from Suresh Prabhu, Jay Panda and Gopal Krishna Agarwal of the BJP, and Veerappa Moily and Shashi Tharoor from the Congress Party. What would be worth mentioning here is a comment from Dr Pramod Sawant, BJP's young Chief Minister of Goa: *"The State of Goa too experienced a major economic setback due to the ban on iron ore mining by the SC. Thus, affecting multitude of Goan livelihoods and businesses".*

I am grateful for these endorsements as it only proves our credentials as a non-partisan centrist organisation, purely interested in working for people's welfare within and outside India.

It is for this reason that we have been benefited by the views of leading scholars and thinkers like Dr. C. Rangarajan, Nitin Desai, Vijay Kelkar, Jagdish Bhagwati and Meghnad Desai. All have been very generous in their praise.

Among our younger scholar activists, I value the rich comments by Nitin Pai and Arghya Sengupta. The list also includes erudite businessmen like R. Seshasayee, Sunil Munjal, Gaurav Dalmia, Jagat Shah, Siddharth Birla, Raju Kanoria and the industry doyen, Tarun Das. To this, we must also add former excellent civil servants like N. K. Singh, Lakshmi Puri, Vinod Rai and Arvind Mayaram, who continue to be active even today. When they wrote their comments, N. K. Singh was Chairman of the 15th Finance Commission, while Arvind Mayaram was the Vice Chairman of the Chief Minister of Rajasthan's Economic Transformation Advisory Council.

Many of my foreign friends too have commented, including Allan Fels from Australia; David Ongolo from Kenya; Thula Kaira from Zambia; David Gerber and Ajay Chhibber from the USA. There are others too who have shared similar views and their specific reasons as to why this book is so timely and crucial.

Below are all the comments in detail in alphabetical order.

"Conferred with wide powers of judicial review coupled with the fact that many economic policy matters of the executive come for judicial scrutiny before the Supreme Court, the decision of these cases have inevitable bearing on the economy of the nation. The approach of the Supreme Court in deciding such matters becomes vital. Whether pure legalistic approach is going to serve the purpose or the court should keep in mind the economic impact while finding the solutions, otherwise legally sustainable? Here comes the connection between law and the economics. In this scenario, the present work of Pradeep Mehta to analyse six crucial judgments of the apex court from the prism of economic welfare, is a visionary step. I

indubitably, his pathbreaking analytical conclusions are going to benefit not only lawyers and policy intellectuals, but have the propensity to bring about necessary change in the judicial approach as well."

— A.K. Sikri, Justice
Former Judge Supreme Court of India
Presently, International Judge, SICC Singapore

Over time the Indian state has become more interventionist and less effective. The Supreme Court has also followed this path of greater activism but often into areas where it needs greater expertise and understanding. In this brilliantly researched and timely book Pradeep Mehta examines the functioning and effectiveness of India's highest legal body - the Supreme Court - by looking in-depth into 6 much discussed cases that it was involved in recently. He highlights, with incisive analysis, what these tell us about the Supreme Court and how it could be improved. It's a must read for any student of law and economics and gives us a much deeper understanding of India's supreme legal institution and the impact of its decisions on economic development.

— Ajay Chhibber
Former Director General, Independent Evaluation Office, Govt of India,
Presently, Distinguished Visiting Scholar,
Institute for International Economic Policy, Elliott School of International Affairs,
George Washington University
Washington DC, USA

Supreme Court discussions can have major economic effects, but few economic analyses exist. Pradeep Mehta a renowned authority on economic reform - whether it be in relation to trade, competition, investment or regulation - has produced a seminal study of how Indian Supreme Court decisions affect economic welfare.

— Allan Fels AO
Professor Melbourne University and Monash University,
Melbourne, Australia

In this book, Pradeep Mehta aptly analyses the judiciary's influence over the Indian economy, and discusses the Supreme Court's role as an arbiter of justice. Exceptionally well-researched and thought provoking, this book is a valuable addition to the existing discourse on the subject, and a must-have on any lawyer's bookshelf.

— Arghya Sengupta
Founder and Research Director at Vidhi, Centre for Legal Policy, New Delhi

The country is passing through troubling times. Institutions don't seem to deliver what citizens need—the bureaucracy, Parliament, political parties, even businesses. Therefore the court of last resort—the Supreme Court—has been overloaded with cases of 'public interest'. It cannot handle the volume of its overload. Nor does it, as Pradeep Mehta explains, have frameworks to handle the multi-faceted nature of the challenges it is expected to resolve. He points out the unintended consequences for the Indian economy of the Court's interventions.

— Arun Maira
Former Member Planning Commission of India, Gurugram

One of the most vexing questions confronting the country in the preceding decade has been the disastrous impact some of the judicial pronouncements have had on the Indian economy. From being one amongst the three fastest growing large economies in the world to becoming one of the seven worst performing economies (the latest report of the The Economist Intelligence Unit), judicial pronouncements have contributed in no small measure to slowing down the Indian economy. Unfortunately, lack of appreciation of the rapidly changing economic realities by the judiciary has been equally striking.

Pradeep Mehta has not only been one of our foremost public thinkers but has done some pioneering work in economics and law. The forthcoming book, the Supreme Court and the Indian Economy and its judgments on

some of the most critical matters in the last decade is a testimony to his keen insight and understanding of the dynamic of the Indian economy.

— Arvind Mayaram

Former Finance Secretary, Govt of India
and Vice Chairman, Rajasthan CM's Economic
Transformation Advisory Council

Legal scholarship in India shies away from principled critique of judgments of the Supreme Court. Perhaps, the lurking fear of falling foul of contempt law inhibits such an exercise. Consequently, the court has been denied access to a potent source of analytical thinking.

Pradeep Mehta, a well-known scholar on law, economy and public policy, attempts to fill the void. The book makes insightful analysis of several judgments of the Supreme Court and points out how they could have been decided better to achieve greater public good. His analysis of the impact of PILs on legal issues is also refreshing.

— B.N. Srikrishna, Justice

Retired Judge, Supreme Court of India

Pradeep Mehta has long been a proponent of reforms for effective development of our country. In this new book, he talks about the reformist role of the Supreme Court in defining the public realm of Indian society and its various roles and limitations. The book analyses six major case judgments which had a far reaching impact on the Indian Economy in either escalating or removing the ills plaguing it. Written at the juncture of economics, law, society and morality, the book is a must read for everyone including lawyers, policy analysts and change makers.

— Baijayant "Jay" Panda

National Vice President & National Spokesperson BJP
Former Member of Parliament of India (Rajya Sabha & Lok Sabha)

Pradeep Mehta has written an extremely useful book which raises some key issues which judiciary and economics profession must ponder over. The link between Law and Economics is getting stronger. There are two

important and separable issues here. One is the economic inputs needed to come to decisions by Judges. Second is the impact on the economy of the decisions given by the courts. The cases analysed in the book are illustrative. The book must catalyse judges and economists to unite and break new ground.

— C. Rangarajan

Former Chairman, Economic Advisory Council to the Prime Minister of India & Former Governor, RBI

This book is one of the first comprehensive and consolidated works to rigorously analyse the impact of some of the decisions taken by the Honourable Supreme Court of India. It is a compelling tour de force packed with sharp analyses and insights on the economic analysis of law and judicial decision-making on complex issues of law, economics and public policy that had, and in some cases continue to have, a significant impact on India.

Apart from a reasoned interdisciplinary approach to analyse the selected cases and their decisions, the overarching message can help scholars, practitioners, jurists and activists understand growth patterns across regions, sectors and time-periods in India. The quality of legal institutions and economic development certainly go hand-in-hand. Therefore, a holistic approach by the judiciary takes as much primacy in India as the speed of justice, and the idea of justice itself.

This outstanding book is not only a must-read primer for academicians considering pursuing law and economics as a research method, but for all legal practitioners, judges and policymakers in India who want to see the application of this approach to real-life cases in India. I congratulate Pradeep Mehta and CUTS for making this significant and substantial contribution to the field of law and economics.

— C. Raj Kumar

Founding Vice Chancellor, O.P. Jindal Global University (An Institution of Eminence)

Pradeep Mehta has been an exceptionally powerful and valuable voice in both Indian and global economic discussions for many decades. Using his broad experience in business and law, he has repeatedly provided keen insights into issues of economic policy and its legal dimensions. In this book he turns his attention to the role of the Indian Supreme Court in India's economic development. He analyses six relatively recent Supreme Court cases that have influenced the structure and operation of the Indian economy. He identifies - and questions - assumptions that lie behind the Court's decisions. He then traces some of the consequences of the decisions and draws valuable conclusions from them about the role of the Supreme Court in the economy. His study is highly valuable not only in the Indian context but also for other countries facing similar problems.

— David J Gerber

University Distinguished Professor of Law, Chicago-Kent College of Law

Pradeep's path breaking book examines an important institution in India's decision making processes. The Supreme Court's decisions discussed in the book richly range from services to productive sectors of the economy. This analytical interchange between law and economics is rightfully needed to enable the discourse on the differential impacts of functional or dysfunctional institutions on the economies of developing countries. A book certainly worth reading. Good job Pradeep!

— David Ong'olo

Formerly Chairman, Competition Authority of Kenya

The story of India's reforms and economic growth would have remained incomplete without the role the Supreme Court has played in addressing the blind spots of policy makers. This book chronicles how it has acted as a voice of the underprivileged, whose democratic voice was crowded out by political and economic forces. It shows how it has nudged the legislative and executive branches towards holistic development; and sometimes explicitly held up against the forces of administrative decay. And finally, as the apex court goes into unchartered waters at the intersection of law and

economics, the book recommends a framework for analysis. For all this, a worthy read.

— Gaurav Dalmia
Chairman, Dalmia Group Holdings

The judiciary is an important pillar of our democracy. Over the years, Indian Court's pronouncements have been impacting the administrative and economic decisions of the government, influencing their outcomes to a large extent. Shri Pradeep Mehta's long association with the reform process and understanding of economic laws is sure to unravel the complexity of the subject. His scholarly work in the form of this book is an enlightenment for all of us.

— Gopal Krishna Agarwal
National Spokesperson of BJP on Economic Affairs

Pradeep Mehta has grassroots to top management experience with businesses and policy makers in India and around the world. What he has written in this book is from that exposure, a rare one to have, very few have. This book would be a hindsight eye opener to judiciary, legal fraternity, the political leaders, bureaucrats, media as well as to business leaders.

— Jagat Shah
CMD, Global Network, Vibrant Markets,
Mentor on Road, Smart Village

Pradeep Mehta has long been a thoughtful and creative guide to the reforms that India needs. In this book, he turns his lens on the Supreme Court of India and its myriad judgments that affect our welfare. The result is a remarkable book that lawyers and policy intellectuals will profit from reading.

— Jagdish Bhagwati
Professor of Economics and Law at Columbia University

For someone who has been steeped in national and international trade, economic development and competition policies for over four decades and headed UNCTAD's flagship International Trade Division in Geneva for seven years, I find Pradeep Mehta's scholarly book an interesting reprise of all the critical debates of our times on these issues.

It analyses the unique policy dilemmas at the heart of economic development and related industry perspectives in conjunction with judgments of India's apex court - the Supreme Court. While stressing the imperative of Judiciary influencing if not shaping economic policies directly or indirectly through its jurisprudence, Pradeep identifies the "what if's" in those political economy defining judgments and the processes that led to them.

He builds a case for an alternative approach to judicial decision making on economic policy matters - one that recognises and relies on domain expertise, protects economic systems, allows the play of competitive market forces while serving the broader national interest. A difficult feat indeed to perform in the complex calculus of social and economic policy making and competing interests in a developing country and emerging economy that is India. A must read for lawyers and economists, policy makers and market players alike.

— Lakshmi Puri

Former Assistant Secretary General, United Nations
and Ambassador of India

I am highly impressed by the unique book written by Pradeep Mehta on the impact of the Supreme Court decisions on the Indian Economy. I have personally known Shri Mehta since the last 20 years.

I shall say that he was thorough in discourse of law in economics in decision making. The book which he has penned not only confines to Bar and Bench but also deals with the entire gamut of legal arena. Shri Mehta possesses expertise on Competition Law of India and also perspective of Company Law. During my tenure as Union Minister of Corporate Affairs, he participated in several symposiums and his contribution to the new Competition Law was unique.

The contribution of Shri Mehta in many aspects of Competition Law has resulted in transformation to build a forward looking contribution to the economic scenario in India.

— M. Veerappa Moily
Former Chief Minister of Karnataka
and former Union Minister for Law and Company Affairs

This concise and analytical monograph breaks open several new doors. Firstly it inaugurates the area of Economics of Law and Legal Judgments practically. Over the years as single party majority governments have waxed and waned, the Supreme Court has become the de facto Executive in deciding contentious matters. Still, when these judgments have severe economic consequences, we need to take notice. Pradeep Mehta, a veteran watchman of practical economics in India, has laid down not just a guide for all of us but a useful advice for the Judiciary itself. Everyone should pay heed to what he has to say.

— Meghnad Desai, Lord
British Economist and Labour Politician

Pradeep Mehta provides a fascinating analysis of the broader economic implications of legal decisions as exemplified in six important Supreme Court cases. The book highlights the complex questions that arise as the Court tries to balance what a narrow focus on the law might justify and what might emerge if a broader view is taken of the economic costs and benefits of particular decisions. This is an important contribution in an area which is increasingly becoming more relevant especially in a world where global business connectivity means that the expectations of investors are affected by how these issues are handled in different jurisdictions.

— Montek Singh Ahluwalia
Former Deputy Chairman, Planning Commission

This is an outstanding and significant contribution designed to foster judicial reforms. The alternatives explored in this book and some suggested actions can have far reaching implications for our economy. This book deserves the attention of anyone serious about the attractiveness and competitiveness of the Indian economy.

— N.K. Singh

Chairman, Fifteenth Finance Commission, Government of India

If anything fundamentally runs the country when government fails to act, it's the Supreme Court of India. It's an institution that is possibly the most independent (of the government), intelligent and innovative in solving the problems of human rights or a complex business. But it's people like Pradeep artfully raise the issues and also take them to the Supreme Court. Pradeep uses his constitutional rights and empowerment to solve the societal or economic issues, intuitively and creatively.

— Nishith Desai

Nishith Desai Associates, Legal Tax Counseling Worldwide

Pradeep Mehta began with consumer protection as his goal but moved on to the broader areas of economic policy as they mattered even more for consumers than consumer protection legislation. In this book he looks a step further at court judgments that affect the economy. This study of the interface between law and economics connects the law's concerns about rights and the need to frame an economic policy to maximise opportunities for every individual. It is a very valuable contribution to our policy discourse.

— Nitin Desai

Former Under Secretary General for Economic and Social Affairs of the United Nations

The judiciary is perhaps the only branch of government immune to the economic consequences of its decisions. At the same time, it is the judicial decisions that are relatively the hardest to change when circumstances demand. Pradeep S Mehta's book opens the eyes of the reader to the intended and unintended consequences of the judiciary's role in economic policies in India.

It is as much a narrative of India's economic history as it is a note of caution for firms, activists and members of the legal community on the possibilities and limitations of judges making economic decisions. It underlines the need for better economic education and of the importance of economic reasoning among the policymaking elite, including and especially India's legal community.

— Nitin Pai
Co-founder & Director, The Takshashila Institution

The issues around rules, regulations, prices, royalties, distribution of businesses, natural resources, monopolies etc. are difficult areas and have led to long debates even when these were directly controlled by state undertakings. They become impossible exercises when competing companies entered most areas, and issues like growth, investment, vexed competition, and level playing field also have to be kept in mind.

The last few years has seen the Supreme Court and other courts getting into micromanagement, and also retrospective judgments on complicated economic issues, without having necessary core competence. This has prevented 'crony capitalism', but has also led to changing 'rules of doing business' which does not help create an environment for maximum investment, and level-playing' field.

'Think tanks' like CUTS etc., and other expert bodies have done exemplary work but it is important that Courts rule by rule-setting, and not micro-management. India has suffered a lot due to changing business environment leading to higher prices of coal, power etc. and inefficient distribution. Only courts can ensure rule bound conduct of businesses.

— Pradip Baijal
Former Chairman of the Telecom Regulatory Authority of India (TRAI), and former Secretary, Disinvestment, Govt of India

Some of the recent decisions of our Supreme Court have had serious negative impact on Indian economy. While pronouncing these decisions the Court went strictly by the letter of the law and failed to appreciate its spirit and larger public interest. Shri Mehta, in this book, has dispassionately analysed these decisions and more importantly suggested systemic reforms that can make our judicial system more perceptive yet resilient.

— Prakash Chandra Parakh
Former Coal Secretary, Government of India

I am happy that this book authored by Shri Pradeep Mehta is being published. Mining being one of the major contributors to the Goa's economy, the context herein has always been very near and dear to every Goan heart.

"This book is a practical and refreshing scholarship on the intersection of law and economics and rightly recognises Supreme Court's wedded role in the economic progress of the country. Shri Mehta dispassionately reflects on six cases of the SC, and its impact on the society's welfare. He underlines the immediate need for economic thinking in the judiciary that will remarkably catalyse India's economic progress and prosperity.

The State of Goa too experienced a major economic setback due to the ban on iron ore mining by the SC. Thus, affecting multitude of Goan livelihoods and businesses. The matter is still pending before the court, prolonging the hardship of affected mining dependents and the Goan economy. Besides, I strongly feel that the book has the potential to not only set the necessary discourse on economic analysis of judicial orders, but also inform the decision makers and the entire legal ecosystem."

I congratulate Shri Pradeep Mehta and wish him a success in his writing.

— Pramod Sawant
Chief Minister, Goa

Contrary to the public perception that economic policy is primarily in the domain of the Executive (read government) and to a lesser extent the Legislature, the simple fact is that the Judiciary too exerts considerable influence in the manner in which economic policy is practiced and

implemented. This is not restricted to correcting actual or perceived malfeasance of the government, but extends to issues of fairness and of contradictions between myriad economic and non-economic Acts. Through this, the judiciary actually has determined the relative priority of conflicting economic objectives for the country, thereby reducing the primacy of the other pillars of the State, especially the Executive.

This book by Pradeep Mehta is an eye-opener and should be made mandatory reading not only for students and practitioners of public policy, but also for the judiciary. One hopes that it will jolt the judiciary into appointing trained economists as amicus curiae in all cases involving larger economic decisions."

— Pronab Sen

Country Director, International Growth Centre
Former Principal Economic Advisor, Planning Commission
and Chief Statistician of India

Pradeep Mehta's unique scholarship on the impact of Supreme Court on economic affairs is exemplary – an exercise rarely taken. He analyses six important Court decisions with balance, fairness and understanding. I think we need reminding that judges and lawyers are not trained or fully sensitive about multi-disciplinary economic areas of the social and economic impact of their decisions. They must be confronted with brilliant books like this by an activist scholar. A book to be read in the hope more will follow on this eclipsed area of judicial decision making.

— Rajeev Dhavan

Indian Senior Advocate and Commissioner of
the International Commission of Jurists

Judicial activism in India is at a point where it no longer confines itself to the interpretation of the law, but is influencing economic decision-making and societal behaviour. In selecting and impartially analysing cases and judicial pronouncements that have far reaching implications beyond the letter of the law, Pradeep Mehta, in his book, lays the foundation for serious debate on the need to re-evaluate our understanding of the intended checks and balances laid down in our

Constitution, to ensure that decision-making and governance in the country is holistic and our economic well-being and social order are not derailed by our expectations from the justice delivery system.

This book is thought provoking and reminds us that as a country, our over reliance on the judiciary to balance all interests and provide the right direction might result in us, sleep walking into a situation which may not be what we want as a nation, economically or socially.

— Rajya 'Raju' Vardhan Kanoria

Chairman and Managing Director,
Kanoria Chemical & Industries Ltd, and former President, FICCI

Higher judiciaries have often had to foray into subjects of specialised nature, such as technology, environment or economics, in the course of dispensing justice. The Supreme Court has the added responsibility of defining the limits of authority of not only the other instruments of democracy, but also its own.

The distinguished author, Pradeep S. Mehta has illuminated the impact of the Supreme Court's decisions on matters of economic policies, that raise deep issues of capacity and comprehension of the judicial system and the complex area of intersection between the Executive and the Judiciary in policy interventions. A must read.

— Ramaswami Seshasayee

Former Chairman, Ashok Leyland Ltd,
Infosys Ltd and IndusInd Bank

Pradeep Mehta brings to you a must-read primer for anyone in the legal fraternity and beyond. This novel work has the potential to be on the required-reading list of many, as it devours and analyses the intricate yet not much discussed relationship between law and economics. This book is a testament to the call to the Judiciary to balance the legal and economic aspects in their decision making by Mehta who has fought beyond his fear to speak about the importance of law and economics for a better society.

— Ranbir Singh

Former Vice Chancellor, National Law University Delhi

Pradeep Mehta has, in his book, proffered wise counsel to those who deliver justice and obiter in the context of the collateral impact that may result from judicial orders. He emphasises the need to balance complex areas including the interface between 'law and economics', something which both of us have learnt over our long term work on competition law & policy.

In particular, he cautions the Courts to reckon and foresee the possible and potential adverse economic consequences that may follow in the implementation of their orders. He has elaborated his call by comprehensive and insightful analyses of six cases. What is unique in the analyses is that he has gone beyond the remit of the Apex Court's orders and assessed them on their socio-economic consequences.

It is a daunting task to strike a balance and posit a road map, which Mehta has done with flair, elan and unassailable logic. His advice to the judiciary to associate experts to carry out a cost-benefit analysis to provide a multi-dimensional and multi-stake holder analysis before pronouncing a judgment is rich and warrants adoption in complex cases. What adds lustre to the book is Mehta's facile pen, or should I say: keyboard. A must read book.

— S. Chakravarthy, IAS (Retd)
Former Member, M R T P Commission

This is a brilliant and incisive contribution to scholarship on the Supreme Court of India as a public institution and as an arbiter of justice. The impact on the economy and society of judicial decision-making in an apex court is a fertile area for insightful analysis and Pradeep Mehta. With his rich and varied practical experience of studying the interrelationship between law and economics, executes the needed task of analysis with aplomb and great skill. He has made a valuable contribution to scholarship in an area which deserves greater attention. This book is highly recommended.

— Samuel Kofi Date-Bah, Justice
Retired Justice of the Supreme Court of Ghana

Pradeep Mehta and CUTS have been at the forefront of championing the interests of the consumer and the economy within the framework of a competitive market economy. This focus on the judiciary is timely. Many have expressed concern about the deleterious impact of various judicial interventions on investment decisions, employment creation and economic growth. A modern yet developing economy requires an economically literate judiciary that promotes, not hinders, economic growth and poverty alleviation. Mehta and colleagues have done well to focus on these issues.

— Sanjaya Baru

Former Adviser to the Prime Minister of India, and
Editor, Economic Times, Financial Express and Business Standard

Pradeep Mehta has done well to discuss and bring into the public domain the economic consequences of six important cases decided by the Supreme Court. Prudent public policy would suggest that wider ramifications of possible judicial decisions be accessed so that the potential loss of rights, and employment, are taken into account. And all affected are allowed to make their case and do not end up as collateral damage.

— Shakti Sinha

Hony Director, Atal Bihari Vajpayee Institute of Policy Research
and International Studies, MS University, Vadodara,
and Distinguished Fellow, India Foundation, New Delhi

Pradeep Mehta examines the pivotal role of the Supreme Court in shaping the daily lives of a billion Indians through its increasing influence in the economic sphere. Examining six landmark cases, Mehta confirms his reputation as an astute thinker on economic policy issues, incisively analysing the consequences of the Court's decisions. An insightful guide to a key facet of Indian governance.

— Shashi Tharoor

M.P., Lok Sabha,
Chairman of the Parliamentary Standing
Committee on Information Technology,
and Chairman, All-India Professionals' Congress

Pradeep Mehta has a deep understanding of the business and regulatory landscape of India. His creativity enhances this understanding to amplify practical insights on how the Indian economy and all its influencing arms can be more functional. To this end, his views on improved judicial processes at the apex level supported by a deeper appreciation of economic impacts, will be a welcome insight into what India can do to consolidate its considerable judicial prowess.

— Sidharth Birla

Chairman, Xpro India Limited

Pradeep Mehta's brand of consumer advocacy is fact-finding research, rigorous analysis, and sustained advocacy – a formula which invariably, albeit in time, achieves the desired outcomes, He has generously shared his expertise with trade, regulatory and consumer protection bodies in numerous developing countries. This book adds to the rich armoury of his advocacy and capacity building efforts.

Undoubtedly, the Supreme Court of India and other judicial bodies in India and elsewhere will soon accommodate economic analysis as part of their adjudicatory process and be richer for it.

— Sothi Rachagan

Nilai University Vice-Chancellor, Malaysia

The Supreme Court has an exceedingly complex role in upholding the Constitution in the delivery of justice, it principal mandate, while at the same time balancing among conflicting demands: public interest, political and social issues and environmental considerations. Most importantly, it must also navigate its way carefully in line with the constitutional separation of powers between the legislature, the judiciary and the executive. How well has the Supreme Court coped over the years in carrying out this exceptionally difficult mandate?

Assessments of the Supreme Court's performance have been few and far between, mostly authored by experts in jurisprudence and therefore viewed through a juridical lens. Pradeep Mehta's important new contribution stands out in that it is an assessment of the role of the Supreme Court through a different lens, namely, the economic impact of its decisions.

Over the past fifty years or so the Supreme Court has played an increasingly 'activist' role, filling in what may be considered deficits in the performance of the legislature and the executive. In so doing it has passed judgments that have had far reaching economic implications.

Drawing on evidence about the impact of judgments in five landmark cases, Mehta argues that the judgments have had severely adverse economic impacts. This is because economic considerations were not adequately taken into consideration in passing these landmark judgments. But Mehta also discusses a less well known case, the Shivashakti Sugar Mills case, where the Court did take a broader view and its judgment accordingly strengthened competition and efficiency. Further, Mehta speaks about how the Court can draw on these experiences to lay out procedures it can follow going forward on such economically important cases.

An important addition to the literature on the performance of the Supreme Court, Mehta's new book is essential reading for students and researchers in the exciting field of law and economics. It will also be of interest to all those who are concerned with these issues.

— Sudipto Mundle
Distinguished Fellow,
National Council of Applied Economic Research
New Delhi, India

For many decades, Pradeep Mehta has written incisively and boldly about India's emerging policy framework and its engagement with the world. Here, through an astute analysis of six key Supreme Court judgments, he has made a strong case for balancing the scales of law with economics. He has suggested alternative ways in which these cases might have been viewed and resolved, while preserving both the letter and spirit of the law. A must-read for legal practitioners and for those who believe the world's largest democracy deserves a contemporary, balanced and benchmark-setting judicial system for the 21st century.

— Sunil Kant Munjal
Chairman, Hero Enterprise, India

Parliaments have the sole prerogative to make laws. But, the judiciary while interpreting it, passes judgments, which many times becomes a "case law". Till it's overturned, such case laws become the law of the country. In economic issues, Supreme Court has passed some landmark judgments which have laid new rules for economic discourse, which is so ably analysed by a distinguished thinker and passionate reformer, Pradeep Mehta. I am sure readers will enjoy his insightful analysis of the SC pronouncements; between the lines thinking behind in his tongue in cheek style.

— Suresh Prabhu

India's Sherpa to the G7 and G20 and
Former Minister of Railways, Minister of Commerce &
Industry and Civil Aviation

Pradeep Mehta has a long history of work and contribution to making available data, information and analysis in regard to Trade and Economy issues. With his book on the role of Supreme Court judgments relating to industry and economy, he has added a significant new dimension, a much- needed one, to his vast work. And, by focusing attention on the Judiciary, the Author is adding to creating new awareness and disseminating important knowledge about the "connect" between Economy and Judiciary.

— Tarun Das

Chairman of Institute of Economic Growth (IEG)

I have known Pradeep for almost 20 years and been enchanted by his passion for social justice and the importance of holding public officials to high levels of accountability through measuring the impact of their decisions. For Pradeep, I have come to learn, and appreciate, that decisions must not be made in a vacuum rather, in the context of tangible benefits that trickle down to the ordinary members of society. This has not just been a pursuit in India, but a pursuit he has carried on offshore even in Africa.

— Thula Kaira

Founding CEO of the Competition Authority in Botswana

Pradeep Mehta is one our extraordinary public intellectuals. He has deep knowledge of the disciplines of law and political economy and of the critical role of the institutions including judicial institutions in promoting inclusive development. The unique combination of his abilities makes this book a compelling contribution to our understanding of the challenges and it also outlines the needed reforms of India's judicial system. Our policy makers, judiciary and opinion leaders would greatly benefit by listening to his valuable analysis and sagacious advice.

— Vijay Kelkar

Chairman, India Development Foundation,
and former Finance Secretary, and
Chairman of the Thirteenth Finance Commission of India

This volume is a pioneering effort by Pradeep Mehta to chronicle the economic impact of verdicts passed by the Supreme Court of India. Courts invariably pass judgments based entirely on the legalistic aspects of the matter under consideration. Its commercial or economic aspects are not within its vision. This book makes a compelling case for the Court to keep the economic fallout of its decisions in focus while delivering verdicts. I am sure the arguments marshalled in the book will initiate an informed dialogue among the country's legal fraternity, leading entrepreneurs and policy planners. Indeed, an outstanding contribution to encourage courtroom dialogues on the social welfare aspects of Court verdicts.

— Vinod Rai

Former Comptroller and Auditor General of India

Prologue

Every creative process has an inspiration behind it. Writing books is perhaps one of the most intensive creative processes. My guess is that it is even more challenging when one is writing nonfiction of the kind that this book is. It deals with facts that must interest every citizen but ironically, they don't.

There are many reasons for this. Issues about governance, institutions and policy are not sexy and simple. They need indulgence and engagement, and need to be explained in detail. Dumbing them down to suit the appetite of the masses might not do justice to their nuanced nature. Therefore, the constituency of their readers is limited while their relevance is universal – a painful paradox indeed. Another reason why they don't make their way to popular discussion is because there is also a very limited number of public policy practitioners dedicated to enlightening citizens and policymakers on it continuously so that debate is suitably stimulated.

What inspires me to write this book are precisely these challenges and my mission to catalyse more and much needed debate on the judicial system and economy. In my career of 40 years as a consumer activist and public policy advocate, I have always questioned unfairness and injustice and worked for a questioning culture rather than one based on passive acceptance.

Much of my philosophy in life has been guided by ideals enshrined in our Constitution, particularly Article 51A which deals with Fundamental Duties. The Article was added to the Constitution in 1976 i.e. eight years before I launched Consumer Unity & Trust Society (CUTS) in 1983-84. Incidentally, the genesis of CUTS which is rooted in a Wall Newspaper, "Gram Gadar" (Village Revolution), is also inspired by Article 51A. Both CUTS and the newspaper continue

to function even today. These initiatives were designed to seek a better world for our people in which consumer sovereignty, always considered a feature of an ideal democracy, would be guaranteed by the government through a suitable framework.

Although this book is critical of Supreme Court's role in select cases, I must also commend the Supreme Court for successfully endeavouring on various occasions to further consumer and citizen welfare. The most prominent of these cases is the expansive interpretation of Article 21 of the Indian Constitution: from examining "right to personal liberty" in 1950 to upholding "right to privacy" as a fundamental right in 2017, to most recently recognising the same sex relationship in 2018, including interpreting the "right to health" manifested in it, the Supreme Court has continuously sought to uphold and mainstream in keeping with the times. Institutionalisation of Public Interest Litigation and the pronouncements on the Basic Structure Doctrine are yet other game changers that the SC must be credited with. There are various other judgments which have helped to advance our democracy and institutions, as well as the environmental cause.

Regarding the Fundamental Duties, Article 51A(h) and Article 51A(j) have been particularly significant for me. They state that it shall be the duty of every citizen of India to develop the scientific temper, humanism, and the spirit of inquiry and reform; and to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Our institutions are supposed to create an enabling environment for these duties to be effectively discharged and people are required to become active citizens[2]. Our courts are part of that institutional framework. In this regard, the following abstract from the SC judgment in the 2G case in terms of citizenship comes to mind.

2. Here it needs to be mentioned that all people in a country do not live like citizens but just as simple individuals. Many of them do not even vote in any of the elections. Once the famous jurist, Nani Palkhiwala had said that, "One citizen is equal to 1000 individuals".

> "When matters like these are brought before the judicial constituent of the State by public spirited citizens, it becomes the duty of the Court to exercise its power in larger public interest and ensure that the institutional integrity is not compromised by those in whom the people have reposed trust and who have taken an oath to discharge duties in accordance with the Constitution and the law without fear or favour, affection or ill will and who, as any other citizen, enjoy fundamental rights and, at the same time, are bound to perform the duties enumerated in Article 51A."

The citizen's duties referred to by the court are related to litigation on the alleged corruption in allocating spectrum licences to many businesses. Indeed, the SC said the right thing, but also passed a stringent order cancelling all the licences thus unsettling the Telecom sector, which had an impact on the economy, international relations etc. In my opinion, I think one doesn't have to cut off the head to cure a headache, but find remedies.

Noted Senior Advocate, Harish Salve in September, 2019 also castigated the apex court for causing much harm to the economy in its orders on various matters, including the Coal Mines Allocation and 2G Spectrum cases.

There can be many reasons for the judiciary to not apply their minds and deliver heroic judgments. At the time of the 2G case, retired Justice Ruma Pal lambasted the higher judiciary in the 5th Justice V. M. Tarkunde Memorial Lecture in New Delhi in November, 2011[3]. She highlighted many inadequacies that blight the higher judiciary. One that may be central to the context of this book is professional arrogance whereby judges do not do their homework and arrive at decisions of grave import ignoring precedents and judicial principles. This is a trait often found in civil servants and responsible people too.

Their inflated egos often distort their analytical abilities and thus decision making. Brilliant exceptions exist in all categories but they

3. http://archive.indianexpress.com/news/higher-judiciary-guilty-of-7-sins-exsc-judge-pulls-no-punches/874183

are exceptions rather than rule. Moreover, in certain cases analytical abilities might be compromised by lack of expertise in, among others, economic issues.

Be that as it may, my journey in this project began with two interesting conversations that I had with very senior policy makers in New Delhi in May, 2017. They told me that the Prime Minister is very concerned with the way the apex court deals with matters having a huge economic impact. In view of the fact that at CUTS we had been doing economic impact analysis of policies, rules and regulations, it was suggested we could conduct research on cases and assess their costs to build awareness. Consequently, we approached the NITI Aayog which agreed to give us a study on the highway liquor ban as a pilot project which we did successfully. That is also captured in this book as the first chapter.

We then proposed five more studies of cases before the Supreme Court and the National Green Tribunal, which we have recently concluded. When I appeared before the high level research board of the NITI Aayog to present our proposal sometime in August, 2019, it was reiterated that the Prime Minister, who is also the Chairman of the Aayog, had expressed the same concerns about court actions impacting the economy adversely, and that our proposal was thus very timely and in the national interest. Here, let me point out that pro-economy does not necessarily mean anti-environment. It just means that economic growth, equity, and the environment deserve equal consideration before a judicial decision is made. This approach becomes extremely important particularly when workers, small suppliers and consumers are almost exclusively dependent on the industry whose actions are found to be environmentally questionable. At the same time, the recent proposals to dilute provisions of environment protection legislations in the name of ease of doing business, without adequate cost benefit analysis and stakeholder consultations, are a matter of grave concern.

Though, none of those new cases are part of this book, some other landmark cases have been discussed. In upholding Article 51A, I have questioned the raison d'etre of those judgments in this book

and sought reforms so that the nation continues to rise to higher levels of endeavour.

In fact, I have done so for five of the six cases discussed in this book. The sixth and last case however comes as a refresher with which I concur wholeheartedly. Here the answer to my spirited inquiry can be summed up in a quote from Justice A. K. Sikri, who said:

> "Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully."

As for the cases, I must not indulge in too many details here. Readers have the rest of the book to delve into them. Coincidently, my friend and Senior Advocate Dr. Abhishek Manu Singhvi was the lead counsel for five of the six cases that are discussed in the book - a fact that he has highlighted in his perspicacious perspective in the Foreword. More often, I have concurred with his views on the challenges in the judiciary around economic analysis, and have benefited a lot from his acumen and adroitness.

Now I wish to shift my gaze to some of the larger issues that form the context of this book. The first issue is corruption. Many factors have contributed to corruption in our country. Corruption is not new to India. It has existed for centuries but in earlier times it was used as grease to induce transactions and was not unpredictable, humongous and exploitative as it has seemed to be in recent times because of the greed of crooked people: politicians, bureaucrats and businessmen. Corruption has vitiated every section of our society and every institution, even the judiciary.

The good news is that people perceive the judiciary to be the least corrupt of our institutions. According to the Transparency International's Global Corruption Barometer for Asia, 2020, 72 percent of respondents believed that political leaders in government are corrupt, 46 percent believe that locally elected representatives are corrupt and 41 percent believe government officials are corrupt. However, only 20 percent people believe that our judiciary is corrupt.

Amongst the factors leading to inexplicable greed of most of our politicians is the need to contest and win elections, which are becoming costlier every year. However, having tasted blood they become shameless in acquisition of riches. Many do not even know their material worth because their wealth is unaccounted for. State funding of elections is a good idea but it will not deter greed as use of money power, in the absence of institutional mechanisms to prevent it, would remain crucial in winning elections.

Manifestations of corruption multiplied when liberalisation was adopted in 1991 and the economy was deregulated to a large extent. Businesses expanded, financial flows eased, communications were faster, and new entrepreneurs were born. The business climate changed radically by upturning the socialist model practiced since independence. 'Big' was not bad and profit was no longer dirty.

However, accompanying all this was continual rent-seeking, involving political and business elites, and foreign companies. Late Arun Jaitley, one of our noted Ministers in the BJP, and himself a very successful lawyer, once said in Parliament that the quality of the judiciary has also fallen as good lawyers do not wish to come to the bench any more. Their incomes from practice are huge. If one looks at the mind-boggling fees charged by successful lawyers, these run into lakhs per hearing. Reportedly, senior lawyers charge between ₹10 lakhs to ₹20 lakhs per hearing because corporates can quench that sort of appetite. One can thus understand the stakes involved in business operations.

On the other hand a junior lawyer would be able to make that much in a month. Inequality within the profession is high. In December 2017, the Supreme Court opined that there should be a floor and a ceiling to lawyers' fees but that was opposed vehemently by many senior lawyers.[4] The matter saw a quiet burial thereafter.

Once liberalisation started to gain steam, all natural resources, except human brains, which were under the ownership of the state, became the new gold. These among other rights were offered to the private sector in measured quantities through a mixed economy

4. https://bit.ly/2TrR8FL

approach. Facilitated by opacity and corruption, businesses went after them like feral cats. Some of the cases captured in this book relate to such allocations, their impact on the economy, and disconcert that it caused to the civil society and the role of the Supreme Court.

The book seeks to ascertain whether the remedy prescribed by the apex court was the best way to go about it, knowing that many such practices thrive in an overarching decadence irrespective of which political regime is in power. We are not questioning the powers of the judiciary to adjudicate. Many in the judiciary too get cosy with the powers that be and end up getting good post retirement positions: head of a tribunal or regulatory agency or a committee or commission or even a parliamentary seat or governorship. This is done blatantly and unashamedly. The latest example is that of former Chief Justice, Ranjan Gogoi who sailed into the Rajya Sabha as a nominated member soon after his retirement. No prizes for guessing about the quid pro quo.

One must concede that the scams took place in spite of the 5 Cs: Courts, CAG, CVC, CBI and CIC[5]. In effect, it is the governance deficit and rent seeking that are to be blamed, and not the judiciary except in cases where the court decision is delayed or distorted causing irreparable loss to the economy.

As they say, rule breakers are smarter than rule makers. So when the court orders end up causing a huge loss to the economy and jobs, the economic environment weakens further leading to greater fermentation of corruption and fertile ground for rule breakers to flourish more. It also adversely affects our investment climate creating much uncertainty.

I have done much policy work on trade, economics and development policies, for over 40 years. My work on investment treaties and competition laws entailed dealing with legal texts and legalities. In the decades of my scholarly engagement with these areas, I have acquired quite a wide view of the economy and economic

5. https://timesofindia.indiatimes.com/india/5Cs-also-hinder-decision-making-Coal-secy/articleshow/51705670.cms

governance and how it functions in a political economy context within and outside India.

Inevitably all these areas straddle law and economics. For instance, consider the Competition Act, 2002 (implemented in 2007 due to a stay by the Supreme Court) which replaced the Monopolies and Restrictive Trade Practices Act, 1969. The major change or approach in the new law was that big is not bad, but its abuse is bad. The MRTP Act, on the other hand, tightly controlled the size of an enterprise and was regressive. Not only that, the new law was drafted in a manner that the competition authority had to apply a 'rule of reason' to decide cases which they encountered rather than a 'rule of law' or 'per se' approach. In the later years of 1990s and the decade of 2000 this became a global phenomenon and many countries like India scrapped their old competition laws and adopted new ones.

Fortunately, I was closely involved in the development of new competition laws for 30 developing countries of Asia and Africa, with India[6] being a prominent member. This was marked by global discussions on a multilateral competition regime. This is when it struck me that a competition law being an economic law would have to be analysed through the economic lens and not just the legal lens. In other words, laws affecting the economy can't be strictly confined within the binaries of a legal text.

I continued learning more about this and other interstices of law and economics through my guru and mentor, Professor Frederic Jenny[7], Emeritus Professor, Essec School of Business, and Co-Director, European Centre for Law & Economics, Paris; Chairman; OECD Committee on Competition, and President of the International Advisory Board of the CUTS Centre for Competition, Investment

6. Noted economic journalist, Sanjaya Baru, as Editor of my festschrift, when I turned 70 in 2018, "Putting Consumers First", April, 2018, CUTS International (Pgs 36-37) said: "Discussion on competition law & policy cannot be complete without a mention of Pradeep's contribution to this field in India.....it must be said that Pradeep Mehta is one of the best Chairmen of the Competition Commission that India never had.... a similar sentiment has been expressed by Dinesh Trivedi, MP and former Union Minister in this book".

7. http://www45.essec.edu/professorsCV/showCV.do?keyUrl=frederic-jenny

and Economic Regulation. He has kindly contributed one of the Forewords to this book.

Fred Jenny is one rare economist who served in the Economic, Commercial and Financial Chambers of the French Supreme Court for eight years during 2004 to 2012. I have had many interesting conversations with him including hosting him once in Delhi in 2016, in partnership with the Society of Indian Law Firms, to speak about his experience in the French Supreme Court[8].

At my own level, I have always endeavoured to cross fertilise such learnings with policy makers in India, often times knowing very well that the generalist, insecure, insensitive, file pushing bureaucracy and ever busy politicians are not always interested in comprehending the value I tried to add to their work. I have been often pained to see that they could not see the public interest in several of those propositions. In other words, the core purpose of their jobs. Of course there are good exceptions.

In spite of all odds, I have remained undeterred and despite the ephemerality that occupies the corridors of power, I have kept my efforts on course and sustained them for 40 years building upon tenuous links to ensure that the continuity does not break. I have been lucky that every once in a while, the persistence yielded results.

The strength that one acquires from a career and life like that gives one the conviction that people eventually hear you out. I guess one just becomes a seasoned optimist after such a prolonged trial in public life and with positivity and Gita (doing my duty without pining for the fruits of my labour) in my heart.

It is in this context that I have not been dissuaded by those who felt that I may be inviting a contempt of court action by writing this book. A few days in the past, the famous trial of a highly public spirited lawyer Prashant Bhushan was happening in the Supreme Court for his (allegedly) scurrilous tweets about some former Chief Justices of India being corrupt.

8. https://cuts-ccier.org/lonely-journey-from-economics-to-law-and-back-lecture-by-prof-frederic-jenny/

He filed many of the PILs relating to corruption and was an active member of the India Against Corruption Movement spearheaded by Anna Hazare. Prashant Bhushan's controversial contempt case in the Supreme Court was settled by levying a ₹1.00 fine on him which he paid up. What the case did was to raise the ante on whether Bhushan was guilty or not and whether what he said was in the realm of contempt. However, it also raised the ante on corruption in our society for which he has been fighting for a long time.

In terms of inviting contempt action against me by writing this book which has critiqued many apex court judgments, I do not think that such a thing will happen because the criticism is of the manner in which the cases were disposed off without taking a big picture view about justice for the whole economy, society and country, and not of the right of the judiciary to have entertained the case.

Justice A. K. Sikri in his judgment on the Shivashakti sugar case speaks about Article142(1) which calls upon the Supreme Court to consider all the dimensions of a matter and arrive at a judicious decision. The spirit of Shivashakti was recently reiterated by the Supreme Court bench of justices MR Shah and AS Bopanna, who called on High Courts to be extremely careful and circumspect in staying projects of national interests[9]. Furthermore, many case laws and eminent lawyers in India which support my view. Here let me also quote a sitting judge of the Supreme Court, Justice S. K. Kaul, who said in a recent case:

> "I feel stringency over expression of dissent has to be more restrained... Democracy has to have dissent. Debate itself is a way of dissent... There has, however, been a debasement of debate. The question is, how do you express a different point of view? One method is, you hold seminars, deliver lectures, and write. I would construe very liberally anything to do with writing, or for that matter, art or culture."

Further, in the context of contempt of court, Faizan Mustafa, currently Vice Chancellor of NALSAR University of Law, Hyderabad,

9. National High Speed Rail Corporation Limited v. Montecarlo Limited & Anr. Civil Appeal No. 6466 of 2021; 31.1.2022.

an expert on constitutional law, criminal law, human rights and personal laws[10], wrote as follows:

> "As British judge Lord Denning observed in Metropolitan Police Commissioner (1969), contempt jurisdiction undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it."

"Like the US, Canada too punishes people for contempt only when there is imminent or clear danger to the administration of justice. In Kopyto (1987) it was said that courts are not "fragile flowers that will wither in a hot sea of controversy".

In Mundey (1972), Australia's Justice Hope said *"there is no more reason why acts of courts should not be trenchantly criticised than acts of public institutions"*.

> "Within the bounds of law, liberal democracies ensure that their citizens enjoy the right to express their views in every conceivable manner, including the right to protest and express dissent against prevailing laws" said Justice Dhananjaya V Chandrachud in his Justice PD Desai Memorial Lecture, delivered at the Gujarat High Court on February 15, 2020.

In the case of PN Dua v Shiv Shankar and others, the Supreme Court held that mere criticism of the Court does not amount to contempt of Court. The Court observed that in a free marketplace of ideas, criticisms about the judicial system or Judges should be welcomed, so long as such criticisms do not impair or hamper the administration of justice. This is how Courts should approach the powers vested in them as Judges to punish a person for an alleged contempt, be it by taking notice of the matter suo motu or at the behest of the litigant or a lawyer.

To sum up, I would say that the biggest beneficiary of the thoughts expressed in this book is the Supreme Court itself, i.e. it

10. https://bit.ly/3nSdJJh

will help improve the administration of justice rather than impair or hamper it.

I am glad that Mr. Amitabh Kant, former CEO of NITI Aayog, who is at the forefront of catalysing economic development in India and has also graciously contributed a Foreword for this book, also thinks alike. Mr. Kant acutely understands the importance of balancing and prioritising economic thinking in the judiciary. He has rightly termed the SC as an increasingly progressive institution, wherein the apex court has shown initiative to adopt technology-driven solutions to reduce stress on their caseload and other functioning challenges. This approach by the SC is changing *status-quo* and must be encouraged and revered.

Mr. Kant has also been vocal about establishing specialised commercial courts in India so that all commercial matters having economic significance can be decided swiftly and effectively, thus potentially benefiting the environment of Ease of Doing Business in India. To that end, there are still some challenges that need to be addressed by the judiciary, which I will discuss in the Epilogue chapter. Currently, Mr. Kant is the G20 Sherpa for India and continues to be active in the economic sphere in a progressive manner.

Finally, let me acknowledge that this book project would not have been possible without the vision of Professor C. Raj Kumar, the dynamic founding Vice Chancellor of the O. P. Jindal Global University and his colleague Ashish Bhardwaj, Dean, Jindal School of Banking & Finance for guidance and hand holding. The University has kindly supported the writing and publication of this book.

I must also thank my colleagues: Abhishek Kumar, my close adviser, and research staff: Amol Kulkarni, Kapil Gupta, Sakhi Shah, Pragya Singh, Shiksha Srivastava, and Ananya Saroha at CUTS for their valuable assistance in helping me write the book.

Jaipur, July, 2023 **Pradeep S. Mehta**

Abbreviations

AGR:	Adjusted Gross Revenue
APMA:	Agriculture Produce and Marketing Act
ASSOCHAM:	Associated Chambers of Commerce & Industry
ATC:	American Tower Corp
BEE:	Bureau of Energy Efficiency
BIPAs:	Bilateral Investment and Promotion Agreements
BITs:	Bilateral Investment Treaties
BTS:	Basic Telephone Services
C&IT:	Communications and Information Technology
CAGR:	Compound Annual Growth Rate
CBI:	Central Bureau of Investigation
CDMA:	Code Division Multiple Access
C-DoT:	Centre for Development of Telematics
CEA:	Central Electricity Authority
CEVs:	Construction Equipment Vehicles
CII:	Confederation of Indian Industry
CIL:	Coal India Limited
CMN Act:	Coal Mining (Nationalisation) Act, 1973
CMSPs:	Cellular Mobile Service Providers
CMTS:	Cellular Mobile Telephone Service
CNG:	Compressed Natural Gas

COAI:	Cellular Operators Association of India
CPCB:	Central Pollution Control Board
CWF:	Consumer Welfare Fund
DoT:	Department of Telecommunications
EBITDA:	Earnings Before Interest, Taxes, Depreciation, And Amortisation
EGoM:	Empowered Group of Ministers
EPCA:	Environment Pollution (Prevention and Control) Authority
FCFS:	First-Come-First-Served
FDI:	Foreign Direct Investment
FICCI:	Federation of Indian Chambers of Commerce & Industry
FSPs:	Fixed Service Providers
GDP:	Gross Domestic Product
GoI:	Government of India
GoM:	Group of Ministers
GoT:	Group on Telecommunications
GSM:	Global System for Mobiles
GST:	Goods and Services Tax
H&T:	Harvesting and Transportation
HC:	High Court
HSD:	High-Speed Diesel
I&M:	Inspection & Maintenance
IARI:	Indian Agricultural Research Institute
IBA:	Indian Banks Association
ICAI:	Institute of Chartered Accountants of India

ITU:	International Telecommunications Union
JVC:	Joint Venture Company
MMDR Act:	Mines and Minerals (Development and Regulation) Act
MMS:	Multimedia Messaging Service
MMT:	Million Metric Tonnes
MNRE:	Ministry of New and Renewable Energy
MoEF:	Ministry of Environment & Forests
MoPNG:	Ministry of Petroleum & Natural Gas
MoRTH:	Ministry of Road Transport and Highways
MoS:	Minister of State
MPFI:	Multi-Point Fuel Injection
MS:	Motor Spirit
MVA:	Motor Vehicles Act, 1988
NAFP:	National Auto Fuel Policy
NCDC:	National Coal Development Corporation
NFAP:	National Frequency Allocation Plan
NFHS:	National Family Health Survey
NOC:	No-objection Certificate
NRSC:	National Road Safety Council
NTP:	New Telecom Policy
OBD:	On-Board Diagnostics
ONGC:	Oil and Natural Gas Commission
PAC:	Public Accounts Committee
PCRA:	Petroleum Conservation and Research Association
PIL:	Public Interest Litigation
PMO:	Prime Minister's Office

PNGRB:	Petroleum and Natural Gas Regulatory Board
PPAs:	Power Purchase Agreements
PUC:	Pollution Under Control
R&D:	Research and Development
RBI:	Reserve Bank of India
RFS:	Radio Frequency Spectrum
RTOs:	Regional Transport Offices
SC:	Supreme Court of India
SCCL:	Singareni Collieries Company Ltd
SCo:	Screening Committee
SCOE:	Standing Committee on Implementation of Emission Legislation
SIAM:	Society of Indian Automobile Manufacturers
SSS:	Swabhimani Shetkari Sanghatana
TDSAT:	Telecom Disputes Settlement and Appellate Tribunal
TRAI:	Telecom Regulatory Authority of India
UAS:	Unified Access Service
UMPPs:	Ultra Mega Power Projects
UN:	United Nations
UT:	Union Territory
WHO:	World Health Organisation
WPC:	Wireless Planning and Coordination Wing

Introduction and Overview

Context

Most public institutions in India perform complex tasks at the intersection of public interest, political pressures, and social expectations. The Supreme Court of India (SC) is one such institution that not only continuously negotiates such undercurrents but is also responsible for demonstrating an ideal conduct for all institutions to follow, including itself.

In the world of judiciary, this amounts to balancing constitutional, legal, economic, political, social, and environmental expectations. To put it succinctly, the SC is expected to balance the interests of society as well as the economy. Note that society refers to 'people' and the interactions among them whereas the 'economy' refers to business transactions among people and the production and consumption decisions underlying these. Since society functions under various laws, both statutory and customary, the balance between law and economics is critical. Has the SC been able to discharge these functions optimally? If not, then what are the obstacles and what needs to be done to overcome the challenges?

To answer these questions, an examination of the role of the SC on two attributes is necessary – first, SC as a public institution and second, SC as an arbiter of justice. In the words of Madhav Khosla and Ananth Padmanabhan, who have written an extensive commentary on SC in their book '*Rethinking the Role of Public Institutions*'[11] in India, there has been extremely limited scholarship on the SC as a

11. Khosla, M., & Padmanabhan, A., (2018), '*Rethinking Public Institutions in India*', Oxford University Press.

public institution. Since this book concerns itself with both, it will be worthwhile to summarise their insights.

In their view, the identity of the SC began to change from the late 1970s. Before that, the influence of the court on other branches of the government was far from strong as it defined its own role narrowly. But the late 1970s marked the beginning of a period of progressive weakening of the legislature and the executive which resulted in the SC assuming a much larger role in regard to socio-economic matters and governance.

This meant that subjects for judicial intervention also increased. On the other hand, the pronouncement of the basic structure doctrine, which empowers the Supreme Court to declare any law that it finds unconstitutional invalid, naturally entailed limitations on parliament, while the emergence of the 'due process doctrine', which calls for fair treatment of individuals with respect for their life, liberty and property, and expanded interpretation of 'Right to Life' under Article 21 of the Indian Constitution in the *Maneka Gandhi Case,*[12] in which the impounding of Maneka Gandhi's passport was declared by the Court to be a violation of her liberty to travel abroad, further increasing the judicial remit.

Further, with mainstreaming of Public Interest Litigation (PIL) which broadened the locus standi definition, the court made itself readily available for grievance redressal. While expansive interpretation of constitutional guarantees altered the character of disputes, PIL changed the character of litigation and adjudication.

Thanks to late Justice P.N. Bhagwati, PILs were initially introduced in India to give voice to marginalised citizens. Justice Bhagwati's judgment in the Judges' Transfer Case[13] came to be described as a kind of manifesto for PILs. Elaborating the rationale for PIL, he said PIL is needed and needs to be promoted so that *"the large masses of people belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socio-economic rights granted to them and*

12. *Maneka Gandhi v. Union of India*, 1978 1 SCC 248.

13. *S.P. Gupta v. President of India & Ors.,* AIR 1982 SC 149.

so these rights may become meaningful for them instead of remaining mere empty hopes."[14]

By the 1990s, PILs had transformed the legal landscape with high-profile cases. Observers of the profession have expressed that so widespread is its reach that PIL has become a sort of metonym for the greatness of the Indian judiciary.[15]

In yet another book titled '*Courting the People*',[16] author Anuj Bhuwania's discussion divides the history of PIL into three phases:

Phase 1, as discussed above, focused on directions and orders passed by the SC primarily to protect fundamental rights, under Article 21 of the Indian Constitution, of the marginalised groups and sections of the society who because of extreme poverty, illiteracy and ignorance could not approach the SC or the High Courts. Phase 2, mainly focused on environmental and historical issues like protection and preservation of ecology, forests, marine life, wildlife, mountains, rivers, and monuments, amongst others. Phase 3, dealt with the directions issued by the courts in regard to maintaining high standards.

This change in priorities in PIL cases has not gone without criticism. The biggest criticism is that the SC has succumbed to populist ideas in dislodging the people with low incomes from the position of PIL's foremost constituency and shifting emphasis to environmentalism and governance.

Whatever may have been the case, Khosla and Padmanabhan in their commentary suggest that while the court extended itself in newer domains, it fell short of capacity and competency to address them effectively.[17]

Limiting this capacity further is Article 136 of the Constitution which vests the Supreme Court with the power to entertain appeals

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14. *S.P. Gupta v. President of India & Ors.*, AIR 1982 SC 149, para 13.

15. Bhuwania, A., (2016), '*Courting the People: Public Interest Litigation in Post-Emergency India (South Asia in the Social Sciences)*', Cambridge University Press.

16. *Ibid.*.

17. Khosla, M., & Padmanabhan, A., (2018), '*Rethinking Public Institutions in India*', Oxford University Press.

against judgment in any Court/tribunal. Though this provision was intended for minimal use, appeal matters seem to have far overtaken regular hearings and led to a backlog of cases. This has necessitated creation of smaller benches so that more cases can be heard and limiting focus to admission hearings and the 'fixing of immediate issues'.

Khosla and Padmanabhan suggest that this results in 'polyvocality' rather than a cohesive structure to the judge made law – something that is evident from the fact that today lawyers are more likely to make a reference to a particular bench rather than SC as a whole.

Another pertinent problem revolves around the inability of the apex Court to look beyond its four walls and seek help from experts, whenever necessitated. It is a well-known fact that in almost all Committees constituted by the SC, the members are almost always sitting or retired judges of the highest judiciary in India. This creates a huge vacuum, as the scope for an external audit, or a different perspective, needs to be improved.

While this book was being written, the issue of stubble burning in Punjab, Haryana and Western Uttar Pradesh cropped up again, thus adding to the pollution levels in Delhi. To curb the same, a Bench headed by the CJI S A Bobde, appointed retired Justice Madan Lokur on October 16, 2020 as the head of a one man panel to investigate this matter. This becomes problematic as constituting a separate panel in this regard, clearly undermines statutory authorities such as the Environment Pollution Control Authority (EPCA), and other agencies. Then there is also the National Green Tribunal exclusively for environmental issues and headed by a retired Supreme Court judge. Nevertheless, the EPCA garnered strong protests against the appointment of a retired judge for another committee and have stated that they might file an application to seek modification of this order.[18] Fortunately, the Government announced the passing

18. Dhananjay Mahapatra, 'SC appoints Justice Lokur to monitor steps to curb stubble burning', The Times of India, 17 October 2020, https://timesofindia.indiatimes.com/india/sc-appoints-justice-lokur-to-monitor-steps-to-curb-stubble-burning/articleshow/78713471.cms.

of an Ordinance[19] to deal with the urgency of curbing pollution due to stubble burning and the court cancelled its order for establishing Justice Lokur's panel.

In recent times, the Supreme Court has been following the practice of appointing and consulting expert committees to decide on cases which will have an economic impact. Certain committees have also been formed to ensure proper implementation of its orders. A committee was formed by the SC to ensure compliance of its order on supply of clean water to people living in colonies adjacent to the abandoned Union Carbide plant (of the Bhopal Gas Tragedy case) as the groundwater has been contaminated due to dumping of toxic waste.[20] The Justice Radhakrishnan committee was constituted by the SC to conduct an enquiry and identify who is "responsible" for clearing the Maradu high-rise residential apartments.[21]

The report of the committee concluded that it was Kerala government, its officials, the *gram-panchayat*, and municipality, who need to be held responsible along with the builders for the illegal construction of the building in an ecologically sensitive zone. But, not all of these 'technical committees' formed to probe facts of cases have fulfilled their purpose. The Justice Raveendran committee formed to investigate the government's role in acquiring the spy software Pegasus, submitted a report which reportedly had no mention of the government's role.[22] The Supreme Court recently highlighted the need for a committee to look into the issue of freebies to citizens by political parties.[23]

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19. https://economictimes.indiatimes.com/news/politics-and-nation/centre-introduces-new-law-through-ordinance-to-tackle-air-pollution-in-delhi-ncr/articleshow/78930582.cms.
20. https://timesofindia.indiatimes.com/city/bhopal/sc-committee-checks-water-quality-in-gas-hit-colonies/articleshow/93014641.cms
21. https://www.thehindu.com/news/national/supreme-court-panel-blames-kerala-government-its-officials-civic-bodies-for-illegal-constructions-in-maradu/article65655411.ece
22. https://thewire.in/rights/ten-men-hold-modis-pegasus-secrets-the-supreme-court-must-compel-them-to-come-clean
23. https://indianexpress.com/article/india/politics-of-freebies-all-stakeholders-involved-in-brainstorming-sc-8068145/

Be that as it may, the practice of appointing dedicated panels in public interest matters has been regularly followed by the SC. They do not think that such appointments undermine the authority and expertise of existing regulators or dedicated agencies. To be fair to the apex court, I must add that in few cases it has ordered existing agencies to do the job and report to them directly.

However, the lack of expert knowledge on the relevant subject matter acts as a barrier for retired SC judges to be able to give recommendations that can be implemented on the ground. Issuing sharp speaking orders from the judicial pulpit is one thing, but getting them implemented and creating practicable recommendations for the ground where livelihoods are at stake, is completely different. This book takes up six cases, where the reader will find different stances on economic principles by different benches of the SC, reinforcing the points made above. Most of these cases had far-reaching consequences on the economy. The SC's role therefore was crucial but the judgments that came out of the court in five out of six cases had further precipitated economic crises. The sixth case refers to a judgment by the apex Court which recognises the interstice between 'law and economics' proactively and looks at the big picture, thus laying out a direction for the future.

However, to be fair to the court, it cannot be said that the SC is singularly responsible for the economic woes that we see as a result of these cases. When some of these cases reached the SC, they had already acquired a life of their own mired in complexities, confusion, and costs. All this has happened due to the greed of the executive aided by the ineptitude and greed of the bureaucracy, and lethargy or apathy of legislature to rein in such misdeeds. Of course, there are exceptions to this phenomenon. I do not wish to be accused of painting everyone with one brush.

Given this, the limited point I have attempted to make in this book is that the SC enjoys constitutionally guaranteed independence as an institution and is expected to be a temple of morality and righteousness where justice is served. Therefore, it is also bound by the duty of ensuring maximum good for the society and economy,

and in doing so it needs to balance complex areas including the interface between 'law and economics'. After all the judiciary is funded by public money so the public has a right to know how their money is being spent.

The cases discussed in this book help drive home this point better. They have been written keeping in mind the lay reader and each discusses the economic impact of a SC judgment. An attempt has also been made to highlight an alternative way for resolving and viewing each case which could have been followed by the SC but the related discussion has been kept brief for the obvious reason that the reader has limited time at his/her disposal. The intention is to initiate a discussion on how the Indian judiciary can undertake more holistic and evidence-based decision making. The analysis in this book is purely an academic exercise which does not intend to interfere with the decision-making process of the judiciary. It is merely an attempt to assess the economic impact of select decisions of the judiciary.

Wherever possible, additional thoughts and wisdom acquired through experience have been added, along with the historical context, in each chapter, to further enrich the view of the concerned reader of relevant issues connected to the mentioned judgments. The issues under each case are also clubbed and highlighted through a discussion in the last chapter which delineates a way forward.

To summarise, the objective of this book is not merely to summarise the six cases it deals with, but also discuss existing political and economic realities that went into the decision making (or the lack of it). I have also considered these practical realities while making suggestions and have ensured that they are implementable.

Increasing Importance of Marrying 'Law and Economics'

"The most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be

amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully," said Judge Richard A. Posner.[24]

The economic analysis of law concerns itself with the application of macroeconomic theory to the analysis of legal rules and institutions.[25] As an analytical framework, law and economics has had a significant influence over scholarly writing for a long time now. It was in 1947 that Judge Learned Hand formulated a new approach to judicial decision making by using an algebraic cost-benefit test for determining negligence.[26] However, it was only in the early 1960s that economic analysis began to be applied rigorously to broad non-economic legal problems.[27]

The seminal works of Judge Guido Calabresi[28] and Nobel Laureate Ronald Coase[29] are often cited as the relevant turning point where law and economics reached the status of an accepted paradigm through which to analyse non-economic legal problems. Coase in his theory connected (legal) rights to its larger economic and social implications. According to him, determination of rights is not enough, and consideration of wider impact is necessary.[30]

He also provided the basis for economic analysis of legal transactions. Additionally, Judge Calabresi took the notion further and provided that in case of an accident when the cost determination

24. Judge Richard A. Posner in Michael Faure & Roger Van Den Bergh, Eds., 'Essays in Law and Economics', 1989.

25. Lewis Kornhauser, 'The Economic Analysis of Law', Stanford Encyclopedia of Philosophy, 17 July 2017, https://plato.stanford.edu/entries/legal-econanalysis/.

26. Larry L. Chubb, 'Economic Analysis in the Courts: Limits and Constraints', Indiana Law Journal, Vol. 64, Issue 3, Article 16, 1989.

27. Keith Kendall, 'The Use of Economic Analysis in Court Judgments: A Comparison between the United States, Australia and New Zealand', UCLA Pacific Basin Law Journal, 2011.

28. Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts', 70 Yale L.J. 499 (1961).

29. Ronald H. Coase, 'The Problem of Social Cost', 3 J.L. & Econ. 1 (1960).

30. Pierre Schlag, Coase Minus the Coase Theorem— Some Problems with Chicago Transaction Cost Analysis, Iowa Law Review,2013, Volume 99:175.

is in question, it is imperative that the wider economic considerations are identified for larger public good.

Although 'law and economics' have often been promoted as a tool to be used by policy makers, several scholars have argued that judges either are or should be guided by economic principles when deciding cases. For instance, Judge Richard Posner argued that judges should consider wealth maximisation as a guiding value in deciding common law cases.[31]

To the extent that economic analysis helps identify which rules maximise wealth, such analysis would be an important tool for judges. Mind you, the economic thinking in USA has been guided by the Chicago School which believed in neo liberalism. In India, wealth maximisation for a select few would not be desirable, but might be desirable for the community or society. However, here, one must keep in mind the equity-efficiency trade-off according to which any attempt at wealth maximisation might be at the expense of equity: the rich might be much better at using existing wealth to create additional wealth. Note that this trade-off might be considered to be a short run reality. In the long run, societal wealth might be maximised by redistributing from the rich to the poor in the short run as such redistribution might enhance the base for human capital formation and infrastructure creation, an important basis for wealth creation.

Posner has also talked about how competition (antitrust) law derives itself from economics. Competition law is essentially concerned with the regulation of markets, the objective being to ensure competition between rival suppliers in any market so that consumers are benefited. Thus, applying competition law involves the identification of markets, assessment of how well competition is working in these markets, and identification of competition contraventions. These are all essentially economic issues.

This economic reasoning that gave birth to the 'rule of reason' analysis under competition law. It was recognised that merely counting the number of firms or their market shares only provides

31. Richar Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Studies 103 (1979).

a rough indication as to whether the market is competitive. Additionally, several industries have specificities, and cannot be subjected to the same analysis when identifying whether there have been competition law contraventions. Thus, came into effect the case-by-case or rule of reason approach to competition, away from the rigid 'per se' rules. The rule of reason is said to have a natural affinity with economic analysis because the rule requires consideration of economically relevant factors, whereas the per se rule is not based on rich analysis,

Jean Tirole, in his Noble Prize Lecture, "Market Failures and Public Policy"[32] rightly pointed out that if regulators do not understand the way various markets function, a competition analysis cannot be conducted. Considering the many different kinds of markets that are surfacing, including two-sided and multi-sided markets, it is imperative for regulators and judges to understand how these markets function, how to ensure that allocation of resources is not distorted by monopolies, and how to ascertain whether an enterprise is dominant in the market or not. A competition analysis will always include an assessment of important economic factors such as: the market elasticity of demand, the market share of the firm(s), the elasticity of supply of other firms, and the market demand and supply elasticities.

Another major competition concern which stems from economic principles, is that of cartels – a group of competing sellers who collude to fix the price etc. This distorts the market equilibrium, where the costs to the consumers outweigh the gain to the cartel members. Every aspect of a competition assessment finds its root in economics; competition assessment is very closely linked to the concept of 'consumer welfare' which is not only enhanced by lower prices but also depends on non-price factors such as quality and consumer choice. For example, the growing digital economies which offer free goods/services to consumers lower the average price level faced by consumers and enhance consumer welfare.

32. Jean Tirole, 'Market Failures and Public Policy', Prize Lecture, 8 December 2014, https://www.nobelprize.org/uploads/2018/06/tirole-lecture.pdf.

The USA is the most advanced in this regard. It was in the 1940s that the strong connection between economics and competition doctrine was established.[33] Some of the earlier competition decisions in the USA bear witness to this. For instance, Judge Learned Hand's opinion in the Alcoa Case[34] is well known for its extensive discussion of market definition and its relation to market power: the judge deemed Alcoa's expansion into a monopoly illegal as it had intentionally taken steps to expand its capacity, increase its efficiency and gain control over the entire available supply of elite personnel. Another such monopolisation opinion was passed in the *United Shoe Case*[35] which is particularly known for its heavy use of economic analysis. In order to induce more competition in the market the court ruled that *United Shoe* be sub-divided into several companies. The Supreme Court's decision in the *Cellophane Case* is also considered to be one of the most extensive and prominent discussions of market definition in that period, where economics concepts such as the cross-elasticity of demand, were heavily relied on. The Court ruled that DuPont's taking over the entire supply of cellophane could not be considered to be 'monopolisation' as it accounted for only about 20 percent of the entire demand for wrapping material, of which cellophane was only a type.

Judge Calabresi has also argued that efficiency, an economic concept, is a component of justice and therefore, judges should concern themselves with efficiency as they decide cases.[36] Similarly, Edward Yorio has also argued that judges deciding tax cases should adopt efficiency rules whenever possible.[37]

Over the past few decades, several of the most vocal advocates of the law-and-economics approach have ascended to the bench,

33. Louis Kaplow, 'Antitrust, Law & Economics, And The Courts', Law and Contemporary Problems, Vol. 50, No. 4.

34. *United States v. Aluminium Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

35. *Untied States v. United Shoe Mach. Corp.*, 110 F. Supp 295.

36. Guido Calabresi, About Law and Economics: A letter to Ronald Dworkin, 8 Hofstra Law Review 553 (1980).

37. Peter Yorio, Federal Income Tax Rulemaking, An Economic Perspective, 51 Fordham L. Rev. 1, 48-9 (1982).

including Richard Posner, Frank Easterbrook, and Guido Calabresi. Not surprisingly, they have to a lesser extent or greater degree used economic analysis to help them decide the issues they confronted as jurists.

There are certain jurisdictions where there has been great uptake and acceptance of law-and-economics as an approach, even in judicial decision making. To understand why different jurisdictions have had a differing attitudes towards this approach, we shall look into the works of Richard Posner in detail.

It was the first edition of Posner's book, '*Economic Analysis of Law*', in 1972 that made the use of economics in judicial decision making a much talked about issue.[38] In his book, Judge Posner advocated using economic theory in all aspects of the law, including the interpretation and creation of law by judges.[39] The resulting law and economics debate has actually focused on the viability of economic theory as a tool for judicial use in deciding actual cases. In that regard, Posner advocates the use of economic analysis in judicial decision making as a 'new style' of opinion writing.[40] He also believed that law is interdisciplinary and thus should include economists, statisticians, and other social scientists in law reform.[41]

Many judicial systems, including in India, which still do not assign importance to economic analysis as deserved, can be understood through 'the model of expectations', designed by Posner.[42] He described how the inherent nature of judicial systems helps determine their inclination towards (or against) recognising the

38. Larry L. Chubb, 'Economic Analysis in the Courts: Limits and Constraints', Indiana Law Journal, Vol. 64, Issue 3, Article 16, 1989.

39. Samuels & Mercuro, 'Posnerian Law and Economics on the Bench', 4 Int'l Rev. L. & Econ., 107 (1984).

40. Richard Posner, 'The Decline of Law as an Autonomous Discipline', 1962-1987, Harv. L. Rev. (1987).

41. *Ibid*..

42. Posner compared the practical functioning of the United States and continental European legal systems; Richard A. Posner, 'The Future of Law and Economics: Movement in Europe', 17 Int'l Rev. L. & Econ., 3 (1997).

linkages between law and economics.[43] He touches on the root of the role and functionality of the judiciary in different jurisdictions.

In the USA, for instance, judges are drawn from the ranks of a legal profession, thus representing a lateral career move for any member of the bar. Despite having rich legacy of economic analysis, courts in USA have disappointed recently by turning a blind eye to economic impacts of their far-reaching decisions. Recently, the Supreme Court of USA came under fire for the controversial decision to overturn the landmark 1973 *Roe v. Wade* ruling, ending the right to an abortion in the USA. Economists have warned that this judgment will have immediate consequences of a severe and adverse nature, especially in the form of economic losses to women and to the economies they contribute to.[44]

The civil law tradition of European jurisdictions, has a career judiciary, where the judges are required to choose judiciary as a career path. India follows a hybrid system i.e. every state has a judicial service which allows a judge to rise to the position of the District and Sessions Judge until s/he retires or is appointed as a judge in the high court. High courts are required to take on about two thirds of its judges from the bar based upon a selection process which is quite subjective. One third of the high court vacancies are filled up from a cadre of district judges. Unfortunately, career judges do not easily get to the high court because they become eligible about the time they are about to retire; thus more lawyers get appointed as judges in the high courts. The same judges are then promoted as judges in the Supreme Court depending upon their track record etc through a collegial process.

That said, Posner has also described that the functioning of the American judiciary resembles that of the legislature, whereby they are required to consider the policy implications of their decisions,

43. Keith Kendall, 'The Use of Economic Analysis in Court Judgments: A Comparison between the United States, Australia and New Zealand', UCLA Pacific Basin Law Journal, 2011.

44. https://www.wsiltv.com/news/overturning-roe-v-wade-will-cause-immediate-economic-pain-experts-say/article_a53fc414-1544-52cf-948b-a32f0ecedb5d.html

similar to how members of Congress consider the policy implications of proposed legislation.

Evidence suggests that the 'law and economics' movement in the USA has historically been quite strong: since judges are expected to contemplate the effect of their decisions on the behaviour of the affected parties, economic analysis is called for as economic factors strongly influence behaviour.

Posner also talks about the bureaucratic judicial systems such as that of Europe and India. Based on that view, Indian courts are expected to decide cases on the basis of settled legal principles, without any great emphasis on policy considerations. Therefore, economic analysis does not feature in Indian jurisprudence, neither is it expected to. Similarly, Posner talks about the Australian legal system and states that economic analysis is unlikely to be found in their judicial decision making as well.

Arguably, two important, and contrasting, papers published in Australia which deal with the use of economic analysis in judicial decision making. The first is, *"Law and Economics"* by Sir Anthony Mason, which represents a particularly ardent position against the use of economic analysis in court decisions.[45] The second paper, *"Law and Economics in the Courts: Is There Hope?"* by Justice Michael Kirby, which is a collection of essays, strongly advocates the use of economic considerations in resolving cases before the courts.[46]

Sir Anthony believes that advocates of law and economics argue that economic theory should be the sole determinant of the outcomes of cases before the courts, which is where his concerns stem from,[47]

> "If counsel present an argument based on economic analysis which suggests that judgment for the defendant would lead to wealth maximisation for society, how does a court take account of this if previous authorities or considerations of justice or morality point in the other direction? As I have already said, there is the possibility

45. Sir Anthony Mason, 'Law and Economics', 17 Monash U.L.Rev. 167 (1991).

46. Michael Kirby, 'Law and Economics in the Courts: Is There Hope?", in The Second Wave of Law and Economics 114 (Megan Richardson and Gillian Hadfield, Eds, 1999).

47. Sir Anthony Mason, 'Law and Economics', 17 Monash U.L.Rev. 167 (1991), pg. 181.

that courts would set at risk their own standing were they to decide such cases on the basis of the economic approach."

This view by Sir Anthony has been rebutted by many, claiming that it shows his inherent lack of understanding of the arguments of the proponents of 'law and economics'. In that regard, Judge Posner's reasoning has been clarified - where there is applicable precedent that should be the first determinant of the judge's reasoning; only when there is no binding or even persuasive authority on a legal question, that economic analysis should be used by judges in decision making.

To further the use of law and economics in judicial reasoning, Justice Michael Kirby has been the greatest advocate in Australia. Even though he accepts the basic tenet of Sir Anthony's argument that cases must be decided first upon legal methodology by using precedents, Justice Kirby argues that, *"economic analysis serves the important purpose of explicitly highlighting the implications of the various alternatives before the court."*[48] Such an alternative assessment allows the judge to be fully apprised of the consequences of their decisions.

The inherent difference in the nature and jurisprudential background of these judicial systems and the proponents for and against the law and economics approach puts forward an explanation as to why law and economics have not grown to the same extent in countries as in Europe, the UK, Australia, and even India, as compared to the USA.

Other scholars have also contended that economic analysis of law succeeded increasingly in certain jurisdictions such as the USA is because economics found a vacant niche in the "intellectual ecology" of law and rapidly filled it.[49] To explain this niche, consider this classical definition of law: "A law is an obligation backed by state sanction".

To this question, lawmakers often ask how such sanctions will affect behaviour. For instance, if punitive damages are imposed upon

48. Michael Kirby, 'Law and Economics in the Courts: Is There Hope?", in The Second Wave of Law and Economics 114 (Megan Richardson and Gillian Hadfield, Eds, 1999).

49. 'An Introduction to Law and Economics', Berkeley Law, https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4554.

the maker of a defective product, what will happen to the safety and price of the product in the future? Or will the amount of crime decrease if third-time offenders are automatically imprisoned? Such questions have been answered by judges and lawmakers by using intuition, the existing laws, and relevant and available facts.

On the other hand, to economists, sanctions look like prices, and presumably, people respond to these sanctions much the same way as they respond to prices. That is, people respond to higher prices by consuming less of the expensive goods. Similarly (presumably), people also respond to more severe legal sanctions by doing less of the sanctioned activity. In that regard, economics has mathematically precise theories such as price theory and game theory, and empirically sound methods (statistics and econometrics) for analysing the effects of the implicit prices that laws attach to behaviour.[50]

However, numerous scholars have also questioned the goals and usefulness of law and economics. Some have questioned its underlying assumption that people behave rationally. Here it must be pointed out that 'rationality' has a broad interpretation: people are rational because they choose to do what they prefer most; the use of 'rationality' as a concept is based on defining costs and benefits of alternative actions and then advocating the action which maximises the difference between costs and benefits. At the same time, scholars have also opined that expecting judges to undertake economic analysis, by its very nature, gives the judiciary unwarranted discretion to go beyond what is legislatively and constitutionally required from them, thus opening the gates to judicial overreach and activism.

Economic analysis is based on certain assumptions that people make decisions in a quantifiable way. This technical and mechanical extension of economic theory into the law, to the exclusion of other traditional methods that has created the law and economics debate. However useful economic analysis cannot be ignored that there are inherent limitations to its usage.

50. 'An Introduction to Law and Economics', Berkeley Law, https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4554.

It is useful in cases where the subject matter and precedent are inherently economic. In the areas of common law and constitutional law where the law is predominantly judge-made, and no controlling precedent exists, economic analysis may offer an alternative method of decision making for the judges, given their inclination (or not) to use it. Alternatively, in the areas of law governed by statutes and regulations, or where there is a controlling precedent, the use of economic analysis becomes tenuous. The use of such extensive, quantitative economic analysis is further limited by a possible lack of acceptance within the courts, and by its inherent complexity.

1

Banning Liquor Sale on Highways to Curb Accidents

Justice or Disruption?

Summary

Alcohol or liquor consumption is a very touchy subject in India, though it has been part of its history since aeons. One important reason is that of irresponsible drinking leading to higher incidence of domestic violence and another is its relationship with careless driving which results in mayhem. India already has the worst road accident record. As per the latest report of the government road accidents in India kill almost 1.5 lakh people annually.[51]

Accordingly, India accounts for almost 11 percent of the accident-related deaths in the World. As per the report, in the year 2019, over 1.5 lakh (1,51,113) people died and 4.5 lakh (4,51,361) were injured due to road accidents. The overall loss to the national economy by way of road accidents is estimated at three percent. The Ministry of Road Transport and Highways (MoRTH) claims that nearly 80 percent of accidents are due to drivers' fault, of which drunken driving is one factor. Regulating drunken driving has been in the news for a long time and surely if curbed it can lead to a lesser number of accidents, morbidities and fatalities.

On December 15, 2016, the Supreme Court of India, in the case of *State of Tamil Nadu Vs. K. Balu and Anr.*, passed a judgment prohibiting the sale of alcohol up to 500 metres from the outer edge of National and State Highways across India to rein in accidents due to drunken driving. In the subsequent order on March 31, 2017, the

51. https://morth.nic.in/sites/default/files/RA_Uploading.pdf

distance for the outlets which fall within jurisdictions of local bodies with a population of less than 20,000 was reduced by the SC to 220 meters from the outer edge of highways.

Further, on July 11, 2017, the SC exempted highways under the municipal jurisdiction from the purview of the above judgment. Since the alcohol market in India, growing at a compound annual growth rate (CAGR) of 8.8 percent and expected to reach 1680 crore litres of consumption by the year 2023, is one of the fastest-growing alcohol markets in the world,[52] any discontinuance in business is likely to cause significant disruptions.

This chapter draws heavily from the primary study undertaken by CUTS (Consumer Unity & Trust Society) International in a commissioned research project done for NITI Aayog.[53] It looks at the economic impact of the above judgment and the effect of the same on drunken driving in select locations. These are on select highways in four states namely Uttar Pradesh (Meerut and Ghaziabad), Delhi, Haryana (Rewari and Gurugram) and Rajasthan (Jaipur and Alwar).

With regards to the economic impact, there are mainly two components that were analysed in each state. These are - 'Impact of the judgment on State Revenue' and 'Impact of the judgment on retail outlets' which include vends, clubs, bars, restaurants and hotels, amongst others. The national economic impact of the judgment was calculated for the retail outlets in the select locations through which the highway stretches pass.

The State Revenue analysis further focussed on two aspects, namely Excise Duty and License Fee as these are the main revenue components for respective excise departments in the four states. The study measures the impact of the aforementioned judgment from April-September 2017. The above period was chosen because the aforementioned judgment of December 15, 2016, allowed the existing licenses to continue up to March 31, 2017 and later revised the same to September 30, 2017.

52. Pre COVID-19 estimates

53. http://cuts-ccier.org/pdf/report-research-study-on-economic-impact-analysis-of-supreme-court-judgement-prohibiting-sale-of-alcohol-on-highways.pdf.

Further, hotels and restaurants were brought under the purview of the judgment on March 31, 2017. The impact of the SC's order dated July 11, 2017, which exempted highways falling within the geography of local bodies with a population of 20,000 or less, is also considered.

The study revealed significant adverse economic impact at the retail outlet level. At the same time, the state revenue did not see any significant negative impact except in Delhi. In Delhi, considerable excise duty was forgone with respect to 97 retail outlets.

Importantly, revisions in components like Excise Duty and Licence Fees helped to keep the state revenue afloat. Even in a state like Maharashtra, revenue from excise for 2017-18 saw an increase despite a fall in the consumption of alcohol.

Further, ambiguities in the judgment such as the lack of clarity on how to measure the distance of 500 metres or 220 metres (as the case may be), have raised questions on the enforceability of the judgment. This is because the judgment did not clarify whether the distance of 500 metres or 220 metres was motorable or aerial. The evidence suggests no significant reduction in drunken driving cases after the judgment.

These facts raise a serious question about the effective implementation of the judgment. Therefore, it is recommended that when an issue concerns a substantive social as well as economic dimension, the courts in India will do well to assess the impact and enforceability before passing any ruling or making any recommendations.

In this case, there was a SC appointed Standing Committee on Road Safety headed by former SC Justice S. Radhakrishnan along with two road transport experts, which had also recommended action on drunken driving. However, the court did not make a mention about the Committee or its recommendation in its judgment upon which the bench prescribed the ban on the sale of liquor on highways, or even bother to consult it on enforceability. This is not the only case of inconsistency but there are many more, thus adding strength to our case that the apex court needs to work systematically or cohesively.

Background

This is a very interesting case that touches a very complex set of issues. Historically, the production and consumption of liquor have been a part of India's rich civilisation. However, it has stirred debate even in the past. For example, Chanakya in his Arthneeti (300 BCE) prescribed prohibition but its enforcement was always difficult then and now.

Be that as it may, the alcohol economy, like many other sectors, is a subset of a larger economy and generates many jobs and other economic opportunities. It contributes significantly to state revenues and therefore to welfare expenditure by the State Governments. It is therefore unclear whether it is good or bad for society: alcohol consumption is not only addictive but compromises public safety through drunk driving; on the other hand, it generates revenue which contributes to welfare activities and generates jobs and incomes. The judicial approach towards the alcohol economy requires a much deeper understanding of economic interlinkages, vested interests, and limitations on enforceability.

Further, as a backdrop to the matter, there are many views among our citizens in regard to the consumption of liquor. The opinion is divided, thus enhancing the chances of authority taking biased action. The context springs from our Constitution which under Directive Principles calls upon the state to prohibit the sale and consumption of alcohol in the country. It reads as follows:

> *"Article 47.* Duty of the State to raise the level of nutrition and the standard of living and to improve public health:
>
> The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health."[54]

54. http://legislative.gov.in/sites/default/files/COI.pdf.

National prohibition was advocated by Mahatma Gandhi, as well as by many Indian women.[55] Prohibition, in the states of India that have implemented the policy, has led to lower rates of drinking among men, as well as a decreased incidence of violence against women.[56]

Few of our states such as Gujarat, Bihar, Nagaland, Mizoram, and the Union Territory (UT) of Lakshadweep have imposed prohibition in their territories at a considerable loss of revenue. Alas, liquor is available in the black market in all these states at a premium which the consumer pays for. In both Gujarat and Nagaland, I have attended parties where alcohol was flowing freely. One of these parties was in Kohima, capital of Nagaland on the occasion of a meeting of the country's road transport ministers regarding amendments to the Motor Vehicles Act and road safety!

There have been other instances of prohibition in the past, such as that in various states during the rule of the Janata Party in 1977-79 with its declared policy of implementing Article 47 in letter and spirit. Nearly all such states have since done an about-turn to allow the sale and consumption of liquor. One of these states was Bihar which brought in prohibition at a later juncture to appease women voters.

One of the downsides of prohibition is liquor being smuggled from bordering states and/or the selling of illegal hooch, a criminal activity which costs the economy and society substantially. In this case the State loses revenue though the enforcement authorities earn money in the form of bribes. Illegal liquor, which is often adulterated, results in deaths among the poor.

Alcohol Economy

According to the National Family Health Survey (NFHS-5) 2019-21, one percent of Indian women and 19 percent of Indian men of

55. https://newint.org/blog/2017/11/13/Indian-women-prohibition.

56. Luca, Dara Lee; Owens, Emily; Sharma, Gunjan (May 2015). "Can Alcohol Prohibition Reduce Violence Against Women?". American Economic Review. 105 (5): 625–629.

age 15 and over currently drink alcohol.[57] The corresponding state wise figures for women are highest in Arunachal Pradesh (24 percent) and Sikkim (16 percent). For men, the highest figures are observed in Arunachal Pradesh (53 percent) and Telangana (43 percent), and the lowest in Lakshadweep (0.4 percent). India's annual alcohol consumption per person reached 5.7 litres in 2016, a rise of about 140 percent since 2005. The increasing urban population and a middle class with rising spending power are some of the reasons behind this growth in the market, making it one of the biggest in the world.[58]

As per the pre-COVID-19 estimates, India is one of the fastest-growing alcohol markets in the world and was growing at a CAGR of 8.8 percent which was expected to reflect in 1680 crore litres of consumption by the year 2022.[59]

What it Means for State Revenues

For nearly all State Governments, liquor is a significant source of revenue. This is because Excise Duty on alcohol is a State subject under Schedule VII of the Constitution of India. As per a report published by the Reserve Bank of India (RBI) called 'State Finances: A Study of Budgets of 2019-20', state excise duty on alcohol accounts for around 10-15 percent of tax revenue for most of the states.[60]

Usually, this forms the second or third most significant source of the State's tax revenues. In light of the fact that with GST, the tax room available to States has been reduced substantially, this is very significant.[61]

In absolute terms, State Governments in India earned collective revenue of US$19.8bn from alcohol sales in 2018-19 making India's

57. https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf

58. https://www.statista.com/topics/5041/alcohol-market-in-india/#dossierSummary__chapter2.

59. https://www.researchandmarkets.com/research/3l5kdm/indian_alcohol.

60. https://indianexpress.com/article/explained/explained-why-states-are-so-keen-about-excise-duty-on-liquor-6393643/.

61. https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/STATEFINANCE201920E15C4A9A916D4F4B8BF01608933FF0BB.PDF

dependence on alcohol revenues much greater than developed economies like the USA and the UK that garnered US$10bn and US$13.05bn respectively from alcohol excise duties.[62]

It is no surprise therefore that during COVID-19, states relied heavily on alcohol sales[63] to repair the economic damage caused by the pandemic. This has been a challenging move which involved raising the rate of excise duty steeply (50-70 percent on retail sale prices) to rake in more money to make up for the loss of revenue elsewhere.

The Alcohol Economy: A Mixed Blessing

On the one hand, the alcohol economy is critical to state finances and private businesses, on the other hand, a study suggests that a loss of 543 million life-years due to alcohol-led afflictions would add up to an economic loss of US$72bn between 2011–2050. When healthcare costs and other losses to the economy such as health system financing, out-of-pocket expenses, and productivity losses are included, the total losses can go up to US$2.77tn. This means that economically, every year, India loses about 1.45 percent of its GDP due to alcohol consumption.[64]

Further, the Global Burden of Disease Results Tool states that in 2017, alcohol consumption was responsible for more than 580,000 deaths in India. The three leading causes of alcohol-attributable deaths have been identified as violence, self-harm, and road injuries.

The positives related to alcohol consumption often get overshadowed by the adverse consequences of irresponsible drinking. The Internet is full of mixed messages about alcohol. On the one

62. https://www.globalhealthnow.org/2020-05/alcohol-bad-indian-outbreak-worse-indian-economy.

63. While sale of liquor was stopped during the early stages of the pandemic from January to April, after much pressure by alcohol consumers and state treasuries sales of liquor was opened up in early May with instructions for social distancing and/or home delivery. Not only that, many states started levying a varying COVID Tax of up to 70 percent to boost their depleting revenues. Consequently, sales also suffered.

64. https://timesofindia.indiatimes.com/india/alcohol-deaths-to-cost-1-5-gdp/year-study/articleshow/70236838.cms

hand, moderate amounts have been linked to health benefits. On the other, it is addictive and highly toxic, when consumed in excess. It deserves to note that the health effects of alcohol consumption show interpersonal variation and depend on the amount and type of alcohol consumed.[65]

Alcohol and Road Safety

Since this chapter focuses on the judicial approach for reining in drunken-driving accidents, focusing only on the road safety dimension will be pertinent. Road safety is one of the most serious issues in India but has not got the deserved attention. To put this in perspective, road traffic deaths across the world are about 13.5 lakhs every year with India's record being the worst in the tally. Roughly, about 149,000 people lost their lives on Indian roads in 2018 alone. As per MoRTH report, the number of road accidents in 2019 was 3.86 percent lower than in 2018, while the number of persons killed and several injuries were lower by 0.20 percent and 3.85 percent respectively.

In the year 2020, drunk driving led to 8,355 road accidents.[66] As per the MoRTH report titled, "Road Accidents in India 2019", drunken driving accounted for 3.5 percent of the persons killed in road accidents. Further the numbers of persons killed for these reasons in 2019 were much higher than in 2018.[67]

As per a World Bank report, in 2014-2038 India could halve the deaths and injuries because of road traffic. Today, the country accounts for about two percent of motor vehicles globally, but more than 11 percent of road traffic deaths.[68] According to a UN study, it is estimated that road accidents cost three percent of our GDP.[69]

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65. https://www.healthline.com/nutrition/alcohol-good-or-bad.
66. https://www.livemint.com/news/india/drunk-driving-causes-8-355-road-accidents-in-2020-wrong-side-driving-leads-to-20-228-mishaps-11643814608980.html
67. https://morth.nic.in/sites/default/files/RA_Uploading.pdf
68. https://www.business-standard.com/article/current-affairs/story-in-numbers-killer-roads-fatal-rides-cost-india-5-of-gdp-every-year-119112400822_1.html.
69. https://auto.economictimes.indiatimes.com/news/industry/india-losses-3-of-its-gdp-to-road-accidents-un-study/55700816.

Injuries and fatalities on the road are caused due to several factors. Drunken driving is the third-biggest reason for road accidents in India, after over-speeding and lane indiscipline.[70] During the calendar year 2019, the total number of road accidents in India were 449,002 out of which 319,028 (almost 71.1 percent) have been attributed to over speeding.[71]

These statistics are compelling and therefore, all hands are needed on the deck to rein in road accidents. But just as important as it is to support such attempts, it is equally important to evaluate what may or may not work. More importantly, it is vital to avoid potentially counter-productive measures.

Regulatory Intervention and Framework on Road Safety

As mentioned earlier, the issue of road safety is a significant public policy issue that has linkages to the health and well-being of people as well as the development of the national economy. It involves high human suffering and impact on financial health on account of untimely death, injuries, and loss of potential income, among other things.

While the significance of road safety was being officially recognised by the United Nations; India too was deliberating on renewed actions for improving road safety in the country.

The history of this development is marked by sadness. This was not the first time that the Government of India discussed designing and adopting a National Road Safety (NRS) Policy. In 1993, I was a member of the National Road Safety Council headed by Jagdish Tytler, the Minister of State for Surface Transport, a member in the reformist Prime Minister P. V. Narasimha Rao's cabinet. It decided to establish a Ministerial Committee to draft the NRS Policy. This committee was headed jointly by two State ministers along with me and late Prof Dinesh Mohan of IIT, Delhi a transportation expert.

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70. https://www.rushlane.com/india-road-accident-report-2018-12340314.html

71. https://www.thehindu.com/news/national/parliament-proceedings-overspeeding-led-to-319-lakh-road-accidents-in-country-in-2019-rajya-sabha-told/article32648430.ece.

We came up with a draft policy, developed mainly by Prof Mohan which was presented in the subsequent meeting in 1993 and adopted. That was the last one heard of the NRS Policy drafted by the Ministerial Committee. It was never taken to the cabinet for approval and adoption and died in the corridors of Transport Bhavan. The Ministry also lost the draft policy statement, and someone called me one day to ask for a copy which I sent.

I narrate this only to show how insouciant our ministers and babus can be and insensitive to a severe health issue. The matter rested there until in 2004, the World Health Organisation (WHO) and the World Bank took it up globally to wake up the governments to do something.

According to WHO statistics (2022), road traffic injuries are the leading cause of death for children and young adults aged 5-29 years. Approximately 1.3 million people die each year as a result of road traffic crashes.[72] 93 percent of the world's fatalities on the roads occur in low- and middle-income countries, even though these countries have approximately 60 percent of the world's vehicles. Road traffic crashes cost most countries 3 percent of their gross domestic product.

An analysis, conducted by Bosch India estimated India's socio-economic cost of road traffic accidents for the year 2019 to be in the range of US$15.71bn to US$38.81bn, which amount to 0.55–1.35 percent of the GDP.[73]

At a plenary meeting of the United Nations General Assembly on April 14, 2004, a resolution co-sponsored by India expressed grave concern about a large number of fatalities in road crashes. WHO also declared the year 2004 as the Year of Road Safety and launched World Health Day in April 2004 with the slogan – "Road safety is no accident."

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72. https://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries#:~:text=Road%20traffic%20injuries%20are%20the,pedestrians%2C%20cyclists%2C%20and%20motorcyclists.

73. https://www.thehindu.com/news/national/karnataka/indias-socio-economic-cost-of-road-accidents-in-2019-was-1571-billion-to-3881-billion-bosch/article37161481.ece

On January 13, 2005, the Cabinet Committee on Infrastructure headed by the Prime Minister of India, Manmohan Singh directed the MoRTH to present a note to the Empowered Committee of Secretaries to create a Directorate of Road Safety and Traffic Management.[74]

Following this directive, in the same year, MoRTH constituted a Committee under the Chairmanship of late Mr S. Sundar, former Secretary in the Ministry of Surface Transport, to deliberate and recommend creating a dedicated body on road safety and traffic management. Also, the Sundar Committee was requested to draft the National Road Safety Policy for the consideration of the Government.[75]

The Sundar Committee submitted its report in February 2007 and recommended a draft National Road Safety Policy, which was approved by the Cabinet in its meeting, held on March 15, 2010.[76] It did not refer to the NRSP developed in 1993 by the National Road Safety Council (NRSC) because that Policy did not move at all, as narrated above.

To further the national road safety agenda, action on which had been languishing since March 2010, the MoRTH constituted[77] four Working Groups, on April 11, 2011, on four themes that revolve around various dimensions of road safety: Engineering, Enforcement, Education and Emergency Care.[78] I was assigned the task of writing up the Synthesis Report pro bono as a Member of the National Road Safety Council and Chairman of the Working Group on Road Safety Education.

Each of the four Working Groups submitted their reports to MoRTH on October 21, 2011. The Engineering aspects were divided into two sections, the first on the civil engineering aspects of highway and road design and construction, and the second on the vehicle's

74. https://MORTH.nic.in/sites/default/files/Click_for_the_Sundar_Committee_Report_on_Road_Safety_and_Traffic_Management.pdf.

75. https://main.sci.gov.in/jonew/judis/41438.pdf.

76. Ibid.

77. vide order No. RT-25014/3/20110-RS.

78. https://MORTH.nic.in/sites/default/files/Synthesis_Report_of_four_Working_new.pdf.

safety. It was noted that the Enforcement aspect of road safety is vested with the respective States/Union Territories, who must take it more seriously and devote funds. The Education aspect of road safety pertains to campaigns in print and electronic media by the government in partnership with civil society groups and educational institutions.

Here it was also emphasised that Enforcement must be accompanied by Education to be effective. The Emergency Care aspect pertains to providing care, such as during the Golden Hour,[79] through multiple agencies such as concessionaires, private/public ambulance services and designated trauma centres.[80]

The Working Group on Engineering (Vehicles) analysed the factors that influence road safety through a Haddon Matrix (*Annexure 1*)[81] : a tabulation of factors, pre-crash, during-crash, and post-crash which are linked to prevention of injury and fatality.

The Report of the Working Group on Road Safety about Enforcement[82] also highlighted concern regarding drunken driving and noted that India has one of the highest numbers of accidents and fatalities on the road. The Working Group on Enforcement made the following recommendation on drunken driving:

> "According to Section 185 of Motor Vehicles Act, the penalty for violation of this rule is punishable with a fine of ₹2,000 or 6-months imprisonment or both for the first offence. It is experienced throughout the country that drunken driving is being punished by fine only. Delhi Traffic Police made a healthy beginning in 2010 when the offence of drunken driving started being punished by imprisonment to various jail terms to the defaulters. In the year 2011, up to September 30, as many as 2,374 people have been awarded imprisonment for drunken driving. Awarding imprisonment in drunken driving is also prevalent in cities like Mumbai. All

79. The period immediately following an accident within which medical attention can greatly enhance the chances of survival.

80. India, Ministry of Road Transport and Highways, Annual Report 2014-15.

81. Ibid.

82. MORTH Order no. RT-23014/3/2011-RS dated 11.04.11. https://MORTH.nic.in/sites/default/files/Report_Working_Group_on_Enforcement-7093592822.pdf.

enforcement agencies may impress upon the courts of the concerned cities/states that in graver cases of drunk-driving, the penalty of imprisonment must be used to discourage drunken driving. There is also a provision under Motor Vehicles Act under Section 20 that if there is conviction under Section 185, the driving licence of the offender must be suspended. It has also been seen that in most cities/states, this provision is not being enforced.

Delhi Traffic Police took this up with the concerned courts and it has been encouraging that up to September 30, 2011, 1971 driving licences have been suspended for drunken driving. Other states and city traffic police need to take up with their concerned courts to ensure that for the offence of drunken driving, driving licence suspension and imprisonment becomes a norm. This will have a healthy influence on road safety as drunken driving is one of the biggest reasons for accidents on roads. Similarly, databases should be created by all the state police forces and Transport department to ensure enhanced punishment for drunken driving where the second or subsequent offence takes place."[83]

The Report by the Working Group on Road Safety Education (RSE), which I chaired, emphasised the importance of RSE in curbing and limiting road accidents in general, and also drunk driving induced road accidents and fatalities. In that regard, the draft National Road Safety Policy has talked about RSE as recommended by the Sundar Committee as such:[84]

"Road safety knowledge and awareness will be created amongst the population through education, training and publicity campaigns. RSE will also focus on school children and college going students, while road safety publicity campaigns will be used to propagate good road safety practices among the community. The Government will encourage all professionals associated with road design, road construction, road network management, traffic management and law enforcement to attain adequate knowledge of road safety issues."

83. https://MORTH.nic.in/sites/default/files/Report_Working_Group_on_Enforcement-7093592822.pdf.

84. Report of the Working Group on Road Safety Education (RSE), September 2011, https://MORTH.nic.in/sites/default/files/Report_of_working.pdf.

One major problem the Report highlights is the lack of prioritisation and awareness in the engineering and enforcement teams about RSE. It is suggested that these teams should also be educated and made aware of the criticality of the situation and encouraged to imbibe the best practices from across the world. For instance, it has been noted that instead of ignoring drunken driving cases due to complications in Third Party Insurance, it must be seen how these cases are handled in other countries.

Additionally, it has also been suggested that "testimonials of road accident victims should be made into short video clips of 20 seconds duration which could be telecast on television, cinema halls, schools and 23 colleges, organisations and corporate offices."[85] The films should focus on the repercussions of drunken driving, such as road safety and accidents.

It has also highlighted a good practice adopted in the USA, where Mothers Against Drunk Driving, a not-for-profit organisation, sends representatives to high schools to speak, especially to students in the age group who are starting to drive.

The Institutional Framework on Road Safety

Road safety in India is managed collectively by the Central and State Governments and also supported by academia, private organisations, and non-governmental organisations.[86]

MoRTH is the administrative ministry responsible for road safety in India, with the NRSC, headed by the Union Minister, MoRTH and also including Ministers-in-charge of Transport in State Governments and various official and non-official members, serving as the apex advisory body on road safety.[87]

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85. Ibid.

86. Some organisations include but not limited to Indian Road Congress, Central Road Research Institute, Council of Scientific and Industrial Research, Central Institute of Road Transport, Automotive Research Association of India, Vehicle Research and Development Establishment, Institute of Road Traffic Education, etc.

87. https://MORTH.nic.in/sites/default/files/Click_for_the_Sundar_Committee_Report_on_Road_Safety_and_Traffic_Management.pdf.

At the State level, each State needs to have a State Road Safety Council, headed by the respective Minister-in-charge of Transport, on the lines of the NRSC. Some states have District Road Safety Councils but they function erratically.

Motor Vehicles Act (MVA), 1988

The MVA, 1988 came into force on July 01, 1989, replacing the MVA, 1939 to consolidate and amend the laws relating to motor vehicles. While the MVA was amended multiple times over the years, however, the Motor Vehicles (Amendment) Act, 2019 was among the most comprehensive amendments to date. The Motor Vehicles (Amendment) Act, 2019 was passed by the Parliament in July 2019 and received the assent of the President of India in August 2019. The new Act came into force from September 01, 2019.

The Motor Vehicles (Amendment) Act, 2019 increased the penalties for many offences to check road accidents and improve road safety in the country. Specifically, on drunken driving or driving under the influence of drugs, Section 185 of the MVA Act, 1988 has increased the penalty fine for violation as well as expanded the definition of drugs.

However, even after the MVA was amended in 2019, the Madras High Court in October 2019 directed the Central Government to make further amendments in Section 185 of MVA due to increasing incidents of drunken driving. The HC noted that there should be a zero-tolerance policy in drunken driving cases.[88]

The judgment talked about Section 19(1)(f) of the MVA which gives licencing authorities the power to suspend the driving licences of the offender. The Court noted that the state governments should ensure proper coordination between police and licencing authority to make the procedure of license cancellation stricter and smoother.[89]

88. https://www.business-standard.com/article/pti-stories/tweak-motor-vehicles-act-to-curb-drunk-driving-hc-to-centre119102501207_1.html#:~:text=Section%20185%20of%20the%20Act,or%20with%20fine%20or%20both.

89. Ibid..

Supreme Court and Drunken Driving

On April 22, 2014, the Supreme Court in *S. Rajaseekaran vs Union of India & Ors*.[90] set up a Committee on Road Safety headed by Justice (Retd.) K. S. Radhakrishnan. The litigant pleaded concern about the increasing number of road accidents in India leading to deaths and injuries, which are wholly avoidable. While the Central Government opposed the petition in the initial stages of the proceedings, the Government took a non-adversarial stance on road safety issues.

Thus, a Committee was constituted to monitor the measures undertaken by the Union of India, the State Governments, and the extent of affirmative action on the part of the Union and the States. To this end, the Committee was required to undertake detailed scrutiny and examination of reports of the Central Government and State Governments about the necessity for further legislation or changes in the existing law.

The Justice Radhakrishnan Committee was notified[91] vide no. 25035/62/2012-RS by MoRTH on May 30, 2014, and the terms and conditions of the appointment of Chairperson and Members of the Committee were issued on August 08, 2014. The Committee commenced its work from May 15, 2014, and submitted about 12 reports on road safety issues until November 30, 2017.[92] On the ban on the sale of alcohol on highways, the Committee submitted a report before the SC on February 13, 2015, and recommended prohibiting alcohol sales on highways within a distance of 100 metres.[93, 94]

Following the recommendation on alcohol sale ban, on August 18, 2015, the Justice Radhakrishnan Committee also sent directions[95] to

90. (2014) 6 SCC 36.

91. https://MORTH.nic.in/sites/default/files/Notification_No_25035.pdf.

92. S. Rajaseekaran (II) vs Union of India & Ors., (2018) 13 SCC 516.

93. https://timesofindia.indiatimes.com/india/Ban-alcohol-sale-on-highways-Supreme-Court-panel/articleshow/46239909.cms.

94. The State of Tamil Nadu Rep.by Sec. and ors vs. K. Balu and anr., Civil Appeal Nos, 12164-12166 OF 2016, 31.03.2017, https://main.sci.gov.in/pdf/cir/2017-03-31_1490967488.pdf.

95. Vide letter F.No.05/2014/CoRS-Part-III, https://MORTH.nic.in/sites/default/files/Directions_to_States.pdf.

the States/UTs to implement road safety laws. While the Committee in their letter suggested many advisories, however, on drunken driving, it mentioned the following actions:

> "4. Suspension of the licence for not less than 3 months under section 19 of the Motor Vehicles Act, 1988 read with Rule 21 of the Central Motor Vehicles Rules, 1989 for:
>
> (i) Driving at a speed exceeding the specified limit which in the Committee's view would also include red light jumping;
>
> (ii) Carrying overload in goods carriages and carrying persons in goods carriages;
>
> (iii) Driving vehicles under the influence of drinks and drugs;
>
> (iv) Using a mobile phone while driving a vehicle.
>
> 5. The Committee further directs that in case of driving a vehicle under the influence of drinks or drugs, the policy should prosecute the offender and seek imprisonment as prescribed under Section 185 of the Motor Vehicle Act, 1988 even for the first offence."

Interestingly, the Committee recognised that other than (alcoholic) drinks, even drugs can be the cause of negligent driving. This is also specified in the law, as stated above. But the SC, in this case, did not refer to the Radhakrishnan Committee's report nor consider that even the sale and/or consumption of drugs needs to be checked to reduce road accidents. One doesn't know offhand the amount of taxpayers' money which would have been invested in the Radhakrishnan Committee's functioning but it must have been in the range of a few lakhs. It was given a regular office in Vigyan Bhawan Annexe with full paraphernalia of staff and logistics. The CAG (Comptroller and Auditor General) must do an audit of its effectiveness also so that such wasteful expenditure is curbed or at least the committee is aware of what it must deliver as value for money. They cannot consider this as another routine administrative or judicial task.

Coming to the case at hand, on December 15, 2016, the SC, in the matter of State of Tamil Nadu Vs. K Balu & Anr. passed an order prohibiting the sale of alcohol within a distance of 500 metres

from the national and state highways in the country. In this same judgment, the SC also noted the Union Government's policy titled "Model Policy/taxation/act/rules for alcoholic beverages and alcohol", Para 92(2) that:

> "No licence for sale of liquor shall be granted to a retail vend selected within a distance of 100 metres from any religious or educational institution or hospital or outside the inhabited site of village/ town/city or any Office of the State/Central Government or Local Authorities or within a distance of 220 metres from the middle of the State/National Highways."[96]

The ground for the judgment was primarily the trend of rising drunken driving accidents, while the Court also noted it was enforcing the policy of the Union government.[97] Interestingly, the SC also noted that discontinuing liquor vends on national highways may not eliminate drunken driving cases completely and that the law on preventing drunken driving requires proper enforcement:

> "We are conscious of the fact that the policy of the Union government to discontinue liquor vends on national highways may not eliminate drunken driving. A motor vehicle driver can acquire liquor even before the commencement of a journey or, during a journey at a place other than a national or state highway. The law on preventing drunken driving also requires proper enforcement.
>
> Having said this, the court must accept the policy of the Union government for more than one reason.
>
> First and foremost, it is trite law that in matters of policy, in this case a policy on safety, the court will defer to and accept a considered view formed by an expert body.
>
> Second as we have seen, this view of the Union government is based on statistics and data which make out a consistent pattern year after year.
>
> Third, the existence of liquor vends on highways presents a potent source for easy availability of alcohol. The existence of liquor vends; advertisements and sign boards drawing attention to the availability

96. State of Tamil Nadu Vs. K Balu & Anr. (Civil Appeal Nos. 12164-12166 of 2016 arising out of SLP (C) Nos. 14911-14913 of 2013) https://indiankanoon.org/doc/41625467/.

97. *Ibid.*

> of liquor coupled with the arduous drives particularly in heavy vehicles makes it abundantly necessary to enforce the policy of the Union government to safeguard human life.
>
> In doing so, the court does not fashion its own policy but enforces the right to life under Article 21 of the Constitution based on the considered view of expert bodies."[98]

Moreover, the SC also did not provide any empirical rationale for prescribing a specific distance of 500 metres for the ban on liquor sales on highways. However, in the subsequent proceeding, the Attorney General argued that the Radhakrishnan Committee had suggested 100 metres distance, so was the court liberal by allowing 500 metres distance?. The bench deemed that 100 metres is impractical and hence 500 metres was prescribed, without substantiating the reasons or arguments in favour.

The case also highlighted that on January 15, 2004, NRSC unanimously agreed in a meeting that licenses for liquor shops should not be given along the National Highways, at all. Following this, MoRTH issued an advisory on October 26, 2007. After this, advisories were issued consistently to all State governments to remove liquor shops and not to issue fresh licenses to liquor vends along the National Highways.

What eventually culminated in this judgment emanated from another advisory of MoRTH issued to all State and UTs in 2011.[99] The advisory exhorted states to strictly enforce Section 185 of the MVA that deals with drunken driving.[100] It once again appealed to them to abstain from issuing fresh licenses to liquor vends on National Highways, remove liquor shops along such Highways, take corrective action in cases where a license has been issued in the past and submit an action taken report to the Ministry by the end of 2011. Alas, the political economy operates in such a manner that the advisory was hardly heeded to by states and/or union territories. The investments

98. Ibid.

99. https://MORTH.nic.in/ban-liquor-shops-along-national-highways.

100. As per Section 185, Motor Vehicles Act, 1988, driving under the influence of alcohol or drugs is a punishable offence.

in alcohol business are huge while they also contribute substantially to the state exchequer.

Most importantly, no distance was mentioned in the MoRTH advisory. Yet the court was liberal and perhaps pragmatic to allow liquor vends to exist at a distance exceeding 500 metres, though the Radhakrishnan Committee had advised a minimum distance of 100 metres. Overall, the stipulations regarding distance from the three institutions were mutually conflicting. Not that it mattered as is argued below.

Subsequently, due to the non-compliance of MoRTH's advisory the issue was contested in the High Courts of Punjab & Haryana, and Madras respectively.[101] The Madras High Court while pronouncing the judgment also brought the State highways under the purview of the ban. This was later challenged in the SC, only to be turned down in the final judgment by the SC. The judgment laid down the following specific directions:[102]

1. All States and UTs were ordered to cease and desist from granting licenses for the sale of liquor along the National and State highways with immediate effect.
2. The prohibition was to include stretches of such highways that fall within the limits of a municipal corporation, city, town, or local authority.
3. The existing licences which were renewed before the date of the judgment were to continue until the term of the licence was to expire by April 01, 2017.
4. All signages[103] and advertisements of the availability of liquor on all highways were also prohibited while the existing ones were to be removed with immediate effect.

101. The aforementioned Civil Writ Petitions (CWP) in the High Courts of Madras and Punjab and Haryana were filed in the year 2012. However, the petitions were not related to each other.

102. State of Tamil Nadu Vs. K Balu & Anr. (Civil Appeal Nos. 12164-12166 of 2016 arising out of SLP (C) Nos. 14911-14913 of 2013) https://indiankanoon.org/doc/41625467/.

103. To overcome such a direction one shop put up a clever signboard on the highway saying, in Hindi, that 'drinking liquor is harmful to your health' with an arrow showing the direction of the shop.

5. No shop for the sale of liquor was to be visible from the highways and directly accessible from them. They had to be situated within 500 metres from the outer edge of the highway or service lanes along the highway.
6. All UTs and States were mandated to strictly enforce the directions of the court. Chief Secretaries and Director Generals of Police were given a month to chalk out a plan for enforcement in consultation with the State Revenue and Home departments. Responsibility was to be assigned to District Collectors and Superintendents of Police, amongst other competent authorities and compliance was to be strictly monitored through fortnightly reporting.

The SC's action created much flutter, but simultaneously brought about some ambiguities which were later settled through subsequent clarifications by the apex Court. This essentially meant spelling out the specifics. The 'clarified' judgment included not just liquor shops but just about any establishment engaged in the business of selling liquor along the highways. In other words, everything including hotels, bars, restaurants, and clubs came within the purview of the judgment.

The 500-metre rule was relaxed in response to the plea by local bodies and the distance was revised to 220 metre for those habitats which have less than 20,000 population. The court eventually had to also allow the continuance of certain licences that had validity beyond the cut-off date, i.e. March 31, 2017. A special exemption was given to hilly states like Meghalaya and Sikkim from the 500-metre rule and municipal areas were also subsequently delisted.

Interestingly, one should go through the background of the case to see how it evolved and whether the court was *au fait* with the economic costs of its decision. Surprisingly, the court in this case while making the Committee's recommendation as the basis to prescribe the ban, did not explicitly refer to the findings of the Committee in its order, but liberally referred to the advisories and policy adopted by the Government to curb drunken driving-related accidents. However, the Radhakrishnan Committee's recommendation did come up during arguments in the subsequent

plea, but the court did not accept the same. One wonders why the apex Court ignored its own Committee.

The second anomaly exhibited by the order is that the court recognises the huge economic impact of accidents but does not speak about the economic impact of its order. To wit, says the order:

> "As the road network expands in India, road infrastructure being an integral part of economic development, accidents profoundly impact on the life of the common citizen. For a nation on the cusp of economic development, India can well avoid the tag of being the accident capital of the world. Our highways are expanding, as are the expressways. They provide seamless connectivity and unheralded opportunities for the growth of trade and industry and for the movement of goods, persons and capital. They are the backbone of the freedom of trade and commerce guaranteed by Article 301 of the Constitution."

However, for India to not be known as an accident-prone country, especially because of drunken driving, the Centre, the State, and also the judiciary, will have to work systematically and take a series of steps. According to various news reports, more than 2000 people were booked for drunken driving on New Year's Eve (2019) in major cities across India. However, the number was a significant drop from the previous year: for instance, there was a 26 percent drop in the number of people booked in Mumbai, from 615 to 455, a 33 percent drop in Delhi (765 to 509) and a 52 percent drop in Bengaluru (1390 to 667).[104] The Joint Commissioner of Police (Traffic) in Mumbai attributed the decrease in his jurisdiction to "identifying vulnerable locations and systematic crackdowns throughout the year"[105] in regard to drunk driving.

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104. Chaitanya Mallapur, 'More than 2000 people were booked for drunk driving in India's big cities on New Year's Eve', Scroll, January 04, 2019, https://scroll.in/article/908022/more-than-2000-people-were-booked-for-drink-driving-in-indias-big-cities-on-new-years-eve#:~:text=In%202017%2C%20the%20latest%20year,in%20such%20accidents%20in%202016.

105. *Ibid.*

In the year 2020, drunk driving led to 8,355 road accidents.[106] As per MoRTH report titled, "Road Accidents in India 2019", drunken driving accounted for 3.5 percent of the persons killed in road accidents. Further the numbers of persons killed for these reasons in 2019 were much higher than in 2018.[107]

The number of accidents due to drunken driving in the whole of India saw a drop of 14.6 percent from 14,071 in 2017 to 12,018 in 2018. But the same increased to 12,256 accidents in 2019. *Many of these accidents took place in cities and not highways*.

What Works to Curb Drunken Driving?

A study conducted by the Nobel laureate, Abhijit Banerjee et al, showed that the decision to drink and drive was sensitive to the level of enforcement and potential travel costs of avoiding the police. Thus, broader police enforcement can serve as an effective deterrent.[108]

Developing countries usually lack police manpower and technology to measure driver's alcohol levels, thus making it difficult to measure the role of alcohol in road accidents. In that regard, several studies have evaluated the impact of sobriety checkpoints on reducing traffic accidents and fatalities. Some have suggested that sobriety checkpoints reduce accidents and traffic fatalities by roughly 17 to 20 percent.[109]

In his study, Banerjee found that various factors affect the enforcement of drunken driving laws in India. The official procedure also leaves plenty to the discretion of the police manning the roadblock. For instance, the choice of how many, and which vehicles to pull over for questioning and potential testing is the most

106. https://www.livemint.com/news/india/drunk-driving-causes-8-355-road-accidents-in-2020-wrong-side-driving-leads-to-20-228-mishaps-11643814608980.html

107. https://morth.nic.in/sites/default/files/RA_Uploading.pdf

108. Abhijit Banerjee, Esther Duflo, Daniel Keniston, and Nina Singh, 'Crime, Punishment and Monitoring: Deterring Drunken Driving in India', Dartmouth, 2012, https://www.dartmouth.edu/neudc2012/docs/paper_295.pdf. (2017 version: https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/1/346/files/2017/05/Drunk_Driving_4.3-2kpx9x6.pdf).

109. Elder Randy et al, 'Effectiveness of Sobriety Checkpoints for Reducing Alcohol-Involved Crashes.', 2002; Corinne Peek-Asa, 'The Effect of Random Alcohol Screening in Reducing Motor Vehicle Crash Injuries', American Journal of Preventative Medicine, 1999.

important decision. At the same time, police officers are also faced with a moral question: whether to follow the law or accept a bribe and let the offender go. All these factors add to the unenforceability of drunken driving laws in India.

The study also found that roadblocks of this type occurred rarely before the discussed judicial intervention, mainly because breathalysers were not widely distributed to police stations. Without a breathalyser, the police could only convict the suspect if a blood test at a hospital returned a positive result under the 30mg/100ml clause of the MVA (Section 185). The high cost in terms of time served as a deterrent for the police to take such an action. Thus, in the 925 nights that the surveyors visited control police stations, on only seven (0.76 percent) occasions did they witness the police carrying out a roadblock.[110]

A part of the machinery for countering drunk driving is the correct counting of deaths from accidents due to drunken driving; in this regard, the source of data needs to move from the police to the health system. Relying on the former leads to the undercounting of such deaths, as the current system collects data only through FIRs. This means that if a crash occurs, followed by an immediate death of the victim at the time of filing the FIR, then it is recorded. However, if the death occurs after a week of the crash in the hospital, then the change is made only to the charge sheet and not to the FIR. This results in under attribution of deaths to drunk driving. In this regard, a lesson could be taken from France where the definition of road traffic deaths was changed in January 2005 to include deaths for up to 30 days after the accident, instead of 6 days.[111]

Another significant problem that needs to be addressed to curb drunken driving in India is bettering the implementation and enforcement of drunken driving laws. According to the WHO's Global

110. Banerjee, Duflo, et. Al., Improving Police Performance in Rajasthan, India: Experimental Evidence on Incentives, Managerial Autonomy and Training https://economics.mit.edu/files/16594

111. Dr. Etienne Krug, 'Reducing road traffic injuries: global experience and lessons', World Health Organisation, https://MORTH.nic.in/sites/default/files/Best_Practices_across_the_globe_by_Dr_Etienne_Krug.pdf.

Status Report on Road Safety 2018, India is rated four on a scale of 10 in the enforcement of drunken driving laws.[112] This is the lowest among the BRICS countries. To better enforce, it is imperative to dedicate a lot of human resources to check if the suspect is driving under influence of some intoxicant. It would help manifold if India moves to an electronic enforcement system, which would make it easier, faster, and cost-effective to identify and penalise violators.

International Perspective on Dis-incentivising Drunken Driving

Various studies on enforcement have consistently found a relationship between increased enforcement and reductions in alcohol-impaired driving. For instance, a study conducted in the USA reported that a 10 percent increase in driving while impaired (DWI) arrest rate corresponded to a one percent decrease in alcohol-involved accidents.[113] However, the legal definition of drunken driving in terms of the level of acceptable blood alcohol concentrations (BAC) varies from country to country.

To understand a standard BAC level that could be applied, an evaluation was conducted of six studies of fatalities and injuries among drivers in four Australian states (Queensland, Tasmania, Victoria, and Western Australia) and three states in the United States (Maine, Maryland, and Massachusetts) with blood alcohol limits ranging from 0 to 0.06 g/dL (grams/decilitre).[114]

The analysis found that a BAC limit of 0.02 g/dL or less for young and novice drivers effectively reduce drunk driving-related accidents. A 17 percent reduction in fatalities at night time was observed in jurisdictions with a BAC of 0.02 g/dL, whereas jurisdictions with zero tolerance observed a reduction of 22 percent.

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112. 'Global Status Report on Road Safety 2018', World Health Organisation, 2018, https://www.who.int/violence_injury_prevention/road_safety_status/2018/en/.

113. Frank A. Sloan, Sabrina A. McCutchan, and Lindsey M. Eldred, 'Alcohol-Impaired Driving and Perceived Risks of Legal Consequences', January 2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5272826/.

114. 'Strengthening Road Safety Legislation: A practice and resource manual for countries', World Health Organisation, https://www.google.co.in/books/edition/Strengthening_Road_Safety_Legislation/NrAXDAAAQBAJ?hl=en&gbpv=1&dq=Alcohol+Road+Safety&pg=PA39&printsec=frontcover.

In this regard, the existing laws in India do not meet WHO's standards of best legislative practice because they do not differentiate between alcohol limits for the general population and novice drivers.[115] To understand where India can do better, let's see what other jurisdictions did to successfully bring down their drunk driving cases.

- *China:* China started rigorously enforcing its drunk driving laws in 2008, realising that driving under the influence of alcohol was a major cause of accidents and fatalities. In general, if the BAC is found to be between 0.02 to 0.08 percent, the licence of the offender is suspended for six months and a penalty between 1000 and 2000 Yuan (equivalent to ₹10,000-20,000) is imposed. If the BAC is more than 0.08 percent, the licence is suspended for five years with a possibility of imprisonment for up to three years. According to the Chinese Government, these laws in conjunction with effective enforcement have reduced drunken driving incidents by 40 percent within a year of their adoption.[116]
- *Brazil:* Brazil has had a strict zero-tolerance policy to drunk driving since 2008, popularly known as the 'Dry Law'. However, in practice, a 0.02 percent BAC is generally tolerated to account for variations in breathalyser readings. Like China, Brazilian drunken driving laws also determine punishment

115. Once in Jaipur, sometime in mid 2000s, returning from a friend's house after dinner, my car was stopped by a police barrier which was checking drunk driving armed with breathalysers. My driver, who had had one third of a bottle of strong beer, with other drivers while waiting for their employers to leave for home, was found to have crossed the limits. I too had had 2-3 drinks of Scotch Whisky and voluntarily underwent a test three times but it never showed that I have crossed the limit. I was quite puzzled and one young constable explained that it has not shown up because of my body weight and the fact that I am a daily moderate drinker. However, with some difficulty and calling up the Commissioner of Police at midnight that the police party allowed us to go scot free. There are two lessons from this. One how reliable are the tests? Secondly, I could escape prosecution because of my influence but in many cases either the innocent is harassed or asked to pay a bribe for non-prosecution. Professional drivers are quite afraid because their licences can be punched with each violation, while five violations can lead to cancellation of the driving licence which means his livelihood gets affected adversely.

116. Simar Singh, 'Drink driving laws in other countries and what India can learn', NDTV, 11 December 2017, https://sites.ndtv.com/roadsafety/drink-driving-laws-countries-india-can-learn-2458/.

based on two limits - a BAC of 0 to 0.06 percent invites revocation of licence for a year and a fine of around ₹20,000. Anything above 0.06 percent is criminally punishable with imprisonment between six months to three years. According to the Ministry of Health of Brazil, Rio de Janeiro reported a 32 percent decrease in road accident-related deaths in the first three years of the implementation of the law.[117]

- *Singapore:* Singapore is considered to have one of the strictest punishment for drunken driving in the world. The punishments factors in the BAC as well as the frequency of offence committed by the individual. Moreover, the repeat offenders face greater imprisonment time, with the possibility of third-time offenders being fined a whopping $30,000 and a jail time of three years. The WHO Global Status Report on Road Safety gives Singapore an 8 out of 10 for enforcement, as compared to a dismal 4 out of 10 for India.[118]
- *Australia:* A differentiation between novice and experienced drivers is a significant characteristic of Australia's enforcement policy. In contrast, India has one overarching blood alcohol limit for all drivers which is why it needs to meet the best legislative practice standards by the WHO. Further, Australia does not allow learners and people holding provisional licenses to drive after drinking alcohol.
- *France:* After witnessing a 3.7 percent rise in fatal accidents in 2014, France lowered its blood alcohol content limits in July 2015. Initially, it had a uniform 0.05 percent limit for all drivers. Post-2015, this has now been lowered for inexperienced drivers to 0.02 percent. The government's rationale was that the 18-24 age group accounted for a quarter of all driver deaths directly linked to drunk driving in 2013 and 2014.

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117. *Ibid.*

118. 'Global Status Report on Road Safety 2018', World Health Organisation, 2018, https://www.who.int/violence_injury_prevention/road_safety_status/2018/en/.

Impact of Supreme Court's Judgment

As per MoRTH's report[119], the number of 4,49,002 accidents and 1,51,113 deaths in 2019 translates into an average of 1,230 accidents and 414 deaths every day and nearly 51 accidents and 17 deaths every hour. That said, India is one of the biggest and fastest-growing alcohol markets in the world. The revenue gains and business proceeds of the alcohol economy are not only significantly reflected in the treasury of state governments but also the cash registers of retail outlets and hospitality businesses all over the country. It is also a large job creator. Disruption in any part of the 'alcohol economy' is therefore likely to have an economic impact on workers, businesses as well as state revenues.

Curiosity must also bring one to consider the enforceability dimension of the judgment under discussion in this chapter, i.e. if the judgment had the requisite attributes for spirited enforcement. Nothing gives way to this curiosity more than what has already been discussed. Notice that some amount of dilution of the judgment had started to come about through exemptions soon after the judgment was pronounced. These exemptions were granted by none other than the same SC bench. To a discerning eye, however, they raise some serious questions.

Did the SC rush too fast into the decision? Could it have done things better? Was the afterthought (clarifications) sufficient to plug all leaks? And if these are valid points, what could have constituted a better judicial approach?

Fortunately, and unlike many other cases, an in-depth study conducted by CUTS International provides insight into these questions. Spread across four states over six months (April-September 2017), it seeks to answer these questions through an examination of a highway stretch that starts from Meerut and goes to Ghaziabad in UP (NH 58 and NH 24 from Ghaziabad to Delhi) then cuts through municipal areas of Delhi and ends at Jaipur in Rajasthan via Gurugram and Rewari in Haryana (NH 8). Please see Annexure 1.1.

119. https://morth.nic.in/sites/default/files/RA_Uploading.pdf

In all, it examined two things viz *economic impact* on select categories and *counterfactual* i.e., if the judgment made any difference to drunken driving. These are discussed below:

Economic Impact

The decision given by the SC in the present case was directed towards the prohibition of the sale of alcohol along the highways to control the menace of drunken driving. To examine the impact of the judgment, the study[120] examined both the 'number of road accidents due to drunken driving' and also the 'number of challans issued for drunken driving' during the period chosen on the identified stretch of the national highway in Uttar Pradesh, Delhi, Haryana, and Rajasthan.

Furthermore, with regard to the economic impact, the study focussed mainly on two components - 'impact of the judgment on state revenue' and 'impact of the judgment on retail outlets such as vends, clubs, bars, restaurants and hotels, among others'. The State revenue analysis further focussed on two aspects, namely Excise Duty and Licence Fee as these are the two main revenue components for the excise departments of States. The impact on retail outlets was calculated in terms of change in procurement levels of liquor. In addition to this, the notional impact on retail outlets (retail vends, hotels and bars) in select districts through which the highway stretch passes is also estimated.

The study concluded that significant adverse economic impact was felt at the retail outlet level and the impact peaked during April-September 2017, whereas the state revenue did not see any significant adverse impact except in the case of Delhi. In Delhi, significant excise duty was forgone for 97 retail outlets. At the time of the study, Delhi had a total of 1773 retail outlets, 97 of which were adversely affected, and the findings suggested that in Delhi when a retail outlet is shut, there is no excise duty collection as well, adversely impacting the state revenues. See Annexure 1.3 for details.

120. http://cuts-ccier.org/pdf/report-research-study-on-economic-impact-analysis-of-supreme-court-judgement-prohibiting-sale-of-alcohol-on-highways.pdf.

Revisions in components like Excise Duty and License Fee help to keep the state revenue afloat. Even in states like Maharashtra, State revenue from excise for 2017-18 saw an increase despite a fall in consumption of alcohol after the SC judgment.[121]

The total economic loss of retail outlets (retail vends, hotels, restaurants and bars) in the select districts through which the highway stretch passes is estimated to be approximately ₹180 crores by the study. However, as of March 2018, most of the disrupted retail outlets had resumed operation either at the same location or with relocation. See Annexure 1.4 for the details.

At a consolidated level, the study estimated that, for every 1000 km of similar highway stretch which passes through contiguous regions with similar socio-economic and cultural backgrounds, the notional negative impact on the business from April to September 2017 was around ₹496.54 crores. See Annexure 1.5 for details.

The impact of the judgment could vary from region to region. Hence, a nation-wide impact of the judgment would be difficult to estimate without a granular study like the above. However, the hospitality industry, which came into the purview of the judgment on March 31, 2017, stated an estimated impact of the judgment to be nearly ₹10,000-15,000 crores and job losses to be 100,000.[122]

The then NITI Aayog CEO, Amitabh Kant, tweeted that the ban will adversely impact the whole tourism sector and thus the job losses may be in the range of one million or ten lakhs.[123] His intuitive estimate is possible. He has over 40 years of administrative experience and few years in the Tourism sector.

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121. Liquor Sales in Maharashtra drops after Supreme Court 2017 Ban. https://www.hindustantimes.com/mumbai-news/liquor-sales-in-maharashtra-drop-by-after-supreme-court-s-2017-ban/story-cj6aIzGkrFLGwEMA8KrdbL.html.

122. Ratna Bhushan, Sagar Malviya and Richa Maheshwari. (April 3, 2017) Liquor ban impact estimated at ₹65,000 Crore in revenue foregone by states, hospitality industry. The Economic Times, https://economictimes.indiatimes.com/industry/cons-products/liquor/liquor-ban-impact-estimated-at-rs-65k-Crore-in-revenue-foregone-by-states-hospitality-industry/articleshow/57980528.cms.

123. *Ibid.*

Counterfactual: Did the SC Judgment Make a Difference to Drunken Driving Incidents?

Since the key intent of the SC in its judgment in the present case was to control the menace of drunken driving by prohibiting the sale of alcohol along the highways, it is important to analyse the impact of the judgment on drunken driving. For this purpose, the CUTS study examines both the 'number of road accidents due to drunken driving' and also the 'number of challans issued for drunken driving' during the study period on the identified stretch of the national highway.

In Uttar Pradesh, according to the data provided by the Directorate of Traffic (UP), no drunken driving accident was recorded in the districts of Meerut and Ghaziabad. However, the number of challans issued for drunken driving doubled in 2016 as compared to 2015 and then reduced by 50 percent in 2017 when the judgment was enforced. At the same time, a downfall was also recorded in the procurement of alcohol in Uttar Pradesh at country liquor vends, hotels, and restaurants. However, it could not be validated whether the reduction in challans issued for drunken driving in the districts was as a result of reduced consumption of alcohol due to the judgment. (*Annexure 1.6*)

In the case of Delhi, the only available data on incidents of drunken driving was the total number of challans issued for April-August in 2016 and 2017. Using this data the change in incidents of drunken driving on highways was deduced. Unlike Uttar Pradesh, the number of challans issued for drunken driving in Delhi marginally decreased. The decrease can be attributed to lesser challans issued in May and June 2017. (*Annexure 1.7*)

As indicated earlier, since only 97 of the total 1733 retail alcohol outlets in Delhi were impacted due to the judgment, availability and consumption of alcohol were not adversely impacted.

In Haryana, district level data on incidents of drunken driving pertained to only Rewari and Gurugram. The data was for the entire year and not specifically for the study period. (*Annexure 1.8*)

With respect to challans issued for drunken driving, Haryana presents a picture similar to that in Uttar Pradesh. The challans

issued for drunken driving in Haryana had doubled in the year 2017 as compared to the year 2016. Furthermore, the number of accidents due to drunken driving also marginally increased in 2017 as compared to the previous year. This increase was in spite of a downward trend in alcohol procurement by retail outlets and a reduced number of outlets in districts.

In Rajasthan, the data on the number of road accidents due to drunken driving and the number of challans issued for drunken driving was from both the districts as well as for the highway stretch passing through the district for 2015, 2016 and 2017 (*Annexures 1.9 and 1.10*). There is a steady increase in number of accidents and challans issued in these years.

Similar to Uttar Pradesh, no accidents were recorded on the national highways passing through the concerned districts. However, the share of challans issued for drunken driving on the national highway in the total number of challans issued for drunken driving in the entire district consistently increased from 2015 to 2017. In 2017, the challans issued for drunken driving on highways almost tripled compared to the previous year. It is also interesting to note that in 2017, a high number of challans on the highways were issued in August and September, i.e. after the Supreme Court clarification exempted the highways in municipal jurisdiction from the purview of the judgment.

An upward trend in the procurement of alcohol (IMFL[124] and Beer) at vends on the highway stretch and a higher number of challans for drunken driving on highways suggest that the Supreme Court judgment did not have the expected impact on the incidents of drunken driving in Rajasthan.

Interestingly, it has been observed that in all the states, road accidents due to drunken driving on highways as well as within the districts is either nil or not recorded. Here it may be noted, that the cases of drunken driving are often under-reported particularly where deaths or injuries are involved, and the Supreme Court had also acknowledged the same. Overall, data purity is also a challenge.

124. Indian-made foreign liquor.

Experts' views and our findings showed that accident data is often deflated by nearly 15 percent.

CUTS study supported this view even during informal interactions with police officials in three of the four states. However, a perception exists that a significantly high number of deaths and injuries are due to drunken driving. Furthermore, often, road accidents due to drunken driving are not attributed to the consumption of alcohol so that insurance claims are not denied.

In addition to the above, the CUTS study carried out a primary field survey to record challans issued for drunken driving at two police check posts in Jaipur in Rajasthan to verify the actual cases of drunken driving on the highway and its possible linkage with road accidents. The two check posts were located on the highway stretch of NH 48, at Transport Nagar and Kunda in Jaipur district. Following is the summary of the primary field survey conducted. See Annexure 1.11 for details.

It was observed that the number of drivers caught and prosecuted for drunken driving was relatively low. The data shows that only *0.74 percent* of the drivers were booked for drunken driving.

Based on the ground report, it was observed that policing is an ineffective way to control drunken driving. This is because of the fast and dense flow of traffic, the immense work pressure on the police force, inadequate equipment, and the procedure of manual filtering of suspects. Other more innovative means have to be devised to check drunk diving.

Conclusion

Overall, the evidence suggests (based on official data as well as a primary survey) that there was no significant reduction in drunken driving cases after the judgment. On the other hand, the evidence also suggests that only policing is an ineffective mechanism to rein in drunken driving incidences. It can be seen that alcoholism as a social evil can be tackled through temperance movements and awareness generation rather than over-regulation. Collaboration on all four Es or road safety, i.e., Engineering, Education, Enforcement, and Emergency care, is the need of the hour.

It is then worth acknowledging that any institution, at a standalone level, cannot curb drunk driving. The approach has to be multi-faceted. As drunk-driving, beyond permissible levels, is a serious criminal offence the entire criminal justice machinery needs to work in tandem with civil society, academia, educational institutions, technical institutes, and media organisations working on engineering, education, enforcement, and emergency care aspects of road safety. It can be said that the *Samaj, Sarkar and Bazaar* need to come together and play effective roles to tackle the problem of drunk driving in India.

These facts raise a serious question about the effective enforceability of the judgment and therefore the courts in India will do well to assess the impact *ex-ante*, especially when an issue concerns substantive economic and technical dimensions. Moreover, there was also an explicit conflict of interest as the ban was supposed to be enforced by the state governments which are also the biggest beneficiary of revenues from alcohol sales. How could these oversights have been avoided: probably by engaging experts on economic matters in the expert committee, under the directions of the Court, and by carefully looking into the enforceability of the judgment too in addition to assessing economic costs, as was done by the CUTS study.

In many cases, the apex court has established bodies to dive deeper into the issues raised in a case which would then do the necessary legwork and advise the court. In the case of road safety, the court had established a three-member committee on road safety under the chairmanship of retired Justice S. Radhakrishnan in April 2014. This included two non-judicial members with an understanding of road transport issues.

In its first report submitted in February 2015, the panel had recommended the ban on the sale of liquor on both national and state highways to curb drunken driving[125] but did not do the legwork of finding out more evidence-based information on drunken driving

125. https://www.jagranjosh.com/current-affairs/justice-ks-radhakrishnan-panel-on-road-safety-submitted-its-report-to-the-supreme-court-1424438164-1.

or get it done by the MoRTH. The committee also did not advise the court on the enforceability of such a judgment. Similarly, the panel did not engage any external expert with background and expertise in economics to substantiate the economic analysis of their recommendations.

One would have expected such experienced panellists to have made comprehensive recommendations. Unlike judgments like cancelling 2-G telecom licences or coal block allocations (on which more later in this book), this order to arrest drunken driving had too many dimensions and variables to control or deal with. From now on, the current Committee on Road Safety under the chairmanship of retired Justice A. M. Sapre, who succeeded Justice Radhakrishnan, must engage experts in economics to validate the economic analysis of their recommendations if the Government of India agrees to fund it. We hope that Justice Sapre will take our advice as he was on the division bench with Justice A. K. Sikri in the Shivshakti Sugars matter which spoke eloquently about balancing law and economics to achieve overall justice.

Secondly, the order only looked at making it difficult for drivers to obtain liquor easily while setting off on a journey by removing the point of sale within easy reach. This did not prevent drivers from procuring liquor from the legal and illegal liquor vends much before setting out on the journey. Furthermore, there are other intoxicants, such as bhang, charas and smack among others which are consumed by many drivers leading to negligence in driving resulting in serious accidents. As it is, the Ministry says that 80 percent of our road accidents are caused by drivers' negligence or mistake. If much of these are due to intoxicated drivers, then it needs a different approach, much more comprehensive than just banning the sale of liquor near the highways.

The court also failed to look at successful examples within and outside the country. In China and Brazil, focus on enforcement and strict penalties have helped reduce drunk driving accidents. Even in India, a reduction in the number of people booked for drunk driving was observed in Mumbai. The reason provided by

the police was identification of vulnerable locations and systematic crackdowns. Such localised containment measures by focusing on accident susceptible locations could have been considered by the court, in coordination with the police, and civil society actors. The court could have monitored implementation of its directions through periodic reports and independent inspections, to ensure effective enforcement.

Annexures

Annexure 1.1

Haddon Matrix

Phase	*Human*	*Vehicles/Equipment*	*Environment*
Pre-Crash (Crash Prevention)	• Information • Attitude • Impairment • Police Enforcement	• Roadworthiness Lighting • Braking • Handling • Speed Management	• Road Design and Road Layout • Speed Limits • Pedestrian Facilities
Crash (Injury Prevention during the crash)	• Use of Restraints • Impairment	• Occupant Restraints • Other Safety Devices • Crash Protective Design	• Crash-protective Roadside Objects
Post-Crash	• First-aid skills • Access to Medics	• Ease of Access • Fire Risk	• Rescue Facilities • Congestion

Annexure 1.2

Key Components of Analysis			
Sr. No.	*Name of the State*	*Name of the Sub Area*	*Key Components Analysed*
1	Uttar Pradesh	Two Districts in Meerut Excise Zone: Ghaziabad and Meerut	• State: District Revenue (Excise Duty and License Fee together) • Businesses: Economic impact on retail outlets through procurement details of retail outlets at the district level • Impact on select hotels and restaurants on the highway
2	Delhi	All affected Vends in various locations	• State: Impact on Excise duty and License Fee separately • Businesses: Economic Impact on various affected retail outlets • Impact on select Hotels and Restaurants on the Highway

Key Components of Analysis			
Sr. No.	*Name of the State*	*Name of the Sub Area*	*Key Components Analysed*
3	Haryana	Gurugram and Rewari District	• State: Impact on Excise duty and License Fee separately • Businesses: Economic impact on retail outlets through procurement details of retail outlets at the district level • Economic Impact on retail outlets • Impact on select Hotels and Restaurants on the Highway
4	Rajasthan	Jaipur District (Jaipur Urban & Jaipur Rural) and Alwar District	• State: Impact on Excise duty and License Fee together • Businesses: Economic impact on retail outlets on the highway through procurement details • Impact on select hotels and restaurants on the highway

Annexure 1.3

Summary of Impact on State Revenue and Retail Outlets in Four States				
	Uttar Pradesh	*Delhi*	*Haryana*	*Rajasthan*
Impact on State Revenue (In ₹ Crores)				
State Revenue Collection from Select Locations within States	-0.38	-62.96	78.21	37.66
	Decreased	Decreased	Increased	Increased
Impact on Retail Outlets				
Country Liquor (Procurement)	In Lac Bottles	N.A.	In Proof Litres	Guarantee Amount paid in ₹ Crores
	-15.70		-3.00	-3.83
	Decreased		Decreased	Decreased

Summary of Impact on State Revenue and Retail Outlets in Four States				
	Uttar Pradesh	*Delhi*	*Haryana*	*Rajasthan*
IMFL*-Retail Vends (Procurement)	In Lac Bottles	Revenue Loss in ₹ Crores	In Proof Litres	In Lac Bulk Litres
	5.99	-98.56	-11.38	2.03
	Increased	Decreased	Decreased	Increased
Beer-Retail Vends (Procurement)	In Bulk Litres	N.A.	In Bulk Litres	In Lac Bulk Litres
	3.07		-102.93	8.02
	Increased		Decreased	Increased
IMFL-Hotel/Bar (Procurement)	In Lac Bottles	N.A.	N.A.	N.A.
	-0.02			
	Decreased			
Beer-Hotel/Bar (Procurement)	In Bulk Litres	N.A.	N.A.	N.A.
	-0.37			
	Decreased			
Impact on Hotels and Restaurants (Sample Survey)				
Number of Hotels, Restaurants and Bars	3	8	3	N.A.
Change in Estimated Revenue (₹ Crores)	-3.70	-25.24	-4.80	N.A.
Percentage Change in Estimated Revenue	-20-30%	-25-50%	-30-40%	N.A.
Loss of Jobs	30	225	103	N.A.

Note: * Indian Made Foreign Liquor.

Source: CUTS analysis.

Annexure 1.4

Aggregate Estimated Impact on Retail Outlets (in ₹ Crore)

Sr. No.	*Particulars*	*Uttar Pradesh*	*Delhi*	*Haryana*	*Rajasthan*	*Total*
1.	Retail vends	30.77	-98.56	-124.60	48.75	-143.64
2.	Hotels and Bars	-4.56	-25.24	-4.97	-1.32	-35.09
	Aggregate Estimated Impact	26.21	-123.80	-129.58	47.43	-179.74

Source: CUTS Analysis.

Annexure 1.5

Aggregate Estimated Impact on Select Districts in Four States

1.	Aggregate Estimated Impact in select districts	In ₹ Crore	-179.74
3.	Notional Impact per km of highway	In ₹ Crore	-0.496
4.	Estimated Impact per 1000 Kms of highway	In ₹ Crore	-496.54

Source: CUTS Analysis.

Annexure 1.6

Incidents of Drunken Driving in Uttar Pradesh (in Meerut and Ghaziabad Districts)

	2015		*2016*		*2017*	
Month	*Accidents due to drunken driving*	*Challans*	*Accidents due to drunken driving*	*Challans*	*Accidents due to drunken driving*	*Challans*
April	0	13	0	0	0	5
May	0	9	0	10	0	17
June	0	3	0	73	0	5
July	0	33	0	16	0	8
August	0	19	0	40	0	8
September	0	5	0	22	0	36
Total	0	82	0	161	0	79

Source: Directorate of Traffic, Uttar Pradesh.

Annexure 1.7

Number of Challans issued for Drunken Driving in Delhi

Month	*2016*	*2017*
April	731	1735
May	2140	1621
June	4934	2419
July	3240	3716
August	2387	3800
Total	13432	13291

Source: Delhi Traffic Police.

Annexure 1.8

Incidents of Drunken Driving in Haryana (in Rewari and Gurugram Districts)	
2015 (January-December)	
Total Accidents	26
Persons killed	11
Persons injured	34
Challans issued	4899
2016 (January-December)	
Total Accidents	26
Persons killed	9
Persons injured	30
Challans issued	2921
2017 (January-December)	
Total Accidents	27
Persons killed	8
Persons injured	33
Challans issued	5859

Source: Haryana Traffic Police.

Annexure 1.9

Number of Accidents due to Drunken Driving in Rajasthan (in Jaipur and Alwar Districts) on NH 48

Month	*2015*		*2016*		*2017*	
	In Jaipur and Alwar Districts	*On NH48*	*In Jaipur and Alwar Districts*	*On NH-48*	*In Jaipur and Alwar Districts*	*On NH-48*
April	3	0	1	0	9	0
May	7	0	4	0	8	0
June	1	0	4	0	2	0
July	4	0	4	0	6	0
August	5	0	7	0	12	0
September	3	0	6	0	15	0
Total	23	0	26	0	52	0

Source: DIG, Traffic, Rajasthan Police.

Annexure 1.10

Number of Challans issued for Drunken Driving in Rajasthan (in Jaipur and Alwar Districts)

Year	*2015*		*2016*		*2017*	
Month	*In Jaipur and Alwar Districts*	*On NH 48*	*In Jaipur and Alwar Districts*	*On NH 48*	*In Jaipur and Alwar Districts*	*On NH 48*
April	210	8	213	8	324	34
May	206	7	275	9	333	15
June	189	13	232	5	335	19
July	139	13	443	23	344	32
August	237	11	380	45	413	89
September	131	5	256	25	346	116
Total	3127	57	3815	115	4112	305

Source: DIG, Traffic, Rajasthan Police.

Annexure 1.11

Summary of Primary Survey of On the Spot Challans for Drunken Driving in Jaipur (at Transport Nagar and Kunda Check Posts)

1.	Total number of vehicles crossing the check posts recorded	2093
2.	Number of vehicles checked at the check posts	406
3.	Total drivers held for drunken driving at both the check posts	3
4.	Percentage of drunken drivers booked to the total number of vehicles passing through the check post	0.14%
5.	Percentage of drunken driving booked to the total number of vehicles checked for drunk drivers	0.74%

2

Public Health and Emission Standards

Summary

Air pollution is a public health emergency in India right now. It is estimated that one in eight deaths in India is caused by air pollution and a reduction of life expectancy in the country by 1.7 years is attributed to it. More importantly, as per the 2021 World Air Quality Report, air pollution levels in India were over 10 times the safe levels prescribed by the WHO for seven months in 2021.[126] No city in India met the updated WHO safety standards of 5 micrograms of PM2.5 per cubic metre of air. The report listed 63 Indian cities among the 100 most polluted in the world. [127]

All of India's 1.4 billion people live in areas where the annual average particulate pollution level exceeds the WHO guideline. Ninety-four percent live in areas where it exceeds India's own air quality standard.[128] The latest Lancet Commission on Pollution and Health estimated that pollution led to more than 2.3 million premature deaths in India in 2019,[129] with air pollution alone accounting for nearly 1.7 million premature deaths. The economic losses from premature deaths and morbidity amount to US$37bn

126. https://www.thethirdpole.net/en/pollution/india-air-pollutionpolicy/?gclid=Cj0KCQjwof6WBhD4ARIsAOi65ah8iepDaB6gWlg3-8rWttPrmi73BQSl_zYsWWUhNhC5X0hRWHZLGskaAquyEALw_wcB

127. https://www.orfonline.org/research/indias-air-pollution-challenge/

128. Air pollution is cutting lives shorter by 5 years in India: Report | Mint (livemint.com); https://www.livemint.com/news/india/air-pollution-is-cutting-lives-shorter-by-5-years-in-india-report-11655188728845.html

129. https://www.bbc.com/news/world-asia-india-61489488

annually or 1.36 percent of India's GDP.[130] The Energy Policy Institute noted that pollution is shortening lives by almost 10 years in Delhi.[131] It is said that Indians stand to lose five years of life due to air pollution levels in the country.[132]

The issue of air pollution is not new to the country. However, with the rapid growth of the automobile industry, air pollution has increased exponentially because of the rise in vehicular use. While it might be true that vehicular tailpipe emissions are not the only source of airborne pollutants, one cannot deny that it is one of the largest contributors.[133]

There are generally four parameters that determine emissions from vehicles. These include Vehicular Technology, Fuel Quality, Inspection & Maintenance of In-Use Vehicles, and Road and Traffic Management. Ideally, emission reduction should be examined in an integrated manner with equal emphasis on each of these four parameters. However, in reality, most of the focus is on the first two parameters. This is probably because it is easier to monitor and influence these parameters, while the levels of the last two parameters are the result of on-ground implementation by dispersed individuals.

Speaking specifically in the context of Fuel Quality, in 2003, the Government of India introduced the National Auto Fuel Policy (NAFP) which provided a roadmap to achieve lesser harmful vehicular emissions and fuel upgradation requirements over the coming years. The policy also laid out the implementation of Bharat Stage Vehicular Emission norms (BS norms) in India. In doing so, the Government of India reviewed such systems in advanced countries such as the European Union.

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130. Explained: India topped air pollution death toll in 2019, says report | Explained News,The Indian Express; https://indianexpress.com/article/explained/explained-india-topped-air-pollution-death-toll-2019-7922560/#:~:text=Air%20pollution%20was%20responsible%20for,in%20The%20Lancet%20Planetary%20Health.

131. NHRC Notice to Centre on Report That Says Air Pollution Cut Indians' Life Span By Five Years (thewire.in)

132. https://timesofindia.indiatimes.com/india/indians-losing-5-years-of-life-due-to-air-pollution-study/articleshow/92215757.cms

133. http://www.indiaenvironmentportal.org.in/files/file/Report%20of%20the%20Expert%20Committee%20on%20Auto%20Fuel%20Vision%20&%20Policy%202025.pdf.

As part of the periodic review of the NAFP, in May 2014, an Expert Committee constituted by the Government of India recommended a detailed country road map for auto fuel quality till the year 2025, which would also detail the countrywide implementation of BS-IV by April 01, 2017, BS-V by April 01, 2020 and BS-VI by April 01, 2024. However, following the implementation and transition from BS-III to BS-IV norms, communication by EPCA became the point of contention.

EPCA directed automobile manufacturers to refrain from selling, manufacturing or registering non-BS-IV vehicles after March 31, 2017, as from April 01, 2017, BS-IV norms were supposed to become applicable throughout the country. While the industry agreed to not manufacture any non-BS-IV vehicle from April 01, 2017, the sale and registration of non-BS-IV vehicles to liquidate stocks were felt necessary. As a result, an appeal was made before the Supreme Court of India. On March 29, 2017, the apex court ruled that vehicles not complying with the Bharat Stage IV emission norms (non-BS-IV vehicles) including two-wheelers, three-wheelers, four-wheelers, or commercial vehicles would not be allowed to be sold in India by any manufacturer or dealer from April 01, 2017, i.e. just after two days. Similarly, the apex court prohibited registration of any non-BS-IV vehicle under the MVA, 1988 from April 01, 2017, except if it was sold on or before March 31, 2017.

The SC judgment caused a frenzy among the automobile manufacturers and dealers to liquidate their stock of non-BS-IV vehicles (mostly, BS-III vehicles) by March 31, 2017.

The automobile industry had an inventory valued at ₹17,300 Crore that they struggled to sell.[134] Automakers claimed that they had an unsold inventory of 8.24 lakh units of two-wheelers, three-wheelers, and commercial vehicles that conformed to BS-III standards. The resultant financial losses also triggered job losses across the industry. On the other hand, the SC judgment seemed to award an exemplary punishment so that environmental consciousness was taken seriously by the industry.

134. http://content.icicidirect.com/mailimages/IDirect_Auto_SectorUpdate_Mar17.pdf.

This is one of those cases where a judicial decision caused an economic disruption which could have been entirely avoided if the government and the auto industry had acted in harmony and on time. The SC could have spelt out an alternate remedy and avoided unnecessary disruption in the auto sector and the economy. Delivering such a judgment would have required a more diligent approach by the court, which it could have adopted via the creation of an expert committee to assist it.

How it all Began?

Global warming and climate change are some of the threats confronting the survival of present and future generations. These threats have principally emerged from the process of industrialisation and the related burning of fossil fuels such as petrol and diesel, and coal.

The transportation sector and the automobile industry have led to an increase in the concentration of greenhouse gases such as Carbon Dioxide, Methane, Nitrous Oxide, and Hydro Fluoro Carbons in the atmosphere, thus disrupting the ecological and social systems across the globe. The rapid growth in the automobile industry and the increasing number of vehicles being used have become one of the major causes of the phenomenal rise of air pollution in India as well as other developing countries. Though air pollution is caused by several factors, the dramatic rise in vehicular emissions has contributed majorly to the problem.[135]

Against this backdrop, the issue of air pollution regulation was first brought to the SC through a PIL filed by a public-spirited advocate, M.C Mehta on December 17, 1985. The petition highlighted the rising levels of air pollution and pleaded the court to direct the government to implement the Air Act of 1981 in Delhi.[136]

In response to the PIL, in 1986, the SC directed the Delhi administration to file an affidavit specifying steps taken to reduce

135. http://164.100.47.193/lsscommittee/Petroleum%20&%20Natural%20Gas/16_Petroleum_And_Natural_Gas_5.pdf

136. Narain, Urvashi & Bell, Ruth Greenspan, 2005. "Who Changed Delhi's Air? The Roles of the Court and the Executive in Environmental Policymaking," Discussion Papers 10466, Resources for the Future.

pollution. Going forward, as the problem of air pollution gained prominence in the subsequent years, the Central Government on its initiative also set vehicular emission standards in 1990.

The process of revising vehicular emission standard norms in India has evolved over the years. In this regard, in 1991, a committee was set up under Prof H.B. Mathur, of the Indian Institute of Technology, Delhi, including a subcommittee[137] under him, headed by S Raju of Automotive Research Association of India, to recommend vehicular mass emissions standards for 1995 and 2000.[138]

Another committee headed by Retd Justice K.N. Saikia, called Saikia Committee, was constituted by the Supreme Court of India in *M.C. Mehta vs Union of India*, 1991 SCC (2) 353, to address the issue of vehicular pollution in Delhi and devise a solution to the pollution problem. The committee came into effect in March 1991 and made multiple prominent recommendations[139] on phasing out leaded fuel and increasing the use of Compressed Natural Gas (CNG) as an alternative fuel.

A decade later, the government woke up and in 2001, appointed a panel headed by the noted scientist R. A. Mashelkar, Director General of the Council of Scientific and Industrial Research (CSIR). It was set up to outline the country's roadmap for vehicle emission norms. Based on the recommendations of this committee, the government in 2003 announced the NAFP to implement Bharat Stage Vehicular Emissions norms popularly known as BS norms. The policy, in effect, provided a roadmap for vehicular emissions and fuel upgradation.

Given that setting of emission standards had to be preceded by the availability of the right kind of fuel, the BS-IV norm was applied only to vehicles sold in 13 cities where the government was ready to

137. To recommend methodology of evolving standards, requirement of fuel of appropriate quality, target date for future mass emission, etc.

138. https://www.downtoearth.org.in/indepth/smog-inc-27009.

139. Central Pollution Control Board (CPBC) also constituted a committee to recommend evolving mass emission standards. In its final meeting held on May 04, 1992, the CPCB made several recommendations to the Saikia Committee on mass emission standards. The author was a member of this committee.

supply the required fuel.[140] Overall, there was much confusion and automobile companies blamed the oil companies and vice versa.

Implementation of BS Norms

India's first emission standard was called 'India 2000'. It required re-tuning of the carburettor, secondary air intake system, exhaust gas recirculation system, and better catalyser capacity, amongst other things, in automobiles Then came BS-II, which is marked by a significant change: the replacement of the carburettor by a Multi-Point Fuel Injection (MPFI) system. The norm imposed maximum permissible limits on carbon monoxide and sulphur content in vehicular emissions.

BS-III regulation standards came into force after the implementation of the National Fuel Policy in 2003. It introduced stricter norms such as that in regard to sulphur content and led to a remarkable reduction in emissions from petrol-powered passenger vehicles. Ministry of Shipping, Road Transport and Highways mandated registration of vehicles complying with BS-III emission norms in select cities, which included Delhi, Ahmedabad, Bangalore, Mumbai, Pune and Kolkata. In other words, only BS-III compliant vehicles manufactured on or after April 01, 2005 were allowed registration in these cities. However, it was clarified for practical reasons that BS-I and BS-II compliant vehicles could be registered in these cities until the accumulated stock was exhausted in other areas of relevant States, thereby adopting a staggered approach for phasing out older vehicles.

Subsequently, in 2009 a notification was issued to amend the Central Motor Vehicles Rules, 1989 (Rules 1989) and Mass Emission Standards (BS-III) for two- and three-wheeler vehicles and Mass Emission Standards (BS-IV) for four-wheeler vehicles manufactured on or after April 1, 2010. BS-IV emission norms for four-wheelers manufactured on or after April 1, 2010 were made applicable in National Capital Region (New Delhi and suburbs in neighbouring

140. https://www.thehindubusinessline.com/economy/new-fuel-emission-norms-auto-oil-firms-continue-blame-game/article20612236.ece1.

states), Mumbai, Kolkata, Chennai, Ahmedabad, Bengaluru, Hyderabad (including its twin city Secunderabad), Kanpur, Pune, Surat and Agra.

This was followed by a notice issued in 2010 by the Ministry of Road Transport and Highways (by this time Shipping was spun into an independent ministry housed in Transport Bhavan, New Delhi) regarding registration of four-wheeler vehicles with effect from April 1st, 2010. The notice laid out that BS-III compliant vehicles could be registered even after April 01, 2010 till the accumulated stock was exhausted. The Principal Secretaries (Transport) and Transport Commissioners of States and Union Territories were accordingly required to obtain the stock details of BS-III compliant vehicles from the automobile dealers in their region.

Soon after, an amendment was made to sub-rule (15), Rule 115 of Rules 1989 to make BS-IV emission norms applicable in Sholapur and Lucknow for four-wheelers manufactured on or after June 01, 2010.

In 2012, the Government of India constituted another expert committee, this time under the Chairmanship of Saumitra Chaudhury, the then Member of Planning Commission and the Prime Minister's Economic Advisory Council to review the NAFP of 2003. A need was felt to review the 2003 policy on account of the technological and other changes that had unfolded rather rapidly. It may be noted that the 2003 policy itself envisaged periodic review keeping in mind the dynamic nature of the auto industry, innovation and economic growth.

In May 2014, the Saumitra Chaudhary Committee came out with a report on Auto Fuel Vision and Policy, 2025 recommending a detailed country road map for auto fuel quality till the year 2025. This pan India road map proposed the introduction of BS-IV, BS-V and BS-VI auto fuels in the country as under:

- BS-IV - by April 01 2017, in the entire country
- BS-V - by April 01, 2020, in the entire country
- BS-VI - by April 01, 2024, in the entire country

See Annexure 1 for details.

The MoPNG accepted the recommendations and issued an order in this regard in January 2016 while also considering a proposal to

leapfrog from BS-IV to BS-VI auto fuels by April 01, 2020, instead of stepwise up-gradation from BS-IV to BS-V and then BS-V to BS-VI. This was a significant departure from the draft notification in November 2015 of MoRTH notifying the dates for implementation of BS-V norms as April 01, 2019, and BS-VI norms as April 01, 2021.

In the meantime, i.e., in 2014, several amendments were carried out in Motor Vehicles Rules. For instance, Sub-rule (16) was inserted in Rule 115 of Rules 1989 to ensure that new two-wheelers complied with BS-IV emission norms manufactured on and after April 01, 2016, and existing two-wheeler models complied with BS-IV norms from July 01, 2017. Similarly, another amendment was made to the sub-rule (15), Rule 115 of Rules 1989 to make BS-IV emission norms applicable to several other cities for four-wheelers manufactured on or after October 01, 2014, except four-wheeler transport vehicles plying on Interstate Permits or National Permits or All India Tourist Permits within the jurisdiction of those cities.

Then on March 03, 2015, a memorandum was issued by MoRTH stating the intent of having only BS-IV compliant vehicles manufactured after April 01, 2017. The inventory of old vehicles manufactured until March 31, 2017, was to be, however, protected and registered.

In May 2015, the Parliamentary Standing Committee on Petroleum and Natural Gas submitted a report to the Parliament examining Auto Fuel Policy, 2003 and the Expert Committee Report under Saumitra Chaudhuri on Auto Fuel Vision & Policy 2025. See Annexure 2 for details.

Amongst other things, the Standing Committee noted that BS-IV fuel, first introduced for 11 cities where it had to be made available by April 01, 2010, was later meant to cover 50 additional cities by March 2015. In light of the fact that this could only be done for 26 of the 50 cities, a roadmap was needed to not only cover 50 cities but the entire country so that 'One Country, One Fuel Norm' could be ushered in.

In this regard, amongst other things, the Standing Committee noted that the recommendation contained in the Auto Fuel Policy &

Vision, 2025 on the adoption of BS-IV fuel in the entire country by April 2017 should be followed to accomplish the objective.[141]

Consequently, a few more amendments were introduced on June 12, 2015. First, Sub-rule (17) was inserted in Rule 115 of Rules 1989 to ensure that new three-wheelers manufactured on or after April 01, 2016, and existing three-wheeler models manufactured on or after April 01, 2017, complied with BS-IV emission norms. Second, an amendment was also made to the same rule to make BS-IV emission norms applicable for four-wheelers manufactured on or after July 15, 2015 in more cities. Finally, on August 19, 2015, an amendment to mandate BS-IV norms to be applicable all over the country for four-wheelers manufactured on or after April 01, 2017, was introduced.

First Signs of Trouble!!

About 14 months later in October 2016, the first signs of trouble started to surface. The EPCA met with the representatives of the Society of Indian Automobile Manufacturers (SIAM), where SIAM was on board with the manufacturing of only BS-IV-compliant vehicles after April 01, 2017.

However, EPCA also directed that non-BS-IV vehicles should not be sold or registered after April 01, 2017. This effectively meant that manufacturers had only six months to plan the production and disposal of their existing inventory.

SIAM highlighted concerns on compliance and wrote to the Central Pollution Control Board (CPCB) that EPCA's direction of 'no sale or registration' of non-BS-IV vehicles was at variance with the periodic rules and notifications issued by the Government of India. It argued that at no point had the government indicated that it would ban the sale or registration of BS-III vehicles after April 01, 2017. Incidentally, even after numerous back-and-forth communications involving EPCA, SIAM and CPCB, not much changed. (See Annexure 2.3 about production data of BS-III and BS-IV vehicles submitted by SIAM).

141. http://164.100.47.193/lsscommittee/Petroleum%20&%20Natural%20Gas/16_Petroleum_And_Natural_Gas_5.pdf

It is, however, interesting to note that not all auto manufacturers held the same view as SIAM. Bajaj Auto Limited, for instance, was one company that held a different view to that of SIAM. The company was of the view that the government's cut-off date of April 01, 2017, was for sales and registration of BS-IV vehicles and not just for the production of vehicles with the new norms. It also felt that the automobile companies had enough time to clear the inventory. In one of the statements, its Managing Director, Rajiv Bajaj, even said on record that the auto industry *'has been conditioned to be pushed and kicked into adhering to new norms'*.

The Matter Moves to Supreme Court

In the above background, a petition was filed by Bajaj Auto Limited[142] on March 06, 2017, praying that an order be passed by the Supreme Court directing the Government of India and/or EPCA to issue a communication that all vehicle manufacturers on or after April 01, 2017, would not manufacture, sell or register vehicles that are not BS-IV compliant. After notices were issued and interventions were filed by SIAM and association of dealers, Amicus Curiae in the case, Senior Advocate Harish Salve, also filed an application[143] praying that non-BS-IV vehicles shall not be manufactured, sold and registered on and after April 01, 2017.

The core issue of the petition was whether the accumulated stock of BS-III vehicles manufactured on or before March 31, 2017, could be sold and registered after April 01, 2017.

Arguments by Different Parties

Government's Position on BS-IV Vehicles

The office memorandum issued by MoRTH on March 03, 2015, and the additional notifications issued by various ministries with respect to the matter highlighted that while the government intended to have only BS-IV compliant vehicles manufactured after April 01,

142. I.A. No. 487 of 2017.

143. *Ibid.*

2017, the government did not intend to prohibit sale or registration of BS-III vehicles manufactured by March 31, 2017. This was in line with the precedent of the implementation process adopted by the Government for BS-II and BS-III norms.

In this regard, it is pertinent to mention an earlier instance from 2010 when the government issued a clarification stating that BS-III compliant vehicles could be registered in listed areas even after April 01, 2017, i.e. till the accumulated stock was exhausted but there was no intention to permit the manufacturers and dealers of motor vehicles to continue manufacturing and sale of non-compliant vehicles after April 01, 2017.

The government also informed the SC that it had invested ₹30,000 crores to make BS-IV standard fuel available throughout the country from April 01, 2017. This investment was in accordance with the implementation of the Auto Fuel Policy and the report of the Saumitra Chaudhry Committee to transition to BS-IV emission norms and reduce vehicular pollution.

Position of Manufacturers and Dealers

Manufacturers and Dealers (referred to as interveners) maintained that in line with the government notification, they were entitled to manufacture and sell non-BS-IV vehicles till March 31, 2017. In other words, they maintained that from April 01, 2017, manufacturers had to manufacture only BS-IV vehicles, and thus the sale of non-BS-IV vehicles ought not to be prohibited on and from April 01, 2017. They argued that the apex court ought to interpret the notifications issued by the government from time to time in a liberal manner. They also held a view that the number of BS-III vehicles in comparison to the total number of vehicles in the country was minuscule, and thus allowing the sale of those vehicles would not significantly pollute the air. In sum, they requested that a reasonable time be given to them to dispose off the existing stock of BS-III vehicles.

Amicus Curiae's Position

Harish Salve was appointed as Amicus Curiae to advise the apex court on interpreting the notifications issued by the Government.

The noted lawyer recommended a purposeful rather than literal interpretation of the notifications. Additionally, he requested the court to consider the case as a matter of public health and public concern. To this end, he argued for a ban on the sale and registration of non-BS-IV vehicles from April 01, 2017.

Surprisingly, Salve did not look at the economic aspects of the ban or seek a balanced approach to deal with the public health adversity. In any event, the public was already being faced with poorer emission norms and a few more months would not have mattered much. This happened in March 2017.

In September 2019, in an interview with a news portal, Salve said that the Supreme Court is to be squarely blamed for the current economic slowdown, beginning with the 2G case and later the Coalgate matter. In this interview, he also spoke about the adverse impact on foreign investments. In the BS-IV case, there were foreign investors in the automobile sector also, who were quite shaken up. Alas, Salve did not speak about it for obvious reasons.

Furthermore, even after hearing Salve's arguments, the Court could have looked at other options including levying a heavy fine on the automobile manufacturers which would have been an appropriate remedy. The monies collected as fines could have been dedicated to environmental protection and education, and to healthcare facilities to be used for respiratory ailments, which may have been caused by air pollution.

Supreme Court Judgment

Having considered all views, the SC held a view that the matter had important public health implications and fell under the overall rubric of Article 21 of the Indian Constitution, i.e. Citizen's Fundamental Right to Life and Liberty. Accordingly, the SC on March 29, 2017,[144] held that no non-BS-IV vehicle including two, three, and four-wheelers and commercial vehicles would be sold by any dealer or manufacturer across India on and from April 01, 2017. Further, all non-BS-IV vehicles were prohibited from registration on and from

144. M. C. Mehta vs. UOI, AIR 2017 SC 2430.

April 01, 2017, except if such non-BS-IV vehicles had been sold on or before March 31, 2017. The detailed order with the reasoning was issued on April 13, 2017.[145]

The apex court also reacted to the fact that in earlier cases Government of India had permitted the sale and registration of BS-I and BS-II vehicles after the date beyond which manufacturing of such vehicles was prohibited. In its reaction, the court said, that in this case, the industry failed to give the court a timeline for the disposal of accumulated stocks of BS-III vehicles.

In the court's view, the automobile industry had a minimum of five years to plan its activities and strategise its production towards BS-IV vehicles. The court mentioned that the approach of the manufacturers indicated a lack of planning and concern towards actual intent and environment. The court also noted that the government had brought in notifications in a phased manner to allow the auto industry and marketing strategists enough room to gradually manage their commercial affairs.

Therefore, the apex court was of the view that the interpretation of government notifications has to be purposive. The SC also noted that the use of BS-IV auto fuel reduces particulate matter by 80 percent as compared to BS-III auto fuel and was therefore critical to public health. It is for this reason that the Government of India had expended through its refineries an amount of ₹30,000 crores for making BS-IV quality fuel available by April 01, 2017 to implement the Auto Fuel Policy and the recommendations of the Expert Committee. The court noted that the huge investment of tax-payers' earnings could not be defeated by the commercial interest of automobile manufacturers.

In sum and substance, the SC suggested that the language of the notifications could not reasonably be interpreted as a carte blanche to the automobile industry to continue the manufacture of BS-III compliant vehicles till the very last day and then plead the necessity of clearing accumulated stock of BS-III vehicles. This would be tantamount to the mockery of the efforts of all concerned

145. M. C. Mehta vs. UOI, 2017 (2) ACC 597.

in regulating vehicular emissions and the right to life guaranteed by Article 21 of the Constitution to breathe less polluted air.

The court also directed its attention to the notification by the EPCA regarding non-BS-IV vehicles post-April 01, 2017 and observed that SIAM failed to take caution of EPCA's notification. The court, however, permitted registration of BS-III vehicles that were purchased before March 31, 2017.

Surprisingly, while the Saikia Committee, which the Supreme Court had constituted in 1991, played a significant role in addressing vehicular pollution, it did not find a mention or precedence in the BS-IV judgment. Relying on the Committee's recommendation on leaded fuel, the SC had set a precedent of 'phasing out' leaded fuel rather than disrupting the automobile industry with a short and unrealistic deadline as in the BS-IV case.

Even more surprising is the fact that neither the SC nor the industry seems to have focussed on the fact that compliant fuel was still not available uniformly around the country.[146] On SC's part, while it invoked the Saumitra Chaudhary Committee report, it failed to quiz parties on some important aspects of this report.

For instance, important to note here is the fact that 'One Country One Fuel Norm' was not only necessary from the perspective of emissions, but also because of another issue, i.e. if BS-IV vehicles were tanked up with BS-III fuels, significant damage was possible to the engine and systems – a fact highlighted in Saumitra Chaudhary Committee Report.[147]

On the other hand, the report also noted that if *BS-IV fuel could be rolled out at one shot across the country within a year that would undoubtedly be the best solution. However, refineries even working to a very tight schedule would take much longer to switch over to complete BS-IV output, therefore requiring the changeover to be a graduated process.*

146. https://www.thehindubusinessline.com/companies/availability-of-bs-iv-fuel-not-compliance-the-issue-siam/article9606548.ece.

147. http://www.indiaenvironmentportal.org.in/files/file/Report%20of%20the%20Expert%20Committee%20on%20Auto%20Fuel%20Vision%20&%20Policy%202025.pdf.

Given this situation, the government and the SC should have been more considerate towards consumers and the industry.

Another factor that the SC overlooked is that there are generally four parameters that determine emissions from vehicles. These include Vehicular Technology, Fuel Quality, Inspection & Maintenance of In-Use Vehicles, and Road and Traffic Management.[148] Ideally, emission reduction should be seen in an integrated way with equal emphasis on each of these parameters. However, in reality, there is usually an undue focus on the first two parameters. Perhaps, this is because the last two parameters require a substantive effort in regard to on-the-ground implementation. Therefore, merely stopping the sales of vehicles was not expected to result in substantive improvements.

Economic Impact of Non-BS-IV Vehicles Ban

The Indian automobile industry is one of the biggest contributors to the Indian economy, which was growing rapidly at the time of the ban. In addition to employing 3.7 crore people, directly and indirectly, the automobile industry contributed about 7.5 percent to the country's GDP[149] and 49 percent to the manufacturing GDP[150] in favourable economic conditions.

After the SC's ban on sale and registration of non-BS-IV vehicles from April 01, 2017, almost all the dealers and automakers rushed to dispose off over eight lakh units of BS-III compliant inventory through flash sales and discounts.[151] The estimated value of the inventory was ₹17,300 crores. See Annexure 4 for details.

The judgment created panic and uncertainty over the inventory of vehicles and their registrations and led to piling up of stocks in the stockyards of Original Equipment Makers (OEM). Mahindra

148. http://www.siam.in/technical-regulation.aspx?mpgid=31&pgidtrail=33.

149. https://economictimes.indiatimes.com/industry/auto/auto-news/when-indias-economy-is-growing-at-about-7-then-how-could-auto-industry-be-hurting-so-badly/articleshow/69075048.cms?from=mdr.

150. https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/auto_track_quarterly_update.pdf.

151. https://auto.economictimes.indiatimes.com/news/industry/what-does-bs-iii-vehicles-ban-mean-to-stake-holders/57940912.

and Mahindra stated that the unexpected order from the SC would have a one-time material impact. Tata Motors released the following statement on March 29, 2017:

> "The decision by Hon'ble Supreme Court to ban sale of all BS-III vehicles from April 01, 2017 is an unexpected and unprecedented move that will have a material impact on the entire automotive industry, OEMs' and dealer networks. The industry had planned the current transition into BS-IV in line with the accepted past practice of stopping production of earlier emission standard vehicles from the transition date. In the context of this previous experience, this decision by the apex court is 'penalty' to the entire automotive industry"[152]

The industry had two choices, either to export the existing BS-III vehicles after offloading the maximum quantity by March 31, 2017 under heavy discounts or retrofit the entire lot into BS-IV compliant vehicles. The second option also required investment of time and resources including transportation charges, labour and fitment of items adhering to BS-IV. A report by CRISIL estimated a loss to the auto industry of about ₹1200 crores on account of discounts alone[153] for commercial vehicle manufacturers, while the ICRA estimated a loss of ₹600 crores for the two-wheeler industry. BS-III two-wheeler vehicles including bikes and scooters were sold with discounts up to 30 percent.[154] See Annexure 4 for impact on profit of the companies.

Most importantly, the ban not just impacted the manufacturers, but also the dealers in a significant way. Close to 90 percent of the BS-III vehicle inventory was held with the dealers. The two-wheeler dealers were most impacted as the volume of inventory was the highest for them out of all the segments. SIAM reported that over 1.2 lakh units remained unsold across India. Most of these vehicles, either two-wheelers or commercial vehicles were part of the dealers' inventory. No wonder, therefore, that this led to an additional loss

152. https://www.tatamotors.com/press/official-statement/.

153. https://www.imtma.in/files/publications/Machine%20Tools%20User%20Industry%20Updates%20%20Q1%202017.pdf.

154. http://indiafa.org/health-wealth-automotive-dilemma/.

for OEMs towards retro-fitment of the unsold vehicles to make them BS-IV compliant.[155]

Further, to address the challenge of unsold inventories, the companies started exploring export markets and converting vehicles to BS-IV. Almost ₹1300 crores was incurred as the cost of disposal of the unsold inventory (including exports). The cost of the vehicles was also increased by 8-10 percent during the process of conversion from BS-III to BS-IV. See Annexure 4 for details on cumulative abnormal returns for the industry, as a result of the ban.

According to Ashok Leyland's (AL) Annual Report 2017-18, the company reported an inventory of 9,572 BS-III vehicles as of March 31, 2017. Out of this, AL exported 2,449 vehicles to countries with BS-III norms in practice and the remaining 7,123 vehicles were identified for conversion to BS-IV norms.[156] In the subsequent Annual Report 2017-18, AL reported that in FY2018, they sold off 93 percent of the inventory of the BS-III vehicle that was outstanding as of March 31, 2017.[157]

Hero Motorcorp Ltd, in its Annual Report 2016-17 reported that the two-wheeler industry reported a double-digit growth pre-demonetisation, but a negative growth post-demonetisation until the end of the financial year. Importantly, the company noted that when the industry started to show recovery signs around February-March 2017, the same was hampered by the sudden migration from BS-III to BS-IV emission norms.[158]

Tata Motors Ltd. in its Annual Report 2016-17 reported that while the company improved its income from operations, it, however, witnessed lower Earnings Before Interest than the previous year. The company listed factors such as demonetisation, weak

155. https://economictimes.indiatimes.com/bs-iii-vehicles-ban-two-wheeler-industry-took-rs-600-Crore-hit/articleshow/58461951.cms?from=mdr.

156. https://www.ashokleyland.com/documents/1305159/1312385/Ashok_Leyland_+Annual_Report_2016-17.pdf/c1fb618c-b9c3-9f07-4c27-9835a17da33c.

157. https://www.ashokleyland.com/documents/1305159/1312565/Ashok+Leyland++-+Annual+Report+2017-18.pdf/efc413bf-bad9-eb72-0f0e-973dc4fcc19c.

158. https://www.heromotocorp.com/en-in/uploads/Annual_Reports/pdf/20170615081147-pdf-23.pdf.

replacement demand, lower than expected pre-buying ahead of BS-IV implementation, etc.[159]

Tata Motors also reported that the domestic demand for commercial vehicles was volatile due to the implementation of GST, demonetisation, and change from BS-III to BS-IV leading to a fall in 0.8 percent of sales of commercial vehicles. The company also reported a charge of ₹147 crores relating to BS-III vehicles inventory, signifying that the stock of BS-III vehicles could not be sold off as of March 31, 2017. It made a special note that this amount does not include a higher level of customer discounts and variable marketing expenses in March 2017 to support a higher level of retail sales.

According to the research firm Nomura, the Net Profit margins of the automobile firms were also adversely impacted by this ban.

The judgment adversely affected the valuation of auto companies' in the share market. On the date of the announcement of the ban, automobile shares tanked as expected. Although BSE Sensex and NSE Nifty were up by 73.96 points and 25.55 points respectively on that day, S&P BSE Auto sector and S&P Nifty Auto were down by 186.89 points and 42.05 points respectively. More specifically, those automobile manufacturers who had a large amount of unsold BS-III vehicles in their inventory experienced a major blow. See Annexure 2.4 for details.

As indicated earlier, overall, it has been found that the shareholders of the automobile industry had suffered an erosion of ₹8839 crores (approximately) in their wealth on the day of the announcement of a ban on BS-III vehicles. This indicates that the investors penalised the industry for its 'wait-and-watch' approach and lack of proactivity.[160]

In addition to the above, the Supreme Court order also created a great degree of confusion amongst many Regional Transport Offices (RTOs), in states like Delhi, Telangana, Andhra Pradesh, Tamil Nadu, and Uttar Pradesh. The confusion was mainly with regards to new

159. https://www.tatamotors.com/forcedownload/?att_id=Fbighu2fQZNtjYgHFDrIvQ==&file=AKZ1zkelHCICIevLYzHkRQ.

160. http://indiafa.org/health-wealth-automotive-dilemma/.

Construction Equipment Vehicles (CEVs). RTOs turned down the registrations of tractors and CEVs as they fell into the four-wheeler category. An estimated 25,000 tractors and over 1,500 units of CEVs were not registered by RTOs. This affected several people involved in this sector, right from daily wage earners to component manufacturers as OEMs had to cut down production.

Farmers who bought new tractors in these states were stuck as the vehicles were not registered. Even though the number of such cases was relatively small, it did disrupt the livelihood of thousands of rural folk. Consequently, the Supreme Court had to clarify that farming vehicles like – tractors, combine harvesters and CEVs were exempted from the ban.

Conclusion

While the economic impact mentioned in this chapter is not exhaustive, it gives an idea of the scale of disruption. That said, this case presents its complexity. The Supreme Court went the whole hog in punishing the industry as it based the judgment on the intent and purpose of the Auto Fuel Policy. Its core argument was that the timelines of graduation to a particular emission standard were known to the industry well in advance. They were clearly articulated in the policy documents as well. The fact that some of the auto firms had prepared themselves for graduation is a testimony to that fact.

Be that as it may, the judgment reveals several other chinks. For instance, it was ineffective in containing the plying of BS-III vehicles after the cut-off date. The problem of air pollution due to emissions was shifted but not curbed.

One question remains: how could such a ban on sale across the whole country be imposed when the compliant fuel was not available[161]? The availability of BS-IV fuel across the whole country

161. This reminds me of another anomaly in a similar case. Diesel vehicles, buses, auto rickshaws and taxis, were prohibited in Delhi vide a Supreme Court order in March, 2001 and asked to run on CNG. Alas, the infrastructure for supply of CNG in Delhi is bad even today, when one can see big lines of vehicles outside petrol pumps which also sell CNG.

was highlighted as one of the concerns of the industry. The President of SIAM and MD of Ashok Leyland commented:

> "While no one pushed for BS-IV fuel availability for 7 years to change over faster, this sudden decision – just a few days before the changeover - is rather unfortunate as it causes undue stress on the entire industry, and causes loss of jobs. Auto Industry, anywhere in the world, requires a stable and predictable policy which allows for long term planning and investments".[162]

SIAM in another statement highlighted that while the industry had the capability of making BS-IV vehicles since 2010, however, the lack of availability of BS-IV compliant fuel restrained the industry from selling the vehicles nationwide. It is also important to note that running a BS-IV vehicle on BS-III fuel can cause severe damage to the vehicle.[163]

Furthermore, vehicular emission reduction needs to be seen in an integrated way as a combination of several aspects, such as, Vehicular Technology, Fuel Quality, Inspection & Maintenance of In-Use Vehicles, and Road and Traffic Management. Compliance with emission norms is but one of the many things. Without an integrated approach, public health benefits would remain sub-optimal.

The judgment had a massive impact on the economy, though setting out an exemplary punishment while placing public health on the top of the governance agenda. What was odd is that the apex court could have penalised the defaulting manufacturers through heavy fines to be used by the Government for public health and environmental activities rather than stopping the sale of such vehicles in select cities.

Lastly, the court was also ignorant of a public policy dilemma: on one hand 'One Nation, One Fuel Policy' was needed from the perspective of the health of the public as well as the vehicles whereas on the other, it required huge financial commitment by

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162. https://www.thehindu.com/business/Industry/bs-iii-vehicle-sales-ban-unfortunate-siam/article17738486.ece.

163. https://auto.economictimes.indiatimes.com/news/industry/bs-iii-vehicles-auto-industry-to-absorb-losses-over-rs-12000-Crore/57912101.

refineries and automakers. It is important to highlight this because it was an additional duty of the court to assess the readiness of key stakeholders before passing orders.

Postscript

We noted above that the country leapfrogged from BS-IV to BS-VI skipping the interim stage of BS-V four years before the planned dates. Availability of compatible fuel across the country was a major issue. Furthermore, the government also advocated an ethanol-based mix that would reduce the use of fossil fuels. Much investment has been taking place in our oil refineries to produce the right quality of fuel, but this may be a waste if moves from fossil fuels succeed.

For example, there is now a great thrust on producing electric and/or hybrid vehicles and also those that run on CNG which has no harmful emissions. Already many three-wheeler auto-rickshaws in our cities are 100 percent electric. New four-wheelers are being planned to run on electricity for which many manufacturers have started planning. Simultaneously infrastructure to provide electric charging stations across the country is also in the pipeline. All this is happening to reduce climate harm and improve the environment and public health in our cities.

Also, interestingly, while the courts have prohibited first/fresh sale of vehicles not complying with prescribed fuel standards after the cut-off date, resale has apparently not been prohibited. As a result, some creative businesses have found a way out by transferring such vehicles in names of their directors, friends, families, and dealers before the cut-off date, for being comfortably resold even afterwards. It appears that the courts have had no problem with this approach!![164]

164. Bombay HC quashes Maharashtra transport dept orders blacklisting BS-IV compliant vehicles first sold before cut-off date | Cities News,The Indian Express; https://indianexpress.com/article/cities/mumbai/hc-quashes-state-transport-dept-orders-blacklisting-bs-iv-compliant-vehicles-first-sold-before-cut-off-date-allows-resale-7875789/

Annexures

Annexure 2.1

Saumitra Chaudhary Committee for Auto Fuel Vision & Policy 2025[165]

The Government of India's Auto Fuel Policy (2003) had planned for periodic revisions in the policy, incorporating technological and other changes taking place over time. Against this backdrop, it was felt necessary to initiate a process to give form to an Auto Fuel Vision & Policy for the country which would lay a clear roadmap to the year 2025. Accordingly, the MoPNG vide Office Memorandum dated December 19, 2012, constituted an Expert Committee under the Chairmanship of Shri Saumitra Chaudhuri, Member, Planning Commission, Government of India to prepare a "Draft Auto Fuel Vision & Policy 2025".

Issues Reviewed by the Committee[166]

The Committee went into many issues in the course of its deliberations. The process was driven by the objective of making the transition to the higher standards of fuel in as short a time as possible and in a manner that stretched, without being impractical, the capability of the oil refineries and logistics involved in taking the product from the refinery to retail outlet.

A summary of the several issues that were gone into is given below:

- Review of initiatives taken by the Government and the Oil Industry for upgrading Auto Fuel Quality.
- Learning from the experience of implementation of the previous auto fuel policy initiatives and the status of various recommendations of the previous Expert Committee on Auto Fuel Policy.
- Health-related issues of emissions and review of the outcome of the Source Apportionment Studies in six Indian cities carried out by CPCB, February 2011.
- Global experience and developments on Auto Fuel standards.
- Review of current fuel specifications, including investigating the possibility of further tightening of the existing BS-IV fuel specification in respect of sulphur content.

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165. http://www.indiaenvironmentportal.org.in/files/file/Report%20of%20the%20Expert%20Committee%20on%20Auto%20Fuel%20Vision%20&%20Policy%202025.pdf.

166. http://www.indiaenvironmentportal.org.in/files/file/Report%20of%20the%20Expert%20Committee%20on%20Auto%20Fuel%20Vision%20&%20Policy%202025.pdf.

- Review of auto fuel quality parameters in Europe, USA, Japan, Republic of Korea and China vis-à-vis India.
- Simplifications in diesel specification.
- Major differences between BS-IV and Euro V & VI fuel standards.
- Bottlenecks in North East India in meeting future fuel quality.
- Review of refineries capable of producing superior fuels viz. BS-IV and BS-V gasoline and diesel.
- Change in refinery configuration/complexity needed to meet BS-IV and Euro V similar to BS-V fuels, including limitations if any, capital expenditure requirement, timeline, etc.
- Euro V equivalent BS-V fuel specifications.
- Fuel supply logistics.
- Roll-out plan for BS-IV gasoline and diesel nationwide.
- Public policy: Fuel prices, taxes, standards and regulatory regime in broader energy policy context.
- Fuel standards and roadmap for BS-V & BS-VI to 2025.

Annexure 2.2

Key Observations/Recommendations of the Parliamentary Standing Committee of Petroleum and Natural Gas, 2015

Implementation of Expert Committee Report on Auto Fuel Vision & Policy, 2025 Auto Fuel Policy of 2003 and the Expert Committee Report on Auto Fuel Vision and Policy, 2025 were vital public policy instruments at the disposal of the Government to address growing vehicular pollution in the country. The Committee, therefore, recommended that the Ministry chalk out an action plan for the implementation of Expert Committee's recommendations as per the timeline suggested or wherever possible earlier and adhere to the policy in letter and spirit. The Committee also expected the Ministry to review the implementation of the policy with the organisations concerned under its charge at regular intervals.

Setting up of Inter-Ministerial Mechanism at the Highest Level

The Committee observed that the implementation of Auto Fuel Vision and Policy 2025 requires concerted efforts on the part of several stakeholders including MoPNG, MoRTH, Ministry of Heavy Industries, Ministry of Environment & Forests (MoEF), Ministry of Urban Development, Automobile Industry and State Governments.

In this regard, the Committee was informed that MoRTH had constituted a Standing Committee on Emissions under the chairmanship of Joint Secretary (Transport). This was an Inter-Ministerial Committee to deal with various pollution-reducing measures with representatives from MoPNG, MoEF, CPCB and Department of Heavy Industry (DHI). The Committee noted that this Standing Committee on Emissions headed by JS (Transport) was a low-level Committee dealing only with the emission issue and as such probably not effective in dealing with larger and complex issues on important aspects requiring active involvement and coordination with other Ministries at the highest level.

The Committee felt that the implementation of the Auto Fuel Policy required a multisectoral approach due to the involvement of multiple agencies. The Committee, therefore expected the MoPNG to be proactive in playing a leading role to coordinate the implementation of various measures initiated by different stakeholders.

Therefore, the Committee, recommended that being the nodal Ministry for Auto Fuel Vision and Policy 2025, the MoPNG should work out modalities for constituting an inter-ministerial committee comprising of Secretaries of the Ministries concerned to deal with various policy issues relating to transport, environment and heavy industry sectors.

The Committee further desired that a study be conducted to assess the benefits arising out of the implementation of Auto Fuel Vision and Policy 2025 *vis-a-vis* the expenditure that would be incurred to implement the entire gamut of issues dealt with in the policy. According to my knowledge, no such study was conducted. This is pitiful because this would have helped the government to convince everyone about the benefits of the new policy.

One Country - One Fuel Norm

The Committee noted that NAFP envisages the phase-wise introduction of upgraded quality fuels to reduce vehicular emissions in the country. According to Auto Fuel Policy 2003, it was observed that BS-III quality fuels i.e. Motor Spirit (MS) and High-Speed Diesel (HSD) were proposed to be extended to the entire country by April 01, 2010, and BS-IV quality fuels to 11 major cities by April 01, 2010. Subsequently, the Government had decided to extend BS-IV quality fuel to 50 additional cities by March 2015.

However, BS-IV quality fuels were introduced only in 26 highly polluted cities by March 2015. The Committee felt that the successful implementation of BS-IV quality fuels for four-wheelers in 50 cities, had to be followed by the drawing and implementation of a road map for the introduction of BS-IV fuel all across the country to achieve 'One Country - One Fuel Norm' in the shortest possible time.

Further, the Committee observed that various existing logistical constraints for meeting the requirements of upgraded quality of fuels may be taken into consideration to realise this objective. In this regard, the Committee noted the recommendation contained in the Auto Fuel Policy & Vision, 2025 regarding the implementation of BS-IV fuel in the entire country by April 2017 in phases. The Committee further noted that the Expert Committee had also recommended further introduction of BS-V fuel by 2020 and BS-VI fuel by 2024. The Committee had been informed that there is no difference between BS-V and BS-VI fuel quality as both envisage sulphur content at less than 10 ppm. The Government had

informed the committee that it would like to introduce BS-VI quality fuel in the entire country by 2020.[167]

Regarding the implementation of uniform quality of fuels, the Committee observed that the presence of dual quality of fuel would hamper the effective implementation of mandatory fuel efficiency norms in the country. Further, it could also create confusion as there is low awareness among the public about the availability and usage of the right quality of fuel in the market.

In view of the above, as the required infrastructure for the production of BS-IV and BS-V/VI fuels was being developed in oil refineries, the Committee recommended that the Ministry strictly adhere to the implementation schedule for fuels in the entire country so that 'One Country - One Fuel Norm' became a reality: BS-IV by April 2017 and further BS-VI by 2020.

Upgradation of Oil Refineries

The Committee observed that the up-gradation of infrastructure by OMCs was indispensable for the implementation of uniform fuel quality in the country. The Committee was informed that to meet the fuel quality required by the Auto Fuel Policy, 2003, the oil refineries had till date invested over ₹35,000 crores for production and supply of BS-III and BS-IV gasoline and diesel fuels by upgrading their existing technologies. The Committee noted that expansion of BS-IV quality of auto fuels throughout the country required a massive logistical exercise on the part of oil refineries. The Committee was informed that the Ministry was considering a proposal to switch over directly to BS-VI auto fuel from BS-IV by 2020 instead of stepwise switching from BS-IV to BS-V by 2020 and then BS-V to BS-VI by April 2024 as there is no change in fuel quality from BS-V to BS-VI.

The Committee noted that some of the refineries in the public sector did not produce BS-IV quality fuel. For achieving the key objective of 'one country - one fuel' by 2017, it was imperative that all oil refineries in the country be upgraded in a phase-wise and timebound manner for the production of BS-IV quality of fuel.

In this regard, the Committee felt that the acceleration of up-gradation process of fuels by refineries at the earliest would certainly pave way

167. This was introduced in the country w.e.f 1st April, 2020. For more please see: https://www.thehindu.com/news/national/amid-lockdown-india-switches-to-bs-vi-emission-norms/article31231973.ece.

for the realisation of the 'One Country- One Fuel' norm in the country. The Committee, therefore, recommended that the Ministry monitor the projects of oil refineries for upgrading so as to ensure the rolling out of BS-VI quality fuel by all refineries in the country by 2020.

Mobilisation of Funds for Upgradation of Oil Refineries

The Committee observed that the upgradation of oil refineries for the production of BS-IV & BS-V/VI quality of auto fuels was one of the key components of the implementation of Auto Fuel Vision and Policy, 2025. The Committee had been given to understand that to meet the BS-IV quality of fuel, sulphur content in the fuel had to be brought down from 150 ppm to 50 ppm in MS and 350 ppm to 50 ppm in HSD. The Committee had also been informed that to meet this requirement, new process units for sulphur reduction, hydrogen generation and sulphur recovery had to be installed in the refineries and existing units revamped. Further, the Committee had learned that up-gradation of refineries for the production of BS-IV and BS-V/VI quality of auto fuels required huge capital expenditure to the tune of ₹80,000 crore. In this regard, mobilisation of funds was projected as a matter of concern for oil refineries.

The Committee observed that due to the declining trend in the prices of international crude oil and the minimal under-recoveries, the mobilisation of the projected capital expenditure of ₹80,000 crores for up-gradation of refineries would not be an insurmountable task for OMCs/ Government. Further, the Committee also noted that the Ministry had not decided about levying of High Sulphur Cess of 75 paise per litre on BS-III fuel to raise ₹10,000 crores and special fuel up-gradation cess of 75 paise per litre on all gasoline and diesel sold in India to mobilise approx. ₹64,000 crores to fund fuel up-gradation projects of refineries as envisaged in the Auto Fuel Vision and Policy, 2025. The Committee, therefore, recommended to the Ministry to decide at the earliest on the levying of cess for ensuring required funds for fuel up-gradation projects of OMCs.

Promotion of Alternate Fuels

The Committee noted that the Auto Fuel Policy, 2003 had envisaged the promotion of Research and Development (R&D) technologies for producing various alternative fuels like ethanol and biofuels from different energy sources. In this regard, the Committee was aware of the efforts initiated by the Government to promote various alternate fuels.

Further, the Committee noted that as per the Auto Fuel Vision & Policy, 2025 the Ministry of New and Renewable Energy (MNRE) had

devised National Hydrogen Energy Road Map with the objectives to identify the paths leading to the gradual introduction of hydrogen energy, acceleration of commercialisation efforts and the creation of hydrogen energy infrastructure in the country. The Committee further observed that given the depleting pool of hydrocarbon reserves, it is imperative on the part of the Government to explore the commercial viability of various non-conventional fuels like biofuels and hydrogen fuel.

The Committee also felt that the use of alternate fuels should be promoted for the sake of energy security and the reduction of vehicular emissions. The Committee urged the Government to earnestly monitor the progress of five percent mandatory blending of ethanol with petrol in the entire country and also ensure its availability.

The Committee also expected the Government to make sincere efforts to expedite the commercial viability of non-conventional fuels like bio-diesel fuel.

Further, it was felt that R&D activities should be stepped up to explore the commercial viability of hydrogen fuel. The Committee further recommended MoPNG coordinate with the MNRE to explore the feasibility of vehicles run with solar-powered batteries for the overall energy security of the country. The Ministry was also urged to explore various other forms of non-conventional fuels being used in advanced countries.

Promotion of CNG

The Committee observed that the Auto Fuel Vision and Policy 2025 had also laid emphasis on the use of CNG as viable fuel and it needed to be developed as a national mission. CNG, being sulphur-free, is an efficient and safe alternative fuel and vehicles running on it produce very less pollution and particulate matter in comparison to petrol and diesel vehicles. Moreover, CNG is much cheaper and India has also more natural gas reserves than petroleum reserves.

However, the Committee was unhappy to find that though CNG had been in use in India as an alternative auto fuel for more than a decade, its share in total automotive fuel was low. It was being supplied as an automotive fuel only in 44 Geographical Areas (GAs)/Districts in 13 states in addition to 47 locations in Gujarat, thus comprising a total of 969 fuel stations in the whole country. The Committee further observed that only 2.6 crore vehicles were served by these CNG Stations throughout the country which was a meagre number in comparison to approximate 15 Crore total vehicles registered in the country.

The Committee noted that in pursuance of its recommendation, the Petroleum and Natural Gas Regulatory Board (PNGRB) has begun the process of inviting bids for the Fourth, Fifth and Sixth rounds of City Gas Distribution network covering about 85 Geographical Areas/Districts in different States. The Committee while considering the environmental and economic benefits, expressed its dissatisfaction over the slow pace of expansion of CNG use in vehicles, particularly in metropolitan and semi-metropolitan cities including Delhi where air pollution has reached alarming levels. The Committee, therefore, recommended that the Ministry must give high priority for covering more and more areas under CNG so that ambient air quality could be ensured in the country.

Fuel Economy Standards

The Committee noted that one of the policy objectives of the Auto Fuel Policy was the mandatory declaration of fuel economy standards by the automobile manufacturers. In this regard, a sub-committee of the Standing Committee on Implementation of Emission Legislation (SCOE) constituted by the MoRTH had submitted its Report on 'Proposal for Fuel Efficiency Standards for New Passenger Vehicles' (M1 Category, two-wheelers and three-wheelers in India). Accordingly, the Ministry has initiated action to mandate fuel efficiency norms for M1 category vehicles of unladed weight equal to or less than 3500 kg and labelling of vehicles on fuel economy standards under CMVRs in consultation with the Ministry of Energy.

Further, the Committee noted that the Bureau of Energy Efficiency (BEE) in cooperation with the Petroleum Conservation and Research Association (PCRA) has also taken up the task of developing a methodology for fuel economy standards and labelling programme for passenger cars, i.e. Star Rating System. Further, it has been noted that this programme provides consumers with comparative information about the fuel economy standard of cars, with categories ranging from 'one star' to 'five star'.

The Committee noted that the declaration of fuel economy standards of new vehicles by automobile manufacturers would go a long way in helping consumers to know about the fuel efficiency of their vehicles. In this regard, the Committee expected the Ministry of Heavy Industries to accord equal priority to vehicular emission norms and the declaration of fuel economy standards of vehicles.

Further, the Committee hoped that given the rising cost of fuel, the star rating of fuel economy for new vehicles would not only help consumers

in their decision making but also spur competitiveness among automobile manufacturers to produce more fuel-efficient vehicles. The Committee, therefore, recommended that MoPNG coordinate the efforts of PCRA with BEE of the Ministry of Power for expeditious implementation of the labelling programme. According to my knowledge, the star energy rating of automobiles never took off. It is, however, very popular among electric equipment, particularly consumer white goods such as refrigerators and air conditioners.

Pollution Under Check System

The Committee noted that one of the policy objectives of Auto Fuel Policy, 2003 was the reduction of pollution in in-use vehicles. The Policy envisaged that the existing PUC system would be replaced and upgraded to a more reliable computerised system by April 01, 2015, for all categories of vehicles for ensuring better compliance.

In this regard, the Committee was informed that computerised PUC system for vehicles, along with data collection, was being constructed with positive results by some states such as Delhi, Karnataka and Andhra Pradesh. The same effort had been undertaken by other States but it had not taken off well thus far. The Committee learnt that the State Governments were facing manpower and resource constraints for the maintenance of computerised emission control checking systems.

Given the above, the Committee emphasised that an efficient mechanism for checking pollution from in-use vehicles was vital for bringing down pollution levels due to vehicular emissions. With the alarming rise of pollution levels becoming a major public health hazard in Indian cities, the Committee recommended that PUC centres should be set up in all the states of the country. Establishment of a centralised national data centre for collecting information from all PUC centres regarding polluting vehicles was imperative, according to the Committee. The Committee also desired that if required, a Plan Scheme may be formulated and specific funds allocated for the purpose. In this regard, the Committee expected MoPNG to play a proactive role to coordinate with the MoRTH and the State Governments to ensure that the ambient air quality in the country was satisfactory.

Inspection and Maintenance System

The Committee observed that a robust vehicle I&M system would enhance the overall safety and emission performance of vehicles plying on the roads and also would ensure better fuel efficiency of vehicles. The Committee observed that as per Auto Fuel Policy, 2003 I&M system was initially scheduled to be introduced in 11 major cities on an urgent basis and subsequently throughout the country.

Further, the Policy required the I&M system for all categories of vehicles to be put in place by April 01, 2005, in the National Capital Territory of Delhi, by April 01, 2006, in other 10 major cities, and by April 01, 2010, in the entire country. The Committee, however, had learnt that there had been an inordinate delay in setting up of I&M system in the country. The Committee had been informed that MoRTH had sanctioned 10 models of automated inspection and certification (I&C) centres, one each in 10 States, during the 11th Five Year Plan on a pilot basis. Further, the MoRTH had decided to sanction 10 more I&C Centres during the 12th Five Year Plan for which proposals were being sought from State Governments.

The Committee was concerned to note that one of the important objectives of Auto Fuel Policy, the I&M system, had not taken off at all. Based on its awareness that proper maintenance of existing vehicles would contribute towards the reduction of exhaust emission as well as improvement in fuel economy, the Committee, recommended that the MoPNG impress upon MoRTH the need to set up I&C centres in all important cities and towns to facilitate the successful implementation of Auto Fuel Policy.

The Committee also noted that under the existing provisions of the MVA, 1988 mandatory checks were required only for commercial vehicles while private vehicles were required to undergo a fitness test after 15 years before the validity of the registration certificate was renewed. Further, the Committee observed that the Sundar Committee which was set up in 2009 by the MoRTH to review the MVA had recommended the reduction of the periodicity of inspection and certification of private vehicles from the existing 15 years. The Committee had also learnt that the report of Sundar Committee had been circulated to all States to elicit feedback for further coordination on this matter. The Committee, therefore, expected the Central Government to prevail upon State Governments to provide feedback on Sundar Committee's Report at the earliest.

While acknowledging the importance of the Auto Fuel Policy document and its recommendation regarding the mandatory operationalisation of Inspection and Maintenance System by April 01, 2010, in the entire country, the Committee observed that the MoRTH had displayed a lackadaisical attitude in implementing the same by sanctioning only 10 centres each in 11th and 12th Five Year Plans respectively, thereby compromising the pursuit of the objectives of the Policy. The Committee, therefore, expected MoRTH to seriously review its role in initiating important measures to achieve the policy objectives of Auto Fuel Policy.

Vehicular Retirement Policy

The Committee learnt that under Section 59 of the MVA of 1988, the Central Government is entrusted with powers to fix the age limit for the retirement of motor vehicles. However, no age limit had been prescribed for the retirement of motor vehicles by the Central Government, given the socio-economic conditions of the country. The Committee observed that in the absence of retirement policy, it may not be possible to derive the intended benefits of air quality improvement.

Further, phasing out of old vehicles is an important requirement as the pollution levels from such vehicles is high even when high quality fuels are used. The Committee felt that the formulation of vehicle retirement policy would certainly go a long way in ensuring ambient air quality in the country. The Committee, therefore, recommended that the Ministry invoke the powers under the MVA of 1988 to fix an age limit for the retirement of vehicles without any delay by taking into consideration various parameters like mileage clock, emission levels, age of vehicles or other suitable criteria as may be decided by the Government.

Road Engineering and Mass Transport Systems

The Committee noted that one of the objectives of Auto Fuel Vision & Policy 2025 was to bring down emission reduction by improving the quality of auto fuel as well as by up-gradation for refineries,

While noting that the Policy had important objectives, the Committee highlighted some issues which needed to be factored in by all Ministries concerned to enhance the benefits of the Policy. The Committee pointed out that application of road engineering in design and condition of roads, location of signals, design of speed breakers, type of quality of the road, road gradient, etc. can play a very significant role in improving the fuel efficiency as well as emission levels of motor vehicles and can also reduce vehicle operating costs.

The Committee was also concerned with the growing use of personal vehicles, particularly automobiles for travel and transportation purposes in many parts of the country, especially in metropolitan cities which indicated the failure of public transport to cater to the needs of the common man. This could also be partly attributed to the inadequacy of public transport, lack of comfort, proper connectivity, etc. The Committee believed that a planned mass public transport system can bring a lot of benefits like lower pollution levels, decongestion of roads, less consumption of fossil fuels, lower accidents, etc.

Hence, the Committee felt that the Government should seriously review the urban transportation systems and adopt a holistic approach for ensuring last-mile connectivity so that there would be enthusiasm and willingness among the general public to use public transport systems. There would be an additional incentive to use mass public transport systems as these are cheaper than personal vehicles.

The Committee, therefore, desired that MoPNG should bring these issues to the notice of concerned Ministries like the MoRTH and Ministry of Urban Development to take appropriate measures and action about road engineering and mass public transport systems in the country to derive maximum benefits from the Auto Fuel Vision & Policy 2025.

Annexure 2.3

Production of BS-III and BS-IV Vehicles as Submitted by SIAM[168]

Name of Company	*January 2016 BS-III*	*December 2016 BS-III*	*February 2017 BS-III*	*January 2016 BS-IV*	*December 2016 BS-IV*	*February 2017 BS-IV*
Two Wheelers						
Hero Motor Corp Ltd.	5,32,078	2,98,839	63,026	Nil	33,078	4,40,275
Honda Motorcycle & Scooters India Pvt. Ltd.	3,63,805	1,91,534	2,30,022	13,644	7,583	1,45,217
India Yahma Motors	50,077	45,017	120	2,880	3,800	66,499
TVS Motor Company Ltd.	1,65,956	1,48,519	22,049	Nil	Nil	1,35,448
Three Wheelers						
Mahindra & Mahindra Ltd.	4,204	3,530	3,060	Nil	Nil	52
Piaggio Vehicles Pvt. Ltd.	12,730	7,287	4,388	Nil	Nil	6,366
Medium and Heavy Trucks, Others Commercial Vehicles						
Ashok Leyland	10,935	9,402	11,528	642	1,661	1,998
Mahindra & Mahindra Ltd.	12,001	8,708	11,287	2,600	4,605	6,096
Tata Motors	27,507	13,734	22,915	3,627	5,004	7,783

168. Ibid.

Annexure 2.4

Impact on the Auto Industry

Direct Impact on the Auto Industry[169]

Vehicle Segment	*No. of Units*	*Total worth (Market Value)*
Two wheelers	670,000	₹3,300 Crore
Three-wheelers	40,000	₹600 Crore
Passenger vehicle	16,000	₹900 Crore
Commercial vehicle	96,000	₹12,500 Crore
Total BS-III vehicles	>800,000	₹17,300 Crore

Source: ICICI Securities.

Net Profit Impact[170]

Inventory (Units)	*Total Cost (Cr)**	*Name of Company*	*Net Profit (estimated) FY 18 (Cr)*	*Loss in Net Profit (%)*
18,000	281	Ashok Leyland	1,435	19.6
11,300	149	Eicher	2,274	6.6
20,015	162	Mahindra & Mahindra	3,722	4.4
300,000	163	Hero MotoCorp	3,844	4.2
75,000	381	Tata Motors	14,249	2.7
65,000	9	Bajaj Auto	4,469	0.2

Note: * Net impact after exports, retrofitting, discounts and inventory carrying cost.

Source: Nomura Research.

169. http://content.icicidirect.com/mailimages/IDirect_Auto_SectorUpdate_Mar17.pdf.

170. In our understanding of the table, the total cost as mentioned in the second column is an additional cost or direct loss to the company on account of exports, retrofitting, inventory carrying cost etc. towards offloading the BS-III vehicles. While the companies still reported profits, the loss incurred due to additional activities impacted their net profit. That is why the estimated net profit in the fourth column is higher although the loss in net profit as in the fifth column shows the extent of loss.

Impact of Ban on BS-III Vehicles from April 01, 2017, on Automobile Firms/Industry Value

	Cumulative Abnormal Returns (CAR)					
	(-6, -1: %)	*(0, 0: %)*	*(-1, 1: %)*	*(-2, 2: %)*	*(-5, 5: %)*	*(-10, 10: %)*
Two Wheelers						
Bajaj Auto	-3.32	-0.22	-0.81	-2.08	-5.13	-1.75
Hero MotoCorp	-0.75	-3.71***	-5.13**	-5.90**	-6.63	-5.33
TVS Motors	-2.04	-1.02	-0.40	-0.50	-0.23	4.84
Four Wheelers						
Ashok Leyland	-2.40	-3.41*	-4.86	-3.83	-6.33	-8.70
Eicher Motors	-1.24	0.10	4.39	3.74	-0.13	5.29
Mahindra & Mahindra	-1.41	-0.92	-0.14	0.30	-1.62	-1.94
Maruti Suzuki	-3.13	-1.12	-2.33	-0.99	0.96	-3.16
SML ISZU	0.80	-1.51	-0.64	3.62	5.24	7.21
Tata Motors	-0.72	-1.66	-2.07	-2.71	-3.83	-6.56
Tata Motors (DVR)	-0.95	-1.42	-0.48	0.25	-0.93	-2.67
Industry average	-1.52	-1.49**	-1.25	-0.81	-1.86	-1.28
Volume-weighted portfolio	-1.94	-0.67	0.50	-0.20	0.31	-0.75
Nifty Auto Portfolio	-1.15	-1.03	-1.29	-1.07	-1.61	-1.82

Table 7 (Panel B). Impact of Ban on BS-III Vehicles from 1 April 2017 on Automobile MNC's ADRs

Honda Motor Company Ltd (HMC)	0.50	-0.13	-1.63	-2.31	-5.66	-5.09
Toyota Motor Corporation (TM)	1.53	-2.00	-2.62	-3.08	-4.51	-3.62
Tata Motors (TTM)	-0.60	-1.46	-3.26	-2.38	-1.77	-1.79

Note: *, ** and *** indicate statistical significant at 10 per cent, 5 per cent and 1 per cent levels, respectively.

Source: Estimated by authors.

Source: Impact of Automobile Regulations on Shareholders' Wealth: Indian Empirical Evidence, by Manoj Anand and Jagandeep Singh[171]

171. https://journals.sagepub.com/doi/pdf/10.1177/0972622518770833.

Lists of Affected Stocks

Company	*% Change*
Hero MotoCorp	-3.67%
Ashok Leyland	-2.66%
Bharat Forge	-1.13%
Eicher	-1.08%
Tata Motors	-0.95%
Maruti Suzuki	-0.65%
Mahindra & Mahindra	-0.61%

Source: www.zeebiz.com

3

Cancelling Coal Blocks Allocations

Could the SC have Salvaged the Situation?

Introduction

Coal in India has been mined since 1774 and huge amounts are extracted every year, with 777.31 million tonnes (MT) (provisional) extracted in 2021-22.[172] State-owned Coal India had a monopoly on coal mining between its nationalisation in 1973 and 2018.[173]

Liberalisation of the economy in the 1990s was marked by a liberalisation of the coal sector involving denationalisation and privatisation. However, this liberalisation was marked by opaqueness and exclusiveness in processes, the genesis of the case discussed in this chapter. Given that coal is a scarce natural resource and public property, its allocation should have been done with utmost transparency and ethics.

In 2004, an open bidding policy for coal mine allocation was officially introduced but could not be implemented due to political reasons accompanied by trade union resistance. Even the private sector showed lack of interest in the proposal though it claimed that it had the expertise to enter into the coal production business.

In 2012 the CAG suggested that the allottees of the coal blocks received a potential gain of an average ₹295/tonnes of coal mined by them, a portion of which could have potentially accrued to the exchequer if the bidding policy had been implemented. This figure was contested but the moot point was not so much the accuracy of

172. https://coal.gov.in/en/major-statistics/production-and-supplies

173. https://www.chathamhouse.org/2021/11/mining-indias-troubled-history-coal-and-politics

the figure but that of lack of transparency, and equity in continuing with a system that provided an opportunity for corruption, rent-seeking, and favouritism.

When the SC finally adjudicated upon the case in 2014, barring few exceptions, it cancelled all coal block allocations since 1993 through the Screening Committee (SCo) route. This was the year in which the SCo was set up by the Ministry of Coal (MoC) under the Coal Secretary to make recommendations on allocations for captive coal mines, particularly because there was a specific criterion for the allocation of coal blocks.

The SC held that the method adopted from 1993 onwards was cryptic and failed to meet the requirements of fairness, transparency, and non-discrimination. Many feel this amounted to over-enthusiasm.

The former Coal Secretary PC Parakh who had flagged the inefficiencies in the coal allocation process writes in his memoir that there was no case for an investigation into allocations made from 1993 to 2003. Even the CAG had not made any adverse observations in those allocations. He also criticised the SC for handing over the investigation to the Central Bureau of Investigation (CBI) – an authority, which he says, was grossly incompetent to investigate complex policy matters.[174]

I will disagree with this view because the issue before the court was corruption which is a criminal issue under the laws of our country. In so far as CBI's competence is concerned, it had to investigate the process involved in the allocation of mines rather than perform the role of the Geological Survey of India or Economic Offences Wing of the Ministry of Corporate Affairs. CBI does not claim or have the capability of any subject, except criminal laws, and if it needs expert advice it calls on relevant government bodies to assist it.

174. Parakh, PC. (2017). *The Coal Conundrum: Executive Failure and Judicial Arrogance*. Secunderabad.

Handing over the investigation to CBI can be called premature and overenthusiastic. It is somewhat equivalent to considering every death in the country as a potential murder and handing over the investigation to CBI. While this issue had gained prominence in light of state's apathy to save lives during the COVID pandemic, the question, like in coal block allocation, has always been: can the state act with more transparency, inclusivity, and fairness?

Be that as it may, the court decision resulted in a severe economic setback for the country. The judgment, to be seen as a punishment for the "potential" loss, had huge adverse implications for government revenue. More importantly, it came about even after the court was informed that huge investments worth lakhs of Crores were at stake and that its decision could lead to an adverse impact on several banks and enormous loss of livelihoods.

The big question is could the court have done anything differently and prevented or contained the harm to the economy?

History of Coal Block Allocation in India

In India, the Coal Block Allocation was governed under the following statutory framework:[175]

175. Post SC Judgment in 2014, there have been several regulatory amendments to the statutory framework.

Table 1

Coal Block Allocation in India

1976-93	• Coal Mines Nationalisation Act (CMNA) amended to allow captive mining for various specified end uses such as generation of power, production of iron and steel, production of cement, etc.
1993-2011	• Allotment of 200+ coal blocks through the Screening Committee and government dispensation routes
Sept 2010	• Amendment of Mines and Minerals (Development and Regulation) Act (MMDRA) to empower the central government to allocate coal blocks through competitive bidding to companies for specified end uses
Aug 2012	• Report by Comptroller and Auditor General (CAG) of India on coal block allocations tabled in Parliament
Sept 2014	• Allocation of 204 blocks cancelled by Supreme Court
Oct 2014	• First CMSP Ordinance promulgated
Dec 2014	• CMSP Bill, 2014 introduced in Parliament • Second CMSP Ordinance promulgated after Parliament fails to pass the 2014 Bill • New allocation methodology and rules finalised to initiate process of auctions and allotments
Jan-Mar 2015	• First two tranches of auction and first round of allotment concluded
Mar 2015	• CMSP Bill, 2015 introduced in Parliament • 2015 Bill passed by Parliament as CMSPA
Jun-Aug 2015	• Third tranche of coal auctions under CMSPA concluded

Source: Prayas (Energy Group), Coal Block Allocations: Opportunity lost, chaos gained?, December 2015.

India's Coal Policy has undergone dynamic changes since the inception of government deliberation over it after independence. To give due attention to the energy needs of the country, during the first five-year plan, the Central Government set up the Oil and Natural Gas Commission (ONGC) in hydrocarbon sectors and National Coal Development Corporation (NCDC) in 1956. In addition to this, the Central Government also acquired a 49 percent stake in Singareni Collieries Company Ltd (SCCL) with the State Government of Andhra Pradesh being the majority stakeholder. Thus, by the 1970s when the coal industry was nationalised, the government-owned two companies in the coal sector, while various smaller private companies were operating in the sector. Interestingly, in 1970-71, 55 million tonnes of coal were produced by the private sector out of the total of 73 million tonnes, while 18 million tonnes of coal was produced by the public sector companies.[176]

It is reported that while the energy needs of the country were increasing in the 1970s, the capital investment from mine owners and the working conditions of workers was dismal. All these factors encouraged the Government to nationalise the coal industry, which was carried out in two phases.

First, the Government enacted the Coking Coal Mines (Emergency Provisions) Act, 1971 in October 1971 to take control over the management of coking coal mines and plants pending nationalisation. After this, the Coking Coal Mines (Nationalisation) Act, 1972 was enacted to nationalise coking coal mines and plants other than those with Tata Iron & Steel Company (TISCO, now Tata Steel) and Indian Iron & Steel Company Limited (IISCO). Similarly, another law was enacted called The Coal Mines (Taking over of Management) Act, 1973 to take over the management of all coking and non-coking coal mines in the seven states of India.

Finally, with the Coal Mining (Nationalisation) Act, 1973 (CMN Act), 711 coal mines were nationalised and vested in the Central Government. 184 coal mines were transferred to Bharat Coking Coal

176. Parakh, PC. (2017). *The Coal Conundrum: Executive Failure and Judicial Arrogance*. Secunderabad.

Limited, a newly created undertaking by the Central Government and 527 coal mines were transferred to Coal Mines Authority Limited, another newly created organisation.[177]

In 1975, Coal India Limited (CIL) was incorporated, after which all the coal mines under the control of the Central Government were transferred to CIL.[178]An amendment was introduced to the CMN Act in 1976 through which coal mining was exclusively reserved for the public sector undertakings,[179] specifically for CIL and SCCL. This resulted in public sector ownership of all the coal mines except for coal mines held by TISCO and IISCO, as they were allowed to retain their mines.

Post-liberalisation India

Post liberalisation, owing to several development projects, power demand and hence the demand for coal from thermal power stations, the main source of power, increased substantially. Most importantly, electricity boards across almost all the states were bankrupt and struggling to survive as a result of faulty policies and mismanagement and thus, were largely dependent on the state's financial support. There was a felt need for privatisation of the power sector as well as the coal sector as the CIL alone was not able to meet the increasing demand for coal.[180]

The statement of objects and reasons in the amended CMN Act stated:

> "Considering the need to augment power generation and to create additional capacity during the eighth plan, the Government has decided to allow private sector participation in the power sector. Consequently, it has become necessary to provide for coal linkages to power generating units coming up in the private sector.

177. *Ibid.*

178. *Ibid.*

179. Except in case of companies engaged in the production of iron and steel and mining in isolated small pockets not benefiting economic development and do not require rail transport.

180. https://www.sourcewatch.org/images/4/40/Draft_CAG_report_Pt_1.pdf.

> Coal India Limited and Neyveli Lignite Corporation Limited, the major producers of coal and lignite in the public sector, are experiencing resource constraints. Several projects cannot be taken up in a short period. As an alternative, it is proposed to offer new coal and lignite mines to the proposed power stations in the private sector for captive end use.

To address this supply deficit, a proposal was made by the Government in 1992 to allow "private sector participation in coal mining operations for captive consumption towards the generation of power and other end-use" in iron and steel, and cement production. To this end, after cabinet deliberations and parliamentary processes, the CMN Act was amended in 1993.

> The same arrangement is also considered necessary for other industries that would be handed over coal mines for captive end use.
>
> Washeries have to be encouraged in the private sector also to augment the availability of washed coal for supply to steel plants, power houses, etc. Under the Coal Mines (Nationalisation) Act, 1973, coal mining is exclusively reserved for the public sector, except in case of companies engaged in the production of iron and steel, and mining in isolated small pockets not amenable to economical development and not requiring rail transport.
>
> In order to allow private sector participation in coal mining for captive use for purpose of power generation as well as for other captive end uses to be notified from time to time and to allow the private sector to set up coal washeries, it is considered necessary to amend the Coal Mines (Nationalisation) Act, 1973. Coal Mines (Nationalisation) Amendment Bill, 1992 seeks to achieve the aforesaid objectives."[181]

In the meantime, in July 1992, the coal blocks which were not in the production plan of CIL and the SCCL were identified and a list of 143 blocks was prepared. Also, the Ministry of Coal issued instructions for the constitution of an Steering Committee (SCo) on July 14, 1992, by its office Memorandum No.13011/3/92-CA for screening proposals for captive mining by private power generation

181. Parakh, PC. (2017). *The Coal Conundrum: Executive Failure and Judicial Arrogance.* Secunderabad.

companies. The SCo was headed by the Additional Secretary in the Ministry of Coal and the members consisted of Adviser (Projects), Ministry of Coal, Joint Secretary & Financial Adviser, Ministry of Coal, and representatives from the Ministry of Railways, Power and concerned State Government. The membership of the Committee was later enhanced on August 05, 1993, to include Director (Technical), CIL, Chairman and Managing Director, Central Mine Planning and Design Institute Limited, the Chairman and Managing Director of the concerned subsidiary of CIL and also representatives from steel and cement sectors.[182, 183]

It may be noted that the SCo was set up by administrative order and thus its mandate was limited only to screen applications and make recommendations about applicants' eligibility for grant of coal mining lease. In effect, the SCo did not have the power to decide on allocations of coal blocks nor was it conceived to take over the powers of the State Government under the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act). It was a forum of inter-ministerial consultations where all stakeholders presented their case. The views were recorded, and the Chairman took the final view. The recommendation of the committee was examined by the Ministry and the Coal Minister decided on the allocation.[184]

Overall, the SCo was created to fill in the information and expertise gaps that existed with the State Government to provide an assessment mechanism to determine if the companies applying for mining leases were eligible to take up the mining operations.[185]

After the CMN Act was amended in 1993, the Planning Commission of India constituted a committee on Integrated Coal Policy headed by K.S.R Chari in 1995 after the Central

182. *Ibid.*

183. Manohar Lal Sharma vs Principal Secretary, (2014) 9 SCC 516.

184. Parakh, PC. (2014). Crusader or Conspirator? Coalgate and Other Truths. Manas Publications.

185. Parakh, PC. (2017). The Coal Conundrum : Executive Failure and Judicial Arrogance. Secunderabad: PC Parakh.

Government realised that captive mining would not fulfill the energy requirements of the country over the long term. The Chari Committee submitted its report in 1996 noting that coal public companies and captive mines will fall short to fulfil the country's energy requirement and stated that to consolidate supply-demand mismatch, new policy measures are warranted. To this end, the Committee recommended a competitive bidding process for all the new coal blocks and thus ensuring an equal platform and a level playing field for the private and public companies to participate in the allocation process.

In 1997, the Union Cabinet approved the recommendations of the Chari Committee which led to the Coal Mines (Nationalisation) Amendment Bill (the Bill) being introduced in the Rajya Sabha in June 1997. However, the Bill witnessed fierce opposition from trade unions and without any consensus, the bill lapsed. After the change of Government, under the new regime led by Prime Minister Atal Bihari Vajpayee, the cabinet note was resubmitted and approved in 1999. The Bill was re-introduced in the Rajya Sabha in April 2000.

The Bill proposed:

To permit mining of coal by all companies as defined under the Companies Act, 1956 excluding foreign companies for their consumption, sale, or any other purpose.

To empower the Government to address the issues that led to the nationalisation of the coal industry in the 1970s.

In the Parliament House, the Bill was referred to the Parliamentary Standing Committee on Energy for detailed and ranging deliberations. The Central ministries of coal, power and steel along with state governments and coal consuming public sector undertakings, favoured opening the coal sector to the private sector. The Secretary of the Ministry of Coal deposed as thus:

> "As far as the future of Coal India itself is concerned, there should be absolutely no doubt or apprehension that the purpose of this Bill is to privatise Coal India. There is no thinking at all in Government

> today regarding the privatisation of Coal India.[186] What is being visualised by this Bill is an addition to the efforts of Coal India. There is absolutely no intention whatsoever to dilute Government of India's equity in Coal India."[187]

The dissenters of the Bill included the trade unions and members of the left parties. They cautioned that the opening of the coal sector will bring back the legacy problems of insufficient investment by the private sector to develop and modernise the mines. The dissenters also highlighted that before the coal industry was nationalised, private companies were also indulging in slaughter mining, and thus the safety and environmental aspects were completely ignored by the private company.

As stated above the big difference then and now was that earlier most mining was done by merchants as against now when large actual user corporates were doing the mining, who thus had a vested interest in maintaining the mines and its workforce in the best condition as far as possible. It was also argued that if Coal India could be made a single company, it would be able to increase output and revenue. According to them, the existing inflating demand is just a hypothetical projection to leverage relevance for private sector participation.

The Parliamentary Committee submitted the report to the Parliament on August 31, 2001, recommending the passage of the Bill. But, when the Bill was introduced in the Rajya Sabha, coal trade unions called for a strike which led the Government to constitute a Group of Ministers (GoM) to dissuade fears and hold discussion with the trade unions. The GoM could not make any breakthrough with the trade unions and the entire tenure of the Government was lost.

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186. As part of its liberalisation policy, unlike many small countries, the Government did not generally privatise its commercial undertakings but opened up various monopolistic sectors, such as insurance, banking, airlines, telecom etc. to private competition thus following a mixed economy approach. After much time, the government also carried out disinvestment of profit-making public-sector companies to raise revenues.

187. Parakh, PC. (2017). *The Coal Conundrum: Executive Failure and Judicial Arrogance*. Secunderabad.

The Politics of Coalition and Coal

Again, a new Government took charge in 2004 under the leadership of Prime Minister Manmohan Singh. Shibu Soren of the Jharkhand Mukti Morcha, a coalition partner, held the charge of the Union Coal Ministry on and off, for short durations.[188]

The Prime Minister was in charge of the MoC for long intervening periods, usually supported by Ministers of State (MoS). Much of the work was disposed off by the MoS. In one case MoS, Santosh Bagrodia was held guilty.[189] When summoned by the apex court in the coal allocation case, he blamed the Prime Minister, Singh for the scam.[190] This is a long story and would divert us from the main issues, hence we move on with the main story.

While Dr. Singh recognised the importance of the Bill, coalition compulsion consisting of support to the UPA-I from the left parties restrained him and the Congress Party from pursuing this reform. However, the situation changed in 2008 after the left parties withdrew their support on account of the nuclear deal with the United States. But the proposed Bill could not be passed due to the political dynamics and pressure, even though Singh was the Coal Minister himself.[191]

P C Parakh in his book mentions that as Coal Secretary he had proposed that the coal blocks be allocated through open auction. This was also approved by Singh in his capacity as Coal Minister. However, the decision was overturned by Shibu Soren after he returned as a Union Minister of Coal.[192] It seemed that with strong opposition from within and outside the government and the power dynamics

188. https://en.wikipedia.org/wiki/Shibu_Soren#:~:text=Shibu%20Soren%20(born%2011%20January,again%20from%202009%20 to%202010.

189. https://economictimes.indiatimes.com/news/politics-and-nation/Coal-block-allocation-scam-Former-minister-of-state-Santosh-Bagrodia-found-prima-facie-guilty/articleshow/46075405.cms

190. https://economictimes.indiatimes.com/news/politics-and-nation/santosh-bagrodia-blames-former-pm-manmohan-singh- for-coal-blocks-allocation-fiasco/articleshow/49052833.cms

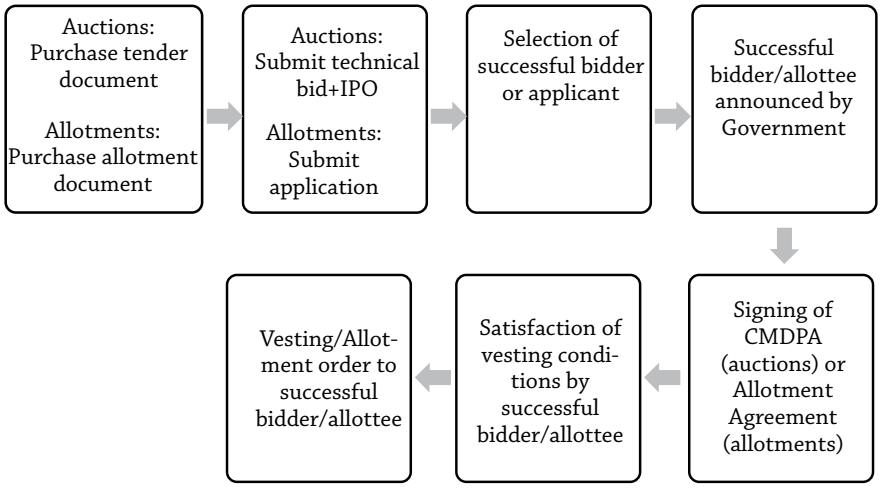
191. Parakh, PC. (2017). The Coal Conundrum : Executive Failure and Judicial Arrogance. Secunderabad.

192. Ibid.

of the coalition, such a proposal could not have been implemented under the UPA-1 and 2 tenures.

Figure 1

Process of Allocation of Coal Blocks



Source: Prayas (Energy Group), Coal Block Allocations: Opportunity lost, chaos gained?, December 2015.

The Central Government constituted the SCo in 1992 to consider various inputs from a variety of government stakeholders such as the Ministry of Coal, Ministry of Railways, the concerned State Government where coal blocks are located, Ministry of Power and Coal India Limited. Each member of the Committee brought specific expertise to the Committee. The specific interventions made by the members of the Committee are listed in Annexure 3.1.

The objective of the SCo was to use these views and screen proposals to decide on the development of coal mines for captive end-uses. However, it is important to note that the SCo was constituted (its constitution was amended five times between 1992 and 2005) to scrutinise proposals by private power generating companies requesting for ownership and operation of captive coal mines. SCo held around 36 meetings between 1993 and 2008 to recommend allocations of coal blocks. Between 1993 and 2011, a total of 218

coal blocks were allotted to the public and private sector companies. Out of these 218 blocks, 105 allocations were made to private sector companies, 99 allocations were made to government companies, 12 allocations were made to Ultra Mega Power Projects (UMPPs) and two coal blocks were allotted for Coal to Liquid projects.

All the allocations were made to private companies through the SCo. With regard to government companies, all allocations before 2001 were made through the SCo. However, post-2001, allocations to the government companies were made only by the Ministry of Coal through the Government Dispensation Route.

From the inception of SCo, a representative of the concerned State Government was always a member of the Committee. The key coal-bearing States of Maharashtra, Madhya Pradesh, Odisha, Chhattisgarh, West Bengal, Jharkhand, and Andhra Pradesh did not raise any objection to the process that was followed by the SCo, nor did the representatives of the concerned State Governments hold a view that the Central Government curtailed their powers as provided under the MMDR Act. Moreover, keeping the interests of CIL paramount, the SCo only allocated the coal blocks from the approved list and where CIL had consented to the blocks being offered.

In 2007, the captive mine allocation that was earlier limited to end-uses related to the production of iron and steel, generation of power and coal washing, was extended to include coal liquefaction and syn-gas production.[193]

Albeit, it must be noted that during the screening process, due to the end-use conditionality, preference was given to the production of iron and steel. Furthermore, a list of technical and economic criteria was referred to by the SCo to assess projects and the capacity of companies. Some of the captive coal blocks were also allocated jointly: instead of a single company, to a group or consortium of companies. The rationale behind the same was to encourage the conservation of precious national resources and the deployment of optimal technology. The Chief Secretary, Government of Chhattisgarh also

193. http://www.cuts-ccier.org/pdf/Report_of_the_Committee_on_Allocation_of_Natural_Resources.pdf.

expressed concern about smaller players not getting coal blocks due to low capacity and weak financial strength.[194] Thus, he suggested that the interest of small players may be taken care of by allocating coal blocks to consortia.

The SCo emphasised the importance of ensuring that a consortium is a well-defined entity in terms of equity participation by the member units. Thus, in case of a joint allocation of captive blocks, mining of such coal blocks is then taken up by the joint allottees/consortia of companies by forming a Joint Venture Company (JVC), where the allottee end-user companies hold equity share proportionate to their share in coal production from the mine.[195] The JVC mining company shall subsequent to mining the coal, transfer it to the block allottees for their captive end-use. With regards to the *inter-se* distribution of shares among the joint allottees, the SCo decided that the capacity of end-use projects will be determined by the following:[196]

> "The capacity indicated in the application form;
>
> The capacity indicated in the MoU entered into between the applicant company and the State Govt. concerned, wherever applicable;
>
> The realistic capacity addition is likely to materialise by the year 2010, as assessed by the nodal Ministry/Department concerned;
>
> Whichever is the lowest."

On the other hand, for the government companies, decisions were taken internally without referring to the SCo. A list of blocks was circulated internally among the Union Ministries and State Governments and applications were made to the Ministry of Coal, with the final decision being taken by the Ministry itself. Certain blocks were directly under the control of the Ministry of Power and allocated through tariff-based competitive bidding. In such cases, eligible companies were invited to apply and the lowest bidder was

194. https://coal.nic.in/sites/upload_files/coal/files/coalupload/minutes040908.pdf.

195. *Ibid.*

196. *Ibid.* The recommended joint allocation for coal blocks can be accessed here, on pg. 9 onwards.

awarded the UMPP as well as the captive block to supply to the UMPP project.[197]

Such a process was followed by the government to expedite infrastructure projects which otherwise got delayed due to various clearances to be sought by the entrepreneur. It was found that low prices could be obtained for the sale of power when the project was sold complete in all pre-implementation matters. The idea was very good because the private sector operator would get an off the shelf project which included all starting compliances and save itself from incurring large transaction costs in addition to delays and litigation costs.

Due to the cancellation of the coal blocks, at least two of the UMPPs in Gujarat, one under the Tatas and the other under Adanis had to import coal from Indonesia. While the contract of purchase was in operation the Indonesian government started levy of export tax. The two UMPPs were forced to pay more for coal and asked their power customers to pay charges that were higher than the agreed rates under the UMPP contract. To cut a long story short, the Central Electricity Regulatory Commission decided to allow an increase in the supply rates to the two companies, but the Supreme Court struck down the CERC's order saying that the case was not of force majeure and the two companies had to adhere to their contracted rates. This judgment leads to a big debate about the Sustainability of Business vs Sanctity of Contract, on which we organised a workshop.[198]

The overall view which emerged from the workshop was that the sustainability of business should be given equal importance. The court order did grant some concessions to the two power companies but held that sanctity of contract prevails.

Why was the Policy of Competitive Bidding not Followed for Coal Block Allocations?

Informally, the competitive bidding policy for allocation of coal blocks was initially mooted in 1992-93 when coal mining was first

197. *Ibid.*

198. https://cuts-international.org/PDF/E-book-Sustainability_of_Business_vs_Sanctity_of_Contract.pdf

opened to the private sector. However, the Central Government was not in the favour of competitive bidding at the time because the price of coal was critical to the economics of production and any price increase would have discouraged private players to come forward and invest. Additionally, the demand for coal was not fully met by CIL and SCCL, and thus participation of private players was crucial.

The proposal for competitive bidding was formally mooted in June 2004. However, the governments of Chhattisgarh, West Bengal, and Orissa opposed the proposal stating that it would increase the cost of coal mining. In July 2004, the Coal Secretary in his note proposed to introduce a bidding system to achieve transparency and objectivity in the allocation process. This note was considered at the level of the Minister (Coal and Mines) and Prime Minister's Office, and disadvantages of competitive bidding were noted in October 2014 including the time delays that would be caused in allocations due to competitive bidding.

In 2006, the MoC[199] communicated to the Prime Minister's Office (PMO) and Cabinet Secretary that the Ministry of Law and Justice had advised MoC for measures to amend the MMDR Act for the inclusion of competitive bidding. MoC introduced the bill in the Parliament to amend the MMDR Act, which was referred to the Parliamentary Standing Committee on Coal and Steel. It submitted its report in 2009. After due consideration of the Committee's views, the Mines and Minerals (Development and Regulation) Amendment Bill, 2008 was introduced and passed by the Parliament in 2010 to provide for the allocation of coal blocks through competitive bidding by the Central Government. However, the rules for auctions by competitive bidding of coal mines were notified only in 2012.[200]

On the allocation process, even the Chawla Committee on Allocation of Natural Resources pointed out complexities involved in the allocation process through the SC and that initiative towards

199. https://cuts-ccier.org/pdf/Report_of_the_Committee_on_Allocation_of_Natural_Resources.pdf

200. https://www.thehindu.com/business/ashok-chawla-committee-report-on-allocation-of-natural-resources-gather- dust/article3320826.ece.

market-based allocation was found to be missing. The Committee report also highlighted that many of the allottees did not initiate any work due to delays in various clearances from the Ministry of Coal and Ministry of Environment and Forests. The industry response to the Ministry of Coal's warning for de-allocation on account of delays was that they were hampered by multiple clearances. The Chawla Committee made a note that of all the mines allocated after 2003, only three of them started production.

History of the Case

In 1993, in the absence of any specific criteria for the allocation of coal blocks, a SCo was set up by the Ministry of Coal under the Coal Secretary to make recommendations on allocations for captive coal mines. All coal block allocations to private companies were made on the recommendations of the SCo, while allocations to government/public sector companies were made directly by the Central Government, through the government dispensation route.

Between 1993 and 2011, 218 coal blocks were allocated to public and private sector companies. Out of these 218 blocks, 105 allocations were made to private companies, 99 allocations were made to government companies, 12 allocations were made to UMPPs and two coal blocks were allocated for Coal to Liquid projects. The CAG report of 2012, which triggered the filing of the case, along with stating the loss to the exchequer, also mentioned the undue gain of more than ₹1.85 lakh crore to private companies. This investigation and report by the CAG were triggered due to a note submitted by the then Coal Secretary in 2004, to bring in more transparency and fairness to the coal allocation process through competitive bidding. It is claimed at that time that due to political resistance the proposal for bringing in changes in the allocation process could not be undertaken.[201]

The main contention of the CAG report was that while the government was authorised under the law to undertake coal

201. Parakh, PC. (2017). *The Coal Conundrum: Executive Failure and Judicial Arrogance*. Secunderabad.

allocation through the auction process, the same was omitted which resulted in the loss to the exchequer. Thus, the entire onus of such a loss lies with the government itself. In this regard, as per the analysis conducted by CAG, these claims rested on the interpretation and understanding that the administrative orders are at par with the provision under a statute and the government could have proceeded with the auction process by issuing administrative orders for the same.[202] However, the CAG report within its analysis, quoting the Law Secretary, stated that:

"The Screening Committee had been constituted using administrative guidelines. Since, under the current dispensation, the allocation of coal blocks is purely administrative, it was felt that the process of auction through competitive bidding can also be done through such administrative arrangements. In fact, this is the basis of our earlier legal advice. This according to the administrative Ministry has been questioned from time to time for legal sanction. If provision is made for competitive bidding in the Act itself or by virtue of rules framed under the Act the bidding process would definitely be placed on a higher level of legal footing."[203]

In any event, even in case of competitive bidding, the CAG had indicated that only a part of such financial gains by the coal block allocatees would have accrued to the exchequer. The entire suggested gain of ₹295/- per metric tonne to the allocatees could in no way have accrued to national exchequer and CAG was cognisant of this fact. The coal block allocatees were entitled to returns on the investments made in the development of coal blocks and had to pay taxes, royalties, cess and other charges.

Thus, the question of the legality of the administrative order was convoluted. Another important contention made by the CAG related to the 'windfall gains' resulting from not following the auction process for coal mines allocation. CAG, in Chapter – IV of its Report of 2012, has clearly referred to the genesis of the concept of bidding in 2004 and its journey thereafter. Nowhere does it state and/or insinuate any role of the private parties in the so-called

202. https://www.sourcewatch.org/images/4/40/Draft_CAG_report_Pt_1.pdf.

203. *Ibid.*

gains on account of allocations. The so-called windfall gains were calculated based on the benefit accruing over the life of the reserve which may well be beyond 100 years and only a portion could have potentially accrued to the exchequer. The proper calculations were also presented in the detailed annexures of the report. Furthermore, it can be said that the allottees were privy to these gains since the risky investments made for the development of the coal blocks could only be justified to banks and investors if there was a lucrative return. However this was never considered in the report. The hefty figures portrayed by CAG resulted in public and media uproar. Moreover, the names of prominent industrialists and ministers associated with the scam further attracted public attention.

The CAG Report highlighted that while there was a policy in place, namely, the New Coal Distribution Policy, 2007 (NCDP) for distribution of coal to small and medium buyers, there was a major lacuna with respect to the monitoring of supply of coal, and verification of the end-use of the coal distributed.[204] The CAG pointed out that such absence of mechanisms in the monitoring and verification of credentials makes it easier to divert coal and sell it in an unregulated market.[205]

The Report further found that while the Ministry of Coal did want to make its allocation process more transparent and objective by 28 June 2004, the same was delayed at various stages, and had still not been introduced at the time of the CAG Report in 2012, even though competitive bidding could have been introduced in the process of allocation of coal blocks as early as September 2004 (as per the notings of MOC officers).[206]

In June 2004, the MOC sought a legal opinion from the Department of Legal Affairs (DLA) on the use of competitive bidding in the process of coal block allocations.[207] DLA opined in July 2006 that the option of introducing competitive bidding in the coal block

204. Pg. 12 of the report.

205. *Ibid.*

206. Pg 27 of the report.

207. *Ibid.*

allocation process was "open to" the MOC as the process of selection for coal block allocation would be possible by amending the existing clauses of the administrative instructions, which could be amended as per the provisions of the Indian Contract Act, 1872.[208] DLA left it to the MOC to adopt the path of either amending the coal legislation or amending the administrative instructions, as per the policy objectives of the MOC.[209]

Meanwhile, the MOC was of the view that if the revised method of allocating coal blocks was not put in place fast enough then there would be increased pressure on the government for continuing with status quo, and the same would not be desirable for bringing about total transparency.[210] The file notings in the MOC show that during the pendency of the legal opinion, the conversation at the ministry suggested that swift action be taken in the decision-making of whether or not the process of competitive bidding be adopted for coal block allocation, in order to allow the process of allocation to move unhindered.[211]

Further, there was "general reluctance" amongst the power utilities about the process of competitive bidding being introduced because of high cost implications.[212] In April 2006, in a meeting held at the Prime Minister's Office, it was "generally felt" that making an amendment in the legislation, specifically, the MMDR Act would be the more appropriate step so that all the minerals covered under the legislation would be subjected to the process of competitive bidding.[213]

It was highlighted by the MoS for Coal that since the amendment of the MMDR Act would mean that the current powers of the State governments would have to be withdrawn, the said issue of

208. *Ibid.*

209. *Ibid.*

210. Pg. 24 of the report.

211. Pg. 25 of the report.

212. *Ibid.*

213. Pg. 26 of the report.

amendment should be given a thought.[214] Accordingly, the Minister of Coal, who found merit in this view, was of the opinion that the Ministry of Coal should keep away from suggestions that had implications for federal polity.[215]

With this, the Ministry of Mines (MoM) was asked to suggest appropriate modifications to the proposed draft for amendment of the law.[216] The new draft with modifications from MoM was sent to the DLA to seek their views on the legal feasibility of the proposed amendment in legislation in May 2006, which advised the MOC to begin suitable measures for the amendment of the MMDR Act.[217] In October 2008, the bill to amend the MMDR Act was introduced in the Parliament.[218]

However, the CAG has quoted the views of the MOC from March 2012 where the MOC stated that pending the amendment in the Act, the MOC followed the advice of the Energy Coordination Committee (ECC) of July 2006 and proceeded to allocate coal blocks.[219] The CAG opined that the audit is not in concurrence with the contentions of the MOC due to the fact that the DLA had "categorically" stated in July 2006 that the route of competitive bidding could be adopted by making some administrative amendments, and it was in fact left to the MOC to take action on this, while the aspect of amendment of the MMDR Act was only opined by the DLA upon request from the MOC to gain legal footing.[220]

With respect to the finding of unjust enrichment, the CAG report noted that the delays caused in the introduction of the competitive bidding route had resulted in the continuation of the existing process through which a large number of private players stood benefitted.[221]

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214. *Ibid.*
215. *Ibid.*
216. *Ibid.*
217. *Ibid.*
218. *Ibid.*
219. Pg. 28 of the report.
220. Pg. 29 of the report.
221. *Ibid.*

In estimating the financial impact of this benefit that accrued to the allottees, the CAG noted in the report that the estimate is restricted to the private parties, and arrived at the figure of ₹185,591.34 crores as the financial gain that the private parties received as of 31 March 2011 with respect to 57 Open Cast or Mixed Mines.[222]

The CAG was of the firm view that a portion of this financial benefit could have been "tapped" by the government if it had taken a timely decision on the adoption of competitive bidding in the coal block allocations.[223] The CAG did not accept the contentions of the Ministry of Coal where the MoC stated (February & March 2012) that the conclusion that the government wanted to tap some part of financial gain through competitive bidding was based on "incomplete appreciation" of the prevailing circumstances and the sequence of events that followed, and that using the route of screening committee for allocating coal blocks was only 15 years old and was seen as a vehicle to enforce rapid development of infrastructure rather than a source of revenue for the government.[224]

The CAG relied upon the deliberations that took place in the meeting dated July 25, 2006 at the PMO where the method of competitive bidding as a route for coal block allocation was discussed.[225] The CAG highlighted that the comments made by the Coal Secretary in the said meeting – that the route of competitive bidding will allow the government to tap a part of the profit that will accrue to the successful companies, and that while the private captive blocks would be sufficient for the needs of the successful players, they would not be required to bear huge costs of manpower/overheads unlike CIL – was an acknowledgement by the Ministry of Coal that the successful allottees gained from the coal block allocation.[226]

Based on the above mentioned findings, inter alia, the CAG was of the opinion that the audit carried out by him was along the same

222. Pgs. 29 & 30 of the report.

223. Pg. 31 of the report.

224. *Ibid.*

225. Pg. 32 of the report.

226. *Ibid.*

lines as the views expressed by Ministry of Coal in the period of 2004-2006 where the MOC deliberated upon bringing about transparency and competitive bidding in the process of allocation of coal blocks.[227] Thus, the CAG recommended in his report that "strict regulatory and monitoring mechanism" was the need of the hour to extend the perks of cheaper coal to its consumers.[228]

Further, the CAG opined that the allocation of coal blocks was not done in a rational and informed way, such that no obstacles halt the process of commencement of the coal projects.[229] Ancillary concerns as to the development as well as exploration of the coal blocks in question were "basic issues", in view of the CAG, that needed to be organised prior to the allocation of the concerned coal blocks.[230]

The CAG noted that while it was mandatorily decided by the MOC to allocate coal blocks only after a Mining Plan had been prepared, and the block had been explored, this stance of the Ministry changed by February 2012 where the MOC was of the view that it would not be possible to allocate only those coal blocks that had undergone exploration, as such coal blocks were limited, and the process of exploration was a highly time consuming exercise.[231]

Therefore, the CAG concluded that the "system of firming of the reserves" was not followed, which was essential for an informed and rational allocation of coal blocks.[232]

Other lacunas pointed out by the CAG in his report included issues such as: the failure of the nodal agency, i.e. the Coal Controller's Organisation (CCO), in carrying out inspections of the coal blocks that had been successfully allocated in order to arrive at a determination of the actual progress made versus the progress reported, which was a requirement under the Mines and

227. *Ibid.*

228. *Ibid.*

229. Pg. 35 of the report.

230. *Ibid.*

231. *Ibid.*

232. *Ibid.*

Minerals (Development and Regulation) Act of 1957.[233] The delay in implementing the system of Bank Guarantees that got introduced with prospective effect in March 2005, and got modified in July 2007, resulted in the inapplicability of this system to several coal blocks that had been allocated prior to 2005, and several coal blocks allocated prior to 2007 could not be penalised for non-compliance as this step was only introduced as a modification in 2007;[234] and that the mismatches in planning and organising of the coal production envisaged by the Planning Commission with the coal production actually undertaken by CIL.[235]

The consequence of the CAG report, also known as the "Rai effect" (named after Vinod Rai, the then CAG and author of the report) did not only set the ball rolling for the devastating effects that followed the report, but also became the basis of compensation figures levied by the Supreme Court on all the allottees of the cancelled coal blocks. The said figure was of ₹295 per metric tonne of coal extracted from the date of extraction, which was seen as the financial loss caused to the State exchequer as a result of flawed coal block allocations. Even though it was heavily contested in court that the said figure arrived at in the CAG Report (which was at the time being contested by the Government of India, and was pending consideration before a Parliamentary Committee on Public Undertakings) was without application of mind as the CAG Report only considered the average price of coal that was given by CIL for a single year, i.e. 2010-11 (being ₹1028/- per metric tonnes), which could not be simply adopted for earlier financial years.

Further, it was also brought to the notice of the Supreme Court that the sale price of the coal extracted from the allotted blocks was significantly lower than the average selling price of CIL due to the fact that the quality of coal so extracted was inferior. In addition to this, the said Report had completely left out underground mines from its

233. Pg. 44 of the report.

234. *Ibid.*

235. Pg. 43 of the report.

calculations while investigating the said financial loss to the State exchequer.

Another point of note was the fact that the cost of production of coal for CIL, a public sector undertaking, was low for the reason that the said undertaking had economically viable mines while the mines allocated to the private sector lacked infrastructure and faced multiple other issues. Imposing a penalty with retrospective effect, considering the fact that the coal extracted by the allottees had already been utilised for production of end-uses such as power, steel, and cement, would be devastating for the private sector. However, the Supreme Court despite acknowledging that the CAG report had not taken into consideration the cost of extraction of coal from underground mines went ahead with relying on the CAG Report as the basis for assessing the additional levy as compensation.

The Supreme Court was convinced that its judgment was not only corrective, as it sought to correct the wrong done by the Union of India by arbitrarily and illegally allotting coal blocks, but was also compensatory, as the State exchequer was being compensated for the financial loss that accrued to it as calculated by the CAG Report, and looked to the future, by highlighting the wrong done by the Union of India expecting that the Indian Government will not deal with the country's natural resources as if they belong to a few individuals who can distribute them at their sweet will.[236]

Public Uproar

The said Report of the CAG had been leaked in the media while it was still a draft,[237] resulting in a huge political storm and angst amongst the public who had been subjected to another explosive report of the CAG on the allocation of 2G spectrum licenses only about a year ago. The exposé of the earlier CAG report on the manner of 2G spectrum allocation brought to light the huge, albeit notional, revenue loss of ₹1.76 lakh crores to the State exchequer that was

236. Coal block judgment 24 September 2014.

237. https://economictimes.indiatimes.com/news/politics-and-nation/cag-anguished-over-leakage-of-draft-report-on-coal-block-allocation/articleshow/12372095.cms?from=mdr

a direct result of the first-come-first-serve method used by the Government to allot the scarce 2G spectrum.

This had already gained immense media attention, and led to criminal action being taken against the Union Ministers, bureaucrats, and the private telecom companies. Apart from this scam, many other political scams had come to light such as the infamous "CWG scam" and the "Chopper scam". The former related to the hosting of the Commonwealth Games of 2010 for which the organising committee reportedly entered into several corrupt deals with firms who furnished inflated prices, leading to a large scale misappropriation of money that was allocated in the budget for preparation of the Games which was around ₹70,000 crores. The latter involved the signing of a contract by the Union Government to purchase 12 Augusta Westland choppers for the Indian Air Force to carry VVIPS, such as the President and the Prime Minister, for the price of ₹3,600 crores in 2010. While the contract was later cancelled by India on grounds that the integrity pact was violated, the controversy revolved around the selection of the particular Italian firm which got the contract by bribing officials in India, as revealed by the Italian courts.

In this backdrop, another explosive report from the office of the CAG exposing shortcomings and inadequacies in the allotment of another natural resource – the main source of power for the country – seemed to be the last nail in the coffin for any goodwill towards the ruling government which was a coalition of several political parties.

The initial draft report of the CAG, that got leaked to the public through an unknown source, sent shock waves through the country with its estimate of ₹10.67 lakh crores as the loss caused to the public exchequer as a result of the coal block allocations. There was a lot of hue and cry within the Government as well as in the CAG establishment over the leak which, as per the CAG himself, contained details that were "under discussion at a preliminary stage" and which did "not even constitute the pre-final report".

When the final CAG report was tabled in the Parliament, it pegged the loss to exchequer caused due to coal block allocation at ₹1.86 lakh crores. The draft report had already become a huge public

spectacle and had sparked a media frenzy around the allocation of coal blocks, with pointed focus on terms like "windfall gains", "unjust enrichment", "undue benefits", and even the labelling of the coal block allocation as the "mother of all scams".

The fact that the figures of presumptive loss of ₹10.67 lakh crore (calculated in the draft report) or ₹1.86 lakh crores (calculated in the report tabled before the Parliament) to the State exchequer were at best guess estimates that called for the need of a probe but in themselves did not add up to a "scam", was appreciated by some, but did little to undo the damage done to the sentiments of the public. Even though in some corners of the country the controversy was looked at through a lens of objectivity whereby one would acknowledge that the headline figures of the notional loss to the Government mentioned in the CAG reports – whether it was the 2G spectrum report, the leaked draft report on coal blocks, or the final report on coal block allocation – had been calculated by the CAG using an absurd methodology, the flawed process of allocation of natural resources, especially coal blocks, was in the forefront.

The issue of the failure in the working of the government had reached the point where it no longer mattered what the exact figures of loss were, to the extent that a leading economist of the country was famously quoted having himself quoted a film dialogue from a Hollywood motion picture, Entrapment, where actor Sean Connery remarks "What can you do with seven billion dollars that you cannot do with four?", and observing that "Does it matter whether it's ₹1.86 lakh crore or it's ₹69,000 crores or ₹6,900 crores? The loss is what matters."

It became a textbook case of crony capitalism where the lack of a clearly-stated objective criteria (no matter how noble - whether it was generating affordable power, maintaining a proper supply chain of coal, and appropriating the so-called gains back to the government through taxation) and lack of transparency in the process of allocating coal blocks shaped the narrative that several "sweetheart deals" were allowed to be made in the coal block allocation process.

Before the case was taken up by the SC, the issue got critical attention in parliament as well which included reactions from then Prime Minister, Manmohan Singh. The final report was presented in

the parliament by CAG in August 2012, in which it presented charges against the government, including those against Singh. as he was holding the cabinet portfolio of the Coal Ministry during some of the allegedly conflicted allocations.

In the parliament, Singh defended the government stating that the auction process was opposed by various state governments such as Rajasthan, Jharkhand, Orissa, West Bengal and Chhattisgarh, and stated that CAG has ignored the practical realities in changing the allocation process. Elaborating on this, he stated that the legislative process and that for convincing the states to reach a consensus to make the required changes would have taken considerable time and in the meantime, the allocation process could not have been halted. Thus, a collective decision was taken by the government to continue with the screening committee process.[238]

The Coal Block Allocation Case[239] can be examined using two judgments delivered by the SC. The first judgment was adjudicated on the legality of the allocations and the second judgment decided the 'course of action' if the coal block allocations were found to be illegal.

In the first judgment, pronounced in August 2014,[240] the SC held that the allocation of coal blocks made through the SCo and the government dispensation route, other than that made to UMPPs and Coal to Liquid projects, was illegal. The court noted that the allocation procedure followed by SCo was arbitrary and no clear criteria or guidelines were followed. Moreover, it observed that the allocation procedure was not in line with the CMN Act.

In the second judgment, which was pronounced in September 2014,[241] the SC cancelled 204 allocations out of the 218 coal blocks allocated between 1993 and 2011. At the time of this judgment, 40 coal blocks were functional mines, and six coal blocks were ready to start extraction. The functional coal blocks were granted six

238. https://www.businesstoday.in/current/economy-politics/coal-scam-full-text-pm-manmohan-singh-speech-in-parliament/story/187552.html.

239. Writ Petition (Crl.) No. 120 of 2012, Manohar Lal Sharma Vs. The Principal Secretary & Ors.

240. Manohar Lal Sharma vs Principal Secretary, (2014) 9 SCC 516.

241. Manohar Lal Sharma vs Principal Secretary, (2014) 9 SCC 614.

months to wind up their operations, while the other coal blocks were cancelled with immediate effect. Additionally, a compensatory payment was imposed on the 46 coal blocks (those were functional and ready to start extraction) in the form of an additional levy.

The coal blocks that were exempted from cancellation were under operation by the Central Government without any linkages with the private sector. These included allocations to the National Thermal Power Corporation and Steel Authority of India and those that were allocated for private-sector UMPPs under competitive bidding.

Notably, the respondents (the coal block allottees), during the arguments in the case, requested that a committee be set up to consider the economic impact of cancellation of coal blocks considering its significance and linkages with many important sectors.[242] They illustrated that the cancellation of coal block allocations would lead to severe losses for the economy, and pleaded that investment up to ₹2.87 lakh crores was already made in 157 coal blocks as of December 2012 and unrecoverable investments in end-use plants were made up to ₹4 lakh crores. However, the apex court declined the request, which was incidentally also supported by the Central Government. The court noted that the process of allocation of coal blocks was found to be illegal and arbitrary. It pointed out that appointing a committee would be tantamount to examining the correctness of the judgment and hence was not permissible.

What a pity that the court did not consider the request considering that curative petitions[243] are also par for the course and often resorted to. The proposed committee could have reported to the court to help it arrive at a more judicious position which could have considered economic costs as well.

Importance of Coal for India

Coal production in India dates back to 1774 when coal began to be mined along the Damodar River by Messrs Summer and Heatly of East India Company in the Raniganj Coalfield. After the initial

242. *Ibid.*

243. https://www.deccanherald.com/national/explained-what-is-curative-petition-793140.html.

slow start that extended for about a century, the production started to increase due to an increase in demand as well as improvement in transportation and the emergence of steam locomotives in 1853. India produced about 6 MMTs of coal per year in 1900, which increased to 18 MMTs of coal per year by 1920.[244] The two World Wars gave coal production in India a huge boost, causing it to reach 29 MMTs by 1946.[245]

In independent India, coal production was synchronised with five-year plans. In the 1970s the sector was nationalised along with a spate of other sectors, such as banks and insurance companies. The nationalisation of the sector was part of the socialist trappings of that time. The case of coal was marked by sub-optimal private capacity. In 1975, CIL, now the world's largest coal mining company, was established to manage all coal mines in the country.

With 300 billion tonnes, India is one of the five countries with the largest coal reserves in the world. It is also the second largest coal producer and the second-largest coal importer, after China. In absolute terms, domestic coal provides for 70 percent of the annual demand while 30 percent is imported.

India has been importing coal essentially due to three main reasons. First, bulk of India's coal production is non-coking coal and therefore India needs to import coking coal.[246] Second, mine operationalisation in India is a rather slow activity due to several bureaucratic reasons like land acquisition and environmental clearances, among others. This was further slowed down by years of state monopoly which resulted in the stagnation of production and processes considerably. Third, the low average quality of thermal coal and high royalty payments actually makes it more commercially viable for port based power producers to import high grade coal instead of using domestic low grade coal.

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244. Parakh, PC. (2017). The Coal Conundrum : Executive Failure and Judicial Arrogance. Secunderabad: PC Parakh.

245. *Ibid*.

246. Coking coal is mainly used in steel and metallurgical industries and non-coking coal is used for power generation

Today, coal provides significant energy security for India and is critical for most of India's power plants even though there is a gradual move to increase renewables in the overall energy mix. To be exact, 70 percent of the power generated in India comes from coal. The remaining 30 percent comes from hydel and nuclear sources, including renewables. The latter are mainly from solar and wind generators.

Experts suggest that coal will continue to remain the king until 2030 and beyond. However, the sector works on anything but efficient principles. It is difficult to bring a coal mine into production in less than a decade because there are problems with a host of issues like environment and forest clearances, land acquisition and other significant delays at the central and state level. Besides this, there is also a global movement against coal-fed thermal power generation due to harmful emissions.[247]

Until recently, opposition to the coal sector reform came from both Government as well as the industry, with none in favour of opening the sector to efficiency and competition. This is despite the fact that the state-run CIL was unable to meet the increasing energy demand. In my own considered opinion, many a time businesses do not want more competition and hence conspire with the administrative authorities to not be open and transparent in so far as they have been able to obtain their privileges.

To make the coal sector sustainable and agile, the need for structural reforms has been felt for a long time by people at large. This entailed opening the coal sector for commercial mining, bringing in transparency in the allocation of coal blocks through open bidding, and curbing the role of mafia in coal marketing by introducing measures like e-marketing.[248]

While all these measures form the comprehensive backbone of coal sector reforms, the present case concerns itself most closely with the open bidding policy or the lack of it. Typically, open bidding works

247. https://en.wikipedia.org/wiki/Health_and_environmental_impact_of_the_coal_industry.

248. https://www.thehindu.com/business/Industry/government-clears-opening-up-of-commercial-coal-mining-to-private-firms/article22806187.ece

when there is a mature private sector. India lacked a mature private sector at the time of coal nationalisation. Before nationalisation in the 1970s most of the coal mines were owned and operated by the private sector, i.e. merchant miners. In many cases, the mines were not developed systematically, or labour treated fairly or taxes paid honestly.[249] Hence when nationalisation took place a large populace was happy. With the opening of the economy in 1991, there was a surge in private sector growth and many companies engaged in other areas like steel, power and cement had acquired capabilities to run successful coal mining businesses.

These capabilities had been consistently increasing. For instance, captive mining by the private sector had been allowed since 1993 and by the early 2000s, the private sector had matured even more. One major difference between the 1970s and now is that captive mining is now in the hands of user industries and not merchants.

Keeping this in mind, in 2004, the concept of open bidding was made public and on the recommendation of the Prime Minister's Office, it was to be applied prospectively. A bill to put the bidding process on sound legal footing was drafted in 2004. A similar bill was introduced earlier in 2000 without any success. If implemented, this would have eliminated corruption and favouritism – something that can easily happen in the coal market as the quality of coal differs from one block to the other. Open bidding, after making all geological data available to bidders, was, therefore, an equitable and transparent system.

Ironically, the proposal did not find favour with anyone. Neither industry nor the political system wanted a transparent and objective system. This is evident from the fact that when in June 2004, the then Coal Secretary called an open house meeting on open bidding, not many were enthusiastic about it including stakeholders from FICCI, CII, ASSOCHAM, and even the Government of India, among others. It also did not go well with the then Coal Minister and major

249. In the 1960s I had the opportunity to visit private merchant owned and run coal mines in MP and then Bihar on excursion trips with friends and found that the conditions of the workers was not so bad. However, I had no understanding of how well the mines were being developed or exploited, except that the owners were quite rich.

coal-bearing states like West Bengal, Chhattisgarh, Jharkhand, Orissa and Madhya Pradesh. They were also not in favour of open bidding.[250]

The state of Rajasthan also opposed the auction process. Even though it may be construed that the decision to allocate instead of auction mines was driven by ease of operations and may even have been driven by malice, however it has to be noted that world over governments nominate and allocate coal blocks to developers instead of the long driven and inefficient auction processes. This conundrum recognises deeper analysis.

In 2012 the CAG suggested that the allottees of the coal blocks received a potential gain of an average ₹295/tonne of coal mined by them, a portion of which could have potentially accrued to the exchequer if the bidding policy had been implemented. This figure was contested, but the moot point was not so much the accuracy of the figure, rather the lack of transparency, and equity in continuing with a system that may provide an opportunity for corruption, rent-seeking, and favouritism.[251]

The figures of loss of ₹1.86 lakh is all in the thin air; and CAG has not spoken about such loss, and certainly not for imposition of any penalty on the prior allottees, which has been strangely portrayed by the Government in their affidavit before the Court. Equally, surprising is that the Court, which otherwise reads the evidence threadbare, has not cared to see the context in which ₹295/- has been used by the CAG in its Report.

The reports by CAG on coal and 2G-spectrum allocation came in quick succession. Both were very critical of the government and led to nationwide antagonism against the government of the day. This resulted in policy paralysis and economic slowdown. To counter the uproar, the Government established the Committee on Allocation of Natural Resources chaired by Ashok Chawla, former Finance Secretary and former Chairman, Competition Commission of India.

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250. https://www.thehindu.com/business/Industry/government-clears-opening-up-of-commercial-coal-mining-to-private-firms/article22806187.ece

251. *Ibid.*

The committee prepared an excellent report[252] within four months, a record time. Alas, the report was never made public, thus only leading to more speculation. Reportedly, the influential oil sector was not keen on the release of the report and the powers that be obliged. We were able to get both hard and soft copies which have been referred to here.

In the context of coal, The Hindu reported thus:

> "Pitching for strong transparency in the coal sector, the Committee stated that the format of the minutes of the meeting of the Standing Linkage Committee (Long Term), where allocation decisions are made, should be standardised. These minutes should include specific justifications for both accepting and rejecting applications".[253]

Coming back to the main story, based on the CAG's report, many PILs were filed. This brought the SC into the picture, which eventually resulted in a bigger turmoil for the coal sector in particular, and the Indian economy in general. In the following paragraphs, there is a step-by-step account of how it all came about.

Coal Block Allocation Case in the Supreme Court

In September 2012, several PILs in the form of Writ Petitions were filed in the Supreme Court for the cancellation of coal blocks allocated by the government between 1993 and 2011.

In the first writ petition, filed by a public-spirited lawyer, Manohar Lal Sharma,[254] it was alleged that the allocation of coal blocks was illegal and unconstitutional. As a consequence, the SC issued notice to the Union of India and required a counter-affidavit from Secretary, Ministry of Coal. The grounds of allegations, issues on which the SC issued notice, and a chronological track of proceedings are mentioned in Annexure 3.2.

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252. By now, Coal and Mines Ministries were split into two as a strategy to create berths for coalition partners, particularly with 'earning' potential. Jharkhand Mukti Morcha, which provided support to the UPA, was represented by Shibu Soren in the cabinet. He held the Coal portfolio thrice during 2004-5.

253. https://www.thehindu.com/news/national/coal-scam-chronology-of-events/article6350481.ece.

254. https://en.wikipedia.org/wiki/Manohar_Lal_Sharma.

Judgment Rationale

Coal Block Allocation Judgment 1

In the first part of the SC judgment on August 25, 2014, the court largely relied on its previous judgments like Natural Resources Allocation Reference[255] and noted that the court cannot go into the merits of various methods of distribution of natural resources and thus, it cannot prescribe one method of allocation of natural resources:

> "146. To summarise in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them.
>
> As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice for disposal of natural resources, is not a constitutional mandate.
>
> We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution.
>
> Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

255. Natural Resources Allocation, In re, Special Reference No.1 of 2012; (2012) 10 SCC 1. The President of India, exercising its power under Article 143(1) of the Constitution of India made the Special Reference on April 12, 2012 and occasioned by the decision of SC in Centre of Public Interest Litigation and Ors. vs Union of India and Ors., (2012) 3 SCC 1, also called as 2G case.

> 147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables; it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.
>
> 148. In our opinion, auction despite being a preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra-vires the constitutional mandate."[256]

The court further noted that to increase participation of private companies to satisfy coal demand, the administrative decision of the Central Government to not go for competitive bidding cannot be termed as arbitrary or unreasonable. However, it was also held that if the coal blocks allocations were against Article 14 of the Indian Constitution, and if the procedure that was followed was unfair, unreasonable, discriminatory, non-transparent or suffering from favouritism or nepotism, then court intervention would be warranted and consequences of such unconstitutional or illegal allocation must follow.

The SC Judgment Part–I held that the Central Government was not legally equipped to allocate the coal blocks as that power is vested with the respective State Governments. However, assuming that the Central Government had competency to allocate coal blocks, the Supreme Court found that the guidelines framed and applied by the SCo for the period from July 14, 1993 (1st meeting) to August 19, 2003 (21st meeting) were silent about the priority to be adopted between applicants competing for the same block. After the guidelines were formulated for the period from November 04, 2003 (22nd meeting) to October 18, 2005 (30th meeting), they were found to be cryptic and failed to meet the requirements of fairness, transparency and non-discrimination. The apex court, therefore, emphasised that the allocations made by the SCo were inconsistent

256. In Re: Special Reference No. 1 of 2012 (27.09.2012 - SC) : MANU/SC/0793/2012

and non-transparent, with no application of mind, without access or use of required material, and use of guidelines. Thus, the allocations were patently considered to be illegal and arbitrary.

Former Coal Secretary PC Parakh also made some pertinent observations on the SC's rationale for terming the recommendations of the SCo as arbitrary:

> "The Court went through the minutes of the Screening Committee meetings and made certain observations that led it to conclude that recommendations made at all the 36 Screening Committee meetings were arbitrary. I would like to respectfully submit, that based on its understanding of a few cases that the Court has discussed in its order, it has made sweeping observations and virtually condemned all officers who chaired and participated in Screening Committee meetings from 1993 to 2005 as guilty of taking arbitrary decisions. I am limiting my submissions to decisions taken between 1993 and 2005 and not those taken after 2006 that has been adversely commented upon by the CAG. I do not wish to discuss individual cases here, but limit my comments to the Court's observations that led it to believe that the Screening Committee decisions were arbitrary.
>
> Flaws in the specific decisions of certain Screening Committees may not be ruled out, but to declare the decisions of all the Screening Committees as arbitrary is rather too sweeping and harsh. The Court has from its very inception, vigorously protected the principles of natural justice, which means that no one would be condemned without being given an opportunity of a hearing, but curiously in this case perhaps this cardinal principle of the justice delivery system escaped the attention of the Court.
>
> It is seen from the Court order that with respect to the recommendations of the 1st to 10th committee meetings, the Court has not found anything amiss except saying that the Committee did not lay down any criteria for deciding inter se priority or merit of the applicants for the same block. It made no adverse comments in respect of decisions taken in the 12th to 14th, 16th to 19th, 21st, 22nd and 24th Screening Committee meetings. Its adverse observations are limited to cases dealt with in 10 out of 30 meetings held between 1993 and 2005, i.e. the 11th, 15th, 20th, 23rd and 25th to 30th meetings. Each one of these findings/observations needs to be dispassionately

examined, by placing it in proper context to understand, whether based on these findings all decisions of the Screening Committee could be considered arbitrary."

The court also found that the Government Dispensation Route that was used to allocate coal blocks to PSUs was also technically against sections 3(3) and 3(4) of the CMN Act, and hence even those allocations were illegal.

An exception was made for those entities which were awarded power projects based on competitive bids for electricity tariffs as Special Purpose Vehicles, and thus were not found to be illegal. This included the allotted coal mines, as well as all clearances. This wise process was adopted by the Government to enable swift execution of infrastructure projects in the power sector and also the highways sector, which were otherwise often delayed due to the absence of various clearances.

Coal Block Allocation Case: Judgment 2

Given the coal block allocations were held to be illegal and arbitrary, the SC cancelled allocations of 204 coal blocks on August 25, 2014. However, detailing the consequences of the declaration was left open for another hearing Thus, the SC rendered another judgment on September 24, 2014, to deal with the consequences following from such cancellation. Since coal was actively extracted at only 40 locations, and another six were ready for extraction, the second judgment primarily dealt with these 46 allocations.

The court decided whether such 46 coal extraction sites should be allowed to function. While deciding the matter, the court noted that having the blocks active or ready for extraction should not provide them with an advantage.

The SC thus cancelled 42 out of 46 allocations,. The court decided that the coal mines would have to be closed within six months to ensure a smooth and effective takeover by CIL.

The SC also ordered that allottees of such 46 coal blocks would be required to pay an additional levy of ₹295 per metric tonne of coal extracted. This was initially proposed by the Attorney General of

India (AG) and accepted by the SC. The AG based the additional levy on the Report of the CAG dealing with the financial loss caused to the exchequer by the illegal and arbitrary allocations. The compensatory payment was to be made on or before December 31, 2014. The coal extracted till March 31, 2015 also attracted the said additional levy.

Did SC Consider the Economic Impact?

The Hon'ble SC held that the coal block allocations by the Government were arbitrary and illegal. The coal block allocatees have worked within the legal framework and cannot be penalised for the acts of arbitrariness of the Government action. In fact the CAG in its report has stated that there should be incentives for timely production of coal by the companies; but on the contrary they have been penalised, and wrongly so.

The AG in his submissions laid out two consequences of the decision by the SC that the allotment of coal blocks was arbitrary and illegal. First, the allotment of the coal blocks was cancelled, so that the Central Government could take them over. And second, the 46 operational coal blocks should not have been cancelled, while the allotment of the remaining coal blocks should be cancelled. The AG also submitted that all allottees of coal blocks should be directed to pay an additional levy of ₹295 per metric tonne of coal extracted from the date of extraction as per the CAG Report.[257]

It was further also submitted by the AG that in case of allottees supplying coal to the power sector, they should be mandated to enter into Power Purchase Agreements (PPAs) with the State utility or distribution company so that the benefit is passed on to the consumers (sic).[258]

The rationale for this suggestion, as we interpret the same, can be linked back to a similar demand by the power ministry in 2012, which was justified on the grounds of ensuring tariff competitiveness.[259] The

257. https://indiankanoon.org/doc/41130429/.

258. *Ibid.*.

259. https://www.livemint.com/Politics/DOP0LnPDfhmAD54zb59X5I/Power-ministry-wants-coal-block-allottees-to-sign- PPAs.html.

power ministry stated that they did not want any of the captive block allottees to sell power in the merchant market as these captive coal blocks are considered to be a national asset and coal should be used to produce electricity for citizens of India. This communication by the power ministry came way before the CAG report was released on the irregularities in coal block allocations. It seems the AG put forth before the SC the demands of the power ministry, to ensure that power plant allottees either enter into long-term PPAs or have their coal mine allocations cancelled.

On the other hand, the respondents submitted that cancellation of all the coal blocks would have very serious and far-reaching consequences on the economy and the industry at large and thus, a committee should be set up to assess the economic impact of cancellation of coal blocks, considering its significance and linkages with many important sectors.[260]

However, the apex court declined the request. This was supported categorically and emphatically by the Attorney General that the Central Government has no difficulty in taking matters forward consequent upon the cancellation of the coal blocks. He argued that the economic implications or the fall out of the cancellation and the possible adverse impact it may have on other socio-economic factors have been taken into consideration by the Government.

The stand taken by the government to not concur with the petitioners in the larger interest of the economy and ignore the economic impacts of the cancellation flummoxes me.

According to Parakh, this was an ideal case for appointing an expert committee to look into the merits of each of the allotments. Tragically, he did not comment on the economic dimensions but stuck to the procedural aspects:

> "There was considerable merit in the submission made to the Court to appoint a committee of three persons including experts to examine each individual allotment and consider the facts peculiar to each allottee and report to the Court whether the coal block allotment should be cancelled or not. Unfortunately, this suggestion, which

260. Manohar Lal Sharma vs Principal Secretary, (2014) 9 SCC 614

could have prevented the injustice that resulted from the Court's order, was opposed by none other than the Attorney General himself. The Court rejected this suggestion on the assumption that it had fully comprehended the technicalities involved in Screening Committee decisions and that there was no case for an expert opinion. The fact however is, as I have explained in detail, that the Court neither understood the logic of the Screening Committee recommendations nor did it understand the intricacies of coal mining operations, before it declared all decisions of the Screening Committee as arbitrary, cancelled all allocations and imposed a retrospective fine."[261]

He further added that:

"No one expects judges to have domain knowledge of all matters that impinge on their decisions. However, they must have the humility and grace to seek expert advice in matters that are outside their expertise. The uppermost thought which comes to one's mind is that when the Courts deal with highly specialised subjects, they should be extra cautious in drawing conclusions and making observations, which do not match with the field realities."[262]

Impact on the Economy

The court was informed that huge investments of about ₹2.87 lakh crores were made in 157 coal blocks as of December 2012. Investments in end-use plants were made to the extent of about ₹4 lakh crores, which may become a dead loss. It was pointed out that the investments in end-use plants would be unrecoverable since their designs were related to the specification of coal for which the blocks were awarded. Moreover, banks and financial institutions had given loans of about ₹2.5 lakh crores to the industry, which may become bad debt,[263] if the allocations were cancelled. The respondents mentioned that the State Bank of India may suffer a loss of up to ₹78,263 crores, almost 7.9 percent of its net worth for the financial year 2013.

261. Parakh, PC. (2017). *The Coal Conundrum : Executive Failure and Judicial Arrogance*. Secunderabad

262. *Ibid*.

263. W.P. (Cr.) No. 120 of 2012, W.P. (Civil) No. 463 of 2012 with W.P. (Civil) No. 515 of 2012 and W.P. (Civil) No. 283 of 2013 Manohar Lal Sharma V Principal Secretary and others

Similarly, other public sector banks such as Punjab National Bank and Union Bank of India may also get adversely impacted.

Further, it was argued that the cancellation will also make about 10 lakh people jobless. Overall, spirited arguments were made that cancellation will adversely impact investor confidence and may lead to acute distress in some industries. Most importantly, as India was dependent on coal as a primary fuel source (of about ~ 70 percent of power generation), cancellations may result in inflationary trends.[264]

Respondents stated that due to cancellation of the coal blocks, power capacity in the range of 28,000 MW could be affected. Similarly, the closure of coal mines may result in an estimated loss of ₹4.40 lakh crores in royalty, cess, direct and indirect taxes to the exchequer. Additionally, imports of coal would need to be increased in FY 2016-17, resulting in an outflow of ₹1.44 lakh crores.

The relevance of these submissions by the respondents and the apathy of the Court towards the potential fallout from their order can be further deduced from Parakh's words. He noted that:

> "The Court took more than seven months to write its order after the conclusion of hearings that lasted for over sixteen months. During this period of almost two years, the coal sector came to a grinding halt, as no one in the State or the Central Government was willing to take any decision pending final orders of the Supreme Court. The Court, however, gave just about six months to the Government and to the companies whose allocations had been cancelled to adjust to the unprecedented crisis arising out of its order."[265]

After the SC decision, the Government huddled to bring in the necessary legislation and complete auction of all operating mines. However, there was no guarantee of a smooth transition:

> "On March 31, 2015, all the operating captive mines stopped operations. Nine months after the auctions were completed, as of January 2016, only five of the 31 mines auctioned had resumed production. What a waste of a national resource when the country was facing serious coal shortage!

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264. Writ Petition (Crl.) No. 120 OF 2012 Manohar Lal Sharma Vs. The Principal Secretary & Ors

265. Parakh, PC. (2017). *The Coal Conundrum: Executive Failure and Judicial Arrogance*. Secunderabad

> While the Coal Ordinance provides that new allottees will compensate prior allottees towards expenditures incurred on land and infrastructure, these provisions will not fully compensate prior allottees for expenditures incurred by them. There are many other costs apart from the land and infrastructure such as the cost of geological reports, expenditure incurred on additional exploration, preparing environmental impact assessment, getting various clearances, staff expenses etc. Thousands of Crores of rupees of the prior allottees are now stuck in the land already acquired or in various stages of acquisition in respect of blocks that have not yet been put under the hammer. Interest in this capital is mounting by the day. In the initial euphoria and severe coal shortage, many companies made exorbitant bids to win coal blocks for operating mines. With the fall in coal price in the international market, many are now regretting and response to subsequent auctions has been tepid."[266]One is sure that the overall loss is huge.

The additional levy was unjustified

'5C's also hinder decision-making: Coal Secretary Anil Swarup'.[267]This was the headline of a leading newspaper in 2016 that generated a tsunami of reactions. Anil Swarup had taken to social media to express his resentment towards five institutions - the 5Cs - CBI, CVC (Central Vigilance Commissioner), CAG, CIC (Central Information Commissioner), and the Courts. He said:

> "We very conveniently blame politicians for all the ills. However isn't it true that 5 Cs namely (CBI, CVC, CAG, CIC and Courts) contribute substantially in creating an inhibiting environment for quick and effective decision making that impact development?"[268]

In his book 'Not Just a Civil Servant', Swarup has discussed in detail the coal fiasco in India, and what led the Supreme Court to deliver such judgments, without taking into consideration its economic impact. He has gone down on the CAG report that was released, highlighting the mismatch in calculations in the report. According

266. *Ibid*.

267. https://economictimes.indiatimes.com/news/politics-and-nation/5cs-also-hinder-decision-making-coal-secretary-anil- swarup/articleshow/51710619.cms?from=mdr.

268. Swarup, Anil. (February 2019). Not Just a Civil Servant. Unicorn Books

to him, if the mathematical calculations would have been done more carefully and in detail, they could have helped avoid the damage caused to the economy as a result of the Supreme Court's judgment.

The loss of revenue to the exchequer to the extent of ₹295 per metric tonne of coal extracted (taken from the report of the CAG) was considered the average price of coal as given by CIL for the year 2010-11 (being ₹1028 per metric tonne). The application of this price retrospectively to previous financial years was questioned as being unjustified. The respondents pointed out that the production cost of coal for CIL is less than the corresponding cost for the private sector because CIL has economically viable mines.

Furthermore, the court did not give due consideration to the difference in grades of coal and differences in the coal mining process that impacts its overall costs. As has been pointed out earlier, during the coal allocation process, the superior grade of coal was allotted to the CIL while only a limited amount of superior grade of coal was made available to the private captive mine users. All these factors should have been considered by the court before deciding on the amount of fine to be levied.

The methodology adopted to charge a uniform levy for all the allocations was unfair. In this regard, Senior Advocates, K.K. Venugopal and Harish Salve also stated that:

> "It may well be that the cost of extraction of coal from an underground mine has not been taken into consideration by the CAG, but in matters of this nature it is difficult to arrive at a mathematically acceptable figure quantifying the loss sustained."[269]

The then CAG, Vinod Rai, in his book 'Not Just an Accountant' used data from the report and talked about how the calculations were worked out, which are given in Annexure 3.

Mr. Swarup, in his book, looked at each of these aspects in detail and identified flaws that only aggravated the adverse economic impact caused by the SC judgment.

He highlighted that the cost of coal mining by CIL ranges between ₹400 and ₹4000 per tonne. Given such a wide range and thus

269. P.C . Parakh, The Coal Conundrum: Executive Failure and Judicial Arrogance, 2017.

arriving at an average cost of mining, as is done by the CAG, was not appropriate. Swarup notes that the cost of mining varies significantly from one mine to another because of several factors:

> "There are issues relating to stripping ratio, grade of coal and transportation cost that were ignored by the CAG in arriving at the correct numbers".[270]

Apart from the cost of mining, there was also a substantial difference between the quality of coal in the blocks with CIL and that of those given to private parties for captive mining (as was conceded by the then Coal Secretary before the Parliamentary Committee). For these reasons, Swarup contends that using CIL numbers as a benchmark by CAG was faulty.

"If one looks at the statistics provided by the Coal Controller of India for the year 2014-15, it is evident that while 33.20 percent of the coal mined by the Coal India Limited was of superior quality (Grades 1 to 9), only 9.4 percent of the coal mined by captive miners was of that grade. Similarly, the stripping ratio for captive mines was much higher than the one for Coal India Limited mines. During the year 2013-144, it was 1.89 for Coal India Limited and 3.46 in the captive blocks."[271]

Thus, Swarup contended that the calculations in the CAG report also led to the cancellation of those mines for which there were no takers. However, all the above factors were not taken into consideration by the CAG, as the CAG was only developing a broad hypothesis and not deciding the fate of individual companies. But the Court had the responsibility of dispensing justice to every individual company.

Mr. Parakh noted in his book that, a hypothesis developed by CAG in a different context while suggesting the imposition of the fine of ₹295 per metric tonne, was arbitrarily transplanted by the Supreme Court to an entirely different situation.[272] The Court could not appreciate the fact that different mines produce different grades of coal and that there is a huge difference in the sale price of different grades of coal. Thus, to adopt a uniform penalty based on data obtained from the CIL was arbitrary and illogical.

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270. Swarup, Anil. (February 2019). *Not Just a Civil Servant*. Unicorn Books.

271. *Ibid.*

272. P.C . Parakh, *The Coal Conundrum: Executive Failure and Judicial Arrogance*, 2017.

Swarup has also portrayed a dissent from Parakh's views about the responsibility of CAG. According to Mr. Swarup, a careful calculation would have determined the 'windfall' gain from each mine. If a mine-wise analysis, based on facts, had been made, allocation of only those mines would have been cancelled where there was a windfall gain. Swarup states that he does not agree with the statement by Parakh:

> "It was not necessary for CAG to arrive at mathematically acceptable figures for establishing its hypothesis."

Rather, according to Swarup, that is exactly where the focus should have been. The CAG came up with numbers without going into the details of each block/mine, thus using averages to justify their calculations. Had the calculations been more precise and mine-specific in a disaggregated manner, it would not have caused so much damage to the economy.

Supreme Court's Position

The Supreme Court considered the arguments proposed by all the parties but did not comment on the economic harm suggested by the respondents. The court agreed to the AG's suggestion in part by allowing the levy of additional charges.

Economic Impact of the Cancellation of Coal Blocks Allocation

The SC decision had a significant impact on the economy including several stakeholders.

Impact Analysis[273]

The Losers

Key Private Sector firms:

Hindalco JSPL, Monnet Ispat Usha Martin

Key Public-sector Organisations: West Bengal Electricity Board, West Bengal Power Development Corp, Punjab State Electricity Board, Karnataka State Power Corp, Rajasthan Rajya Vidyut Utpadan Nigam, Arunachal Pradesh Mineral Development Corp, West Bengal Mineral Development Trading Corp

273. Source: Business Standard, SC cancels all but four coal block allocations, September 24, 2014.

Sector-wise Demand-supply Mismatch Due to SC Order

After the SC judgment, CIL was the key supplier of coal in the country. The CIL supply was projected at 520 million tonnes and the total demand for coal at that time was projected at 787 million tonnes. A huge demand-supply mismatch was created due to the cancellation of coal blocks.[274] (Annexure 4 gives the sector-wise distribution)

Impact on the Fiscal Position of the Centre and States

The SC decision impacted the country's Current Account Deficit[275] for FY 2014-15 by increasing the deficit by US$700mn due to additional coal imports, as cited in a report by SBI's research report Ecowrap.[276] Similarly, in August 2015, the coal import expense increased to US$24.9bn which was US$8.5bn higher than the last fiscal year. Around ₹4.4 lakh crores were the estimated loss in royalty, cess, direct and indirect taxes, etc.

While the Central Government might have received more income from the additional levy, finances of the states such as West Bengal (with six operating cancelled coal blocks held with state government companies), Arunachal Pradesh, Karnataka, Madhya Pradesh, Punjab and Rajasthan (one each cancelled operating coal blocks held with state government companies) would have been impacted. The state government companies would have paid additional levies to the Central Government. Most importantly, if the balance sheet of these companies were under stress, the state government might have supported them with the finances.[277]

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274. STATE BANK OF INDIA: Ecowrap, September 26, 2014.

275. Current Account Deficit is a measure of the trade balance of a country when the total value of goods and services imported exceeds the total value of exports.

276. STATE BANK OF INDIA: Ecowrap - Fiscal bonanza awaits Government, impact on CAD may be marginal, September 26, 2014.

277. https://www.indiaratings.co.in/PressRelease?pressReleaseID=205&title=Ind-Ra%3ACoal-Block-Cancellation-Could-Impact- GDP-Growth-Adversely

Table 2

Coal Supply and Demand Scenario

	FY13	*FY14*	*FY15*
CIL (Coal India Ltd)	464.95	471.09	520
SCCL (Singareni Collieries Company Limited)	52.08	47.89	55.5
Others	50.58	52.03	68.25
Total indigenous supply	*567.6*	*571.0*	*643.75*
Actual Import	*145.79*	*168.5*	-
Demand projected	-	*729.53*	*787.03*
Gap (to be met by Import)	-	-	**143.28**

Sources: Ministry of Coal, Annual Report 2013-14.
State Bank of India: Ecowrap September 26, 2014.

Impact on Trade Balance

The SC ruling led to a mismatch of demand-supply of coal and thus leading to an increase in dependence on imports for coal. In FY14, India imported 171 million (17.1 crores) tonnes of coal at US$16.41bn (₹1640 crores) [(FY13: 145mt at US$17.01bn (₹1700 crores)].[278] Similarly, in FY16 the coal import bill increased substantially by US$6.22bn (₹620 crores) and may have widened the Trade Deficit.

Impact on Metal Companies

A major impact of the SC decision was visible in the metal companies. Since 1993, the major listed private sector companies and the number of coal blocks held by them are as follows:

Jindal Group (11 coal blocks, of which seven were for Jindal Steel and Power)

Bhushan Group (five coal blocks)

Hindalco (four coal blocks)

Tata Group (six coal blocks)

After SC's first judgment on August 25, 2014, the BSE Metal index fell by 9 percent, while the BSE Power index fell by 4.4 percent and BSE Bankex fell by 2 percent. Jindal Steel and Power lost 11 percent

278. *Ibid.*

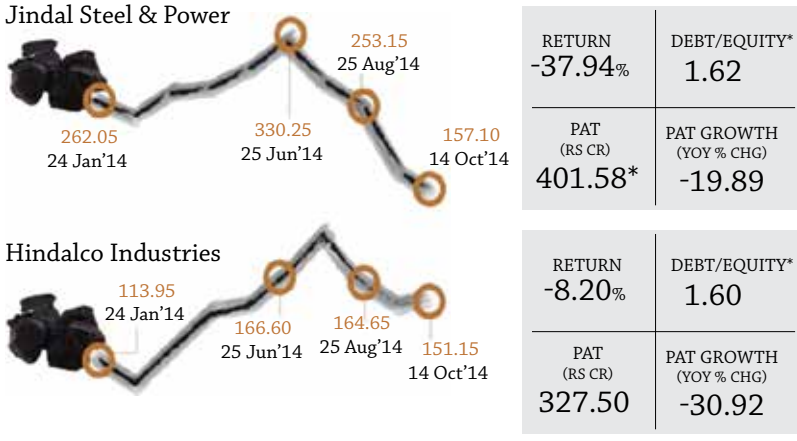
of its share value immediately after the verdict, whereas Hindalco lost 1.2 percent of its share value. Similarly, the share value of Jaiprakash Power Ventures fell by 22.2 percent, Bank of India fell by 18.6 percent and Punjab National Bank fell by 8.5 percent. This came on top of the already existing constraints for the private sector, which they had faced due to the public sector gaining preference and easy access to the allocation process including a high-quality grade of coal.

Kotak Institutional Equities report said that "The biggest challenge for steel companies was the suitability of imported coal to plants designed for low-grade domestic coal." It also said that for companies like JSPL, with little proximity to ports, managing import logistics was not going to be easy.[279]

Domestic metal companies also faced threats to their plans as there were chances that they would be paying a much higher price for mined coal, even from captive coal mines.

Figure 2

Impact on Jindal Steel Power and Hindalco Industries



Sources: Return from August 25 to October 14; debt-to-equity ratio as on March 2014; PAT is profit after tax for quarter ended June 2014; * consolidated figures; Source: Ace Equity.

Breaking into pieces by Money Today, dated November 14, 2014.

279. https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/aftermath-of coal-block-cancellation-metal-companies-profit-may-dip-on-higher-coal imports/articleshow/43848435.cms?from=mdr

Impact on the Power Sector

In India, more than two-thirds of the power sector's output is based on coal and thus the sector is more vulnerable to large-scale shocks such as the cancellation of the coal blocks.[280] The SC judgment created an acute fuel shortage in the power sector and coal had to be imported to fill the gap. Fortunately, import of coal was allowed on open general licence, i.e. no prior approval or a licence was needed to import coal. In the pre-liberalisation era of the 1970s and `1980s import was extremely difficult for several reasons. That said, the companies with cancelled coal blocks did not receive any compensation or support to recover the investment/development expenditure incurred. Instead, they were made to pay an additional amount as a penalty.

Jindal Steel and Power Ltd (JSPL) was the worst hit, as it had the largest number of operational captive mines and produced almost 12 million tonnes of coal every year.[281] JSPL also paid a one-time amount of ₹3,300 crores on its estimated production of 11.2 MT from inception till March 2015 because of the additional penalty levied by the Supreme Court.

According to Fitch Ratings, NTPC became vulnerable after the SC judgment, as nine out of 10 coal blocks held by them were cancelled.[282] The court did not think that NTPC being a government enterprise could not have indulged in any hanky-panky.

The stress on the Indian power sector increased from both ends, with low availability of raw materials and infrequent and insufficient power tariff hikes. Power hikes were passed onto end consumers and were registered in higher figures for inflation but the fact that these were insufficient means that the financial health of the discomes was compromised.[283]

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280. https://timesofindia.indiatimes.com/india/Supreme-Court-ruling-on-coal-blocks-likely-to-hit-economy-India-Inc-says/articleshow/43347176.cms

281. *Ibid.*

282. *Ibid.*

283. https://www.indiaratings.co.in/PressRelease?pressReleaseID=205&title=Ind-Ra%3ACoal-Block-Cancellation-Could-Impact- GDP-Growth-Adversely

The state-run Punjab National Bank, Union Bank of India, IDBI, UCO Bank and United Bank of India were also adversely affected by the Supreme Court decision as the exposure of such banks to the power sector was between 6 percent and 13 percent.

Figure 3

Impact on Union Bank of India and Punjab National Bank[284]

RETURN	DEBT/EQUITY*
0.45%	1.70
PAT (RS CR)	PAT GROWTH (YOY % CHG)
664.11	18.54

RETURN	DEBT/EQUITY*
-3.96%	1.61
PAT (RS CR)	PAT GROWTH (YOY % CHG)
1,405.12	10.18

Other Views on Economic Impact

Several experts have commented on the economic impact of the SC decision to cancel coal blocks. Noted lawyer Harish Salve highlighted that the decision cost the economy one percent of the GDP. In my opinion, the cost to the economy was much more than 1 percent due to the multiplier effect of electric power on nearly all economic activities in the country, not only through the impact on production through upstream and downstream effects but also through the adverse impact on the quality of life of the consumers caused by the lack of power at affordable prices, a basic human need. This also has a dampening effect on investment due to the uncertainty it creates. Foreign investment shies away while domestic

284. https://www.businesstoday.in/moneytoday/stocks/coal-sector-coal-blocks-supreme-court-tata-group- jspl/story/211765.html

investment goes out of the country where it finds greener pastures and easy to do business with some predictability.

The judgment also had an adverse impact on employment as millions of jobs were lost due to a slowdown in production and fresh investment. The country was forced to import coal, despite the available domestic capacity for coal extraction.[285] This reminded me of one of the famous proverbs: carrying coals to Newcastle.[286] It used to be a well-known coal-mining town in Britain where coal was mined since 1600; any attempt to sell coal to that town was therefore foolhardy. The SC judgment had reduced India, rich in coal resources like New Castle, to a coal importer.

Salve also pointed out that the SC has been inconsistent in dealing with commercial cases, causing grave concerns in the minds of investors.[287] *Other noted lawyers have also raised concerns about investments made in equipment and infrastructure, which turned into sunk costs.*[288] *These issues are one of the core points of this book.*

Industry representatives noted that while the judgment may have been intended to bring in transparency, it will raise questions on the sanctity of government policies impacting the investment climate.[289] It has also been pointed out that investments estimated to be close to ₹250,000 crores were tied up in some of these mega industrial projects. While the promoters would have invested close to ₹75,000 crores in these projects, banking finance made up the balance. The banking sector exposure to the power sector alone is upwards of ₹500,000 crores, and the overall exposure of the banking sector to the iron and steel industry as of June 27, 2014, was ₹265,000 crores.

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285. https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-responsible-for-current-slowdown-in-india-senior-lawyer-harishsalve/articleshow/71168723.cms?from=mdr

286. https://www.dictionary.com/browse/carry--coals--to--newcastle#:~:text=Do%20or%20bring%20something%20superfluous,mining%20center%20for%20400%20years.

287. https://theprint.in/judiciary/supreme-court-squarely-to-blame-for-economic-slowdown-says-senior-advocate-harish- salve/292115/

288. https://www.thehindu.com/news/national/supreme-court-lost-its-way-while-cancelling-coal-blocks-2g-licences-former- attorney-general-rohatgi/article31602365.ece

289. https://timesofindia.indiatimes.com/india/Supreme-Court-ruling-on-coal-blocks-likely-to-hit-economy-India-Inc- says/articleshow/43347176.cms

The decision would have had an adverse impact on existing and potential impacts on the economy.[290] Sandeep Bamzai argues about this quite sensibly in India Today:[291]

> "The 'vice of illegality and arbitrariness' stares at all those who were allocated coal blocks. My contention is that the court can levy large penalties on many of the projects and allow them to continue as long as they can establish their bona fides by operating a running business. This way the revenue will also accrue to the exchequer and the businesses can also continue.
>
> "Visualise a scenario where a multi-billion dollar smelter sits ready and waiting for coal from a block next door and to function, you end up importing coal from say Indonesia. That would be a travesty.
>
> "It is therefore imperative that the court study these projects, examine their investments, consider the exposure of state banks and then deliver the verdict. That a majority of the mines haven't even started mining is also an inescapable reality that they must consider".

Experts have also pointed out that the decision has enhanced the risks of doing business in India. Owing to the judgment, the burden is clearly on companies that contract with the government to satisfy themselves that the government has the power to enter into contracts with them. Companies contracting with the government should also be prepared to defend these contracts in courts as they can be challenged by anybody and at any time. The Supreme Court had cancelled auctions without considering a remedy of levying fines or monetary damages on the allottees and allowed them to continue with their operations.[292] However, the additional levy imposed uniformly on every allottee without any finding of wrongdoing against them is a double whammy for the allottees.[293]

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290. https://www.indiatoday.in/opinion/sandeep-bamzai/story/coal-scam-vinod-rai-cag-reports-supreme-court-investment- indian-inc-sandeep-bamzai-206430-2014-08-31

291. *Ibid.*

292. Generally, law cases involve a problem that can be solved by the payment of monetary damages.

293. http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/coal- allocations-cancelled.html?no_cache=1&cHash=2b8d1c092c20772a3a23ed5a9be9add1

Another significant impact on the bureaucracy was that most did not wish to take any risks at all to support investment projects fearing the Five C's outlined above, thus leading to policy stasis. In this case, while Parakh was hounded, another Coal Secretary was jailed for two years by the CBI court much after they had retired. Writes senior journalist Harish Khare in The Wire:[294]

> "P.C. Parakh, also a former coal secretary and self-styled crusader against corruption, found himself subjected to a CBI "raid". Parakh fancies himself as a kind of whistleblower and vigorously defends Vinod Rai's bizarre calculations and conclusions.
>
> "In a self-serving book, Crusader or Conspirator? Coalgate and Other Truths, he prattles: '…a team of dozen [CBI] officers landed at my door to search my flat eight years after I retired. I did not understand what they expected to find in my house. Neither did they. While I took it in my stride, my wife was shocked and traumatised at this reward for 36 years of honest, sincere and dedicated service.' The policeman could not care less for the Parakhs' sensibilities, just as he did not give a fig for Gupta's reputation.
>
> "…every honest, sincere and dedicated bureaucrat, serving or retired, must have felt a cold shudder down the spine as he or she read the news item: a former coal secretary, H.C. Gupta, who has found himself accused in the so-called coal scam, told the court that he would rather "face the trial from inside the jail" than apply for bail.
>
> "Simply put, this fine bureaucrat – whom everyone unhesitatingly certifies to be' the most honest officer' of his generation – has refused to cooperate with the judiciary-monitored sham that the bogus righteousness has inflicted on the nation. In very measured words, Gupta told the court: 'Whatever I did as chairperson of the Screening Committee or as Coal Secretary was done with a clear conscience… I also believe that the coal block allocation was no scam. The Screening Committee did its job sincerely and in good faith'.
>
> "While all the powerful businessmen and politicians have escaped the CBI dragnet, a man like Gupta has to go through the ordeal of a trial… Make no mistake, the Gupta episode is bound to have a

294. https://thewire.in/politics/a-trial-and-a-travesty-one-mans-battle-against-the-bureaucratic-system

deleterious impact on all those men and women who strive to serve the Indian state".

In a counter article, another journalist: M. Rajsekhar writes in The Scroll, that Gupta was Coal Secretary between 2006 and 2009, a period when the largest number of captive coal blocks were allocated.[295] *"What the people defending former coal secretary H C Gupta not telling you? Instead of challenging the captive coal block scam, he seems to have played along in the process".*

In my humble opinion, both H C. Gupta and Manmohan Singh were reportedly honest and did not take any illegal gratification, but due to coalition politics and greed of the High Command, went along with the process. This was certainly a violation of the Indian Penal Code as Acts of Omission. The *quid pro quo* for Singh was the chair of the Prime Minister.[296]

This 'affinity' was so evident that in September 2013 when Rahul Gandhi tore up the Ordinance at a press conference, which sought to negate a Supreme Court ruling that convicted MPs or MLAs cannot contest elections to a public office,[297] Singh did not resign. Gupta got a good post-retirement appointment[298] as a Member of the Competition Commission of India. He resigned from that post when the CBI closed in on him in this case.

After Effects on Revenue of States from Coal Auction

According to a report in *Business Standard* in 2018, after the cancellation of coal blocks by SC, the Central Government had claimed that once coal blocks were auctioned, coal-bearing states would collectively earn ₹3.35 lakh crores revenue from 67 captive coal

295. https://scroll.in/article/814946/what-the-people-defending-former-coal-secretary-hc-gupta-are-not-telling-you

296. https://www.thehindubusinessline.com/news/national/rahul-tears-into-ordinance-to-protect-convicted- lawmakers/article20666122.ece1

297. The ordinance was also issued as part of coalition politics.

298. In all fairness it must be said that nearly most, not all, retired bureaucrats and judges land up getting post retirement jobs because they have played ball with the establishment during the last years of their service. This practice has been termed as corruption by Veerappa Moily, MP and former Union Minister.

blocks allocated by the government during February-March 2015. Furthermore, till September 2018, only 33 blocks had been auctioned against which the States had just received ₹5,684 crores between February 2016 and July 2018.[299]

However, a press release by the Central Government exaggerated the revenue estimation from the auction. The government claimed that after the auction of 29 coal mines in two phases the "total proceeds from the coal mines auctions have crossed ₹1.93 lakh crores surpassing CAG's estimate of ₹1.86 lakh crores losses on account of allocation of 206 captive coal blocks without auction since 1993".[300] Additionally, the projection of ₹3.35 lakh crores revenue to the state pertained to revenue flows over 30 years.

Coal Reforms, Finally!

In 2014, a new opportunity presented itself when the Supreme Court cancelled all the coal block allocations made for captive mining from 1993 onwards. To handle the situation arising out of the SC order, on October 21, 2014, the Central Government issued the Coal Mines (Special Provisions) Ordinance, 2014.[301] Though the Ordinance made an enabling provision to open up the coal sector for commercial mining, however, it still retained restriction of captive use in the initial rounds of auction. The Coal Mines (Special Provisions) Act, 2015 was passed by the Parliament and received the assent of the President on March 30, 2015, thereby amending Coal Mines (Nationalisation) Act, 1973 and the Mines and Minerals (Development and Regulation) Act, 1957.[302, 303]

However, the trade unions yet again opposed this ordinance which would open the coal industry to the private sector. A joint meeting of

299. https://www.business-standard.com/article/economy-policy/after-bold-estimates-coal-auctions-allotments-get-rs-56-84-bn-in-3-5-yrs-118092501278_1.html

300. https://thewire.in/energy/coal-auctions-allocations-narendra-modi-government

301. https://www.prsindia.org/billtrack/the-coal-mines-special-provisions-second-ordinance-2014-3600.

302. *Ibid.*

303. https://www.prsindia.org/uploads/media/Coal%20Mines/Coal%20Mines%20(Special%20Provisions)%20Act,%202015.pdf.

the Central Trade Unions held on December 24, 2014, unanimously opposed the decision of the government.[304] Not surprisingly. Even the Congress party opposed the opening of the coal industry to the private sector, which it supported when in power.[305]

The reform run continued, and on January 10, 2020, the Union Cabinet promulgated the Mineral Laws (Amendment) Ordinance 2020. The Ordinance ushered in the reforms for the coal industry that were pending for decades, allowed coal mining by any company present in the sector other than steel and power, and thereby removed the captive end-use criteria.[306]

The Minerals Laws (Amendment) Act, 2020, received assent from the President of India on March 13, 2020, after it was passed by the Parliament; thereby amending the Mines and Minerals (Development and Regulation) Act, 1957 and the Coal Mines (Special Provisions) Act, 2015.[307] In continuance to the opening up of the coal industry, the Government also approved 100 percent Foreign Direct Investment under the automatic route in mining, processing, and sale of coal.[308]

The government has conducted 12 tranches of auctions since 2015. However, the industry has shown a tepid response. Government in the 12 auction rounds attempted 211 auction processes, out of which it was only able to successfully allot 59 mines. Out of the 59 mines, there are numerous mines which have failed to take off and are either stuck in litigation or have been surrendered by the allottee due to commercial unviability.

In the first round of auctioning the government earmarked 110 mines for auction, out of which after three rounds only 33 blocks were bid out and the other 17 blocks were allotted to the government

304. P.C . Parakh, The Coal Conundrum: Executive Failure and Judicial Arrogance, 2017.

305. *Ibid*.

306. https://www.livemint.com/industry/energy/india-opens-up-coal-mining-further-11578477090179.html.

307. https://coal.nic.in/sites/upload_files/coal/files/curentnotices/gazette%20biil17032020.pdf.

308. https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/coal-sector-gets-nod-for-100- fdi/articleshow/70885133.cms?from=mdr.

companies in the power sector. This led the government to completely deregulate the sector, but still, the response from the private sector has been underwhelming.

It is interesting to note that while the bid for coal blocks with no end-use restriction was opened up in June 2020 and the deadline to submit technical bids were August 2020, it had to be postponed because almost 40 percent of the coal block that was up for auction did not receive any bid. Moreover, even no foreign companies have shown any interest yet. Such a lack of interest and participation from the private companies can also be attributed to depressed coal demand due to the economic downturn and the terrible COVID-19 pandemic.

To this end, the Government has also changed the auctioning model, wherein the fixed fee of ₹150/tonne of coal has been changed to a revenue-sharing model where initially four percent of annual revenue from the mines would be shared with the Government. However, the formula has not yet been adopted and would be notified at a later stage by the Ministry of Coal. Under the auctioning process, the firms are required to bid above a floor price. This change in the auctioning model will certainly help the private companies to get coal blocks at a lower price. But, on the other end, the state government might lose substantial revenue in the form of royalty.

The State of Jharkhand filed a petition in the SC against the Central Government to unilaterally announce the auctions without consulting them. Jharkhand fears low revenue for their state due to lower-priced auctions and depressed demand. In FY18-19, Jharkhand earned about ₹6000 crores from mining, which constitutes about 72 percent of their non-tax revenues. While the Central Government seemed to be wanting to increase coal production, the state government want their revenues to be maximised.

As I write this chapter, the case between the Central Government and the State of Jharkhand is sub judice. Nevertheless, while there is also a push towards renewable energy, however, the reality remains that in August 2020 about 61.3 percent of India's electricity was generated by coal. This demonstrates that coal is still a crucial fuel source for India's energy security.

Coal-Power Fallacy

Another area, which requires dire attention, relates to the coal-power fallacy in India. To ensure that the downfall in the economy which was caused as a result of the SC judgment is not made worse, this issue needs to be addressed effectively and immediately.

Anil Swarup had pointed out in his book that there is a looming crisis due to coal shortage, but the same cannot be the sole reason attributable to the pathetic state of affairs in the power sector in India.[309] In that regard, currently, the push by the government to construct more coal-based power plants to meet the increasing energy demand appears doomed economically. In a recent piece in the Economic Times, concerns have been raised regarding the same.[310]

For one, the energy-requirement projections by the Central Electricity Authority (CEA) are not in sync with the actual demand. Such discrepancies have resulted in excess capacity, thus it necessitates questioning the rationale for more coal power. The existing coal-power plants are already suffering, with capacity utilisation currently down to 45 percent as opposed to 55 percent, pre-COVID.[311]

Incidentally, while making these projections, the CEA noted that India does not need new coal-power plants to meet its demand at least until 2027. Despite that, the country has continued to add capacity, ignoring its calculations. There is no denying that India does not need new coal power plants. If at all, it needs to focus on increasing the efficiency of the existing plants and rapidly phasing out plants older than 20 years. Following the latter, will have multiple economic and environmental benefits, which is the need of the hour, and will continue to be, especially post-COVID, when we need a more resilient and green economy. One way forward is to adopt

309. Swarup, Anil. (February 2019). *Not Just a Civil Servant*. Unicorn Books.

310. https://economictimes.indiatimes.com/prime/environment/the-coal-power-fallacy-ignore-low-demand-forecast-ramp-up-capacity-for-costlier-energy/primearticleshow/78302530.cms?utmsource=newsletter&utm_medium= email &u tm_c ampaign= PrimeMailerPaid&utm_content=Story3&ncode=fecd2253fcaf0ca64379e583315e8a5f.

311. *Ibid.*

coal beneficiation[312] which helps to create cleaner coal with lesser emissions pollution, thus contributing to a green economy.

The Coalgate scam and SC's reaction to the same have been disconcerting to the economy, the people, and one could argue, have gone against national interest. As observed in the initial points made in this chapter, the SC judgment was the final nail in the coffin. The causes of an economic slowdown were in the making for a long time. Structural deficiencies in the management of the coal sector would have eventually caused great harm to the Indian economy with or without the SC.

Even the former Coal Secretary Parakh, who had flagged the inefficiencies in the coal allocation process and continuously fought to improve the system, writes in his memoir that there was no case for an investigation into allocations made from 1993-2003. Even the CAG had not made any adverse observations in those allocations.[313]

Who were the Erring Parties?

In a nutshell, the delay in switching over to the open bidding process caused the Coalgate scam; the least that SC could have done was to minimise that delay and harm rather than accentuate it. This could have been done by singling out erring individuals and companies. Had the Supreme Court heard the individuals concerned in regard to their particular facts as opposed to only hearing the associations of various industries, it would have been in a better situation in regard to assessing the wrongdoers, and identifying the guilty parties. Such an exercise would have acted as a filter in separating the erring parties from all the rest.

Several convictions that have happened in the trial of the coal block allocation process, popularly known as the coal trial or the coal scam trial, have narrowed down on some of the wrongdoers. For instance, a company by the name of Vini Iron & Steel Udyog

312. https://www.sciencedirect.com/topics/engineering/coal-beneficiation#:~:text=1%20Coal%20beneficiation%20processes,characteristics%20to%20the%20fuel%20produced

313. Crusader or Conspirator: Coalgate and Other Truths, PC Parakh.

Limited was initially not recommended by the State of Jharkhand for allocation of the "Rajhara" coal block as it was not found eligible, however, at a subsequent stage following the change of government in the State of Jharkhand, and the change of management of the said company – which reportedly had now been bought by a close aide of the Chief Minister of the State of Jharkhand – the former recommendation of the State Government was manipulated so as to favour the company for allocation of the "Rajhara" coal block.

The trial court in its final judgment called it a case of classic criminal conspiracy, and observed: "It was thus found that the change in stand of officers of Jharkhand so as to favour M/s VISUL for allotment of a coal block and in the process discarding the earlier recommendations of the State which were in favour of M/s Mukund Ltd. and M/s Zoom Vallabh Steel Ltd. was primarily the result of change of ownership of M/s VISUL from "Tulsyan family" to A-8 Vijay Joshi, who was a close associate of A-7 Madhu Koda, the then Chief Minister of State of Jharkhand."

Similarly, in the case of Castron Technologies Limited, the trial court found that the company was initially not found fit for allocation of a coal block in the "Brahamadiha" coal mining area, but after it wrote a representation to the MoS for Coal, Mr Dilip Ray, the company's candidacy took a u-turn, and it got allotted a coal block without any change in the factual circumstances of the company's application and supporting documents. Here, the trial court also convicted Dilip Ray for criminal breach of trust because as MoS for Coal (holding independent charge) Ray had dominion or control over the said Brahmadiha coal mining area on behalf of the Union Government, and thus he dishonestly facilitated allocation of the coal block in favour of a company that never had the intention to establish an end-use project, which was a requirement for allotment.

Thus, there are many juristic persons as well as natural persons who acted with dishonest intentions, and conspired to get coal block allocations to obtain wrongful gain, and cause wrongful loss to the Union Government as well as other eligible applicants. However, the exercise of investigating such erring parties lies with appropriate

investigative agencies and trial courts. As already noted above, the private parties were not given a chance to put forth their side of the narrative before the Supreme Court prior to the rulings of the Court. These rulings did not analyse and identify the actual erring culprits who deserved to be punished for "windfall gains", "corruption", and "unjust enrichment".

After such investigation provides information to the Court on who the unduly benefitted parties were, an offence of corrupt practices under the Prevention of Corruption Act, 1988 (PC Act) can also be established, if the requisite elements are fulfilled. Section 9 of PC Act provides that when the offence is committed by a commercial organisation, it is punishable only with a fine, except if the offence has been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, in which case relevant persons can be held guilty and can be punished with imprisonment and fine.[314]

Instead, the Supreme Court decided to deallocate 214 coal blocks issued since 1993, and additionally, levied a penalty of ₹295 per tonne of coal that had already been mined over the years, which amount was based on the highly disputable figures arrived at by the CAG in his report. The devastating effects of this judgment have already been discussed above in detail; however, another crucial point that got highlighted by the coal block cancellations is that of judicial overreach, and the lack of accountability that comes attached with the Supreme Court while it exercises its powers under Article 142 of the Constitution of India. This is certainly a larger question for debate, and is not the focus of this book, however, it has been brought to the forefront once again with the sweeping order of cancellation of 214 coal blocks based on issues raised in a public interest litigation.

An allegation of corruption cannot be best dealt with by passing an overarching declaration holding all coal block allocations to be cancelled for being illegal, in a court of law which is itself confined by its judicial powers that do not include the powers of a magistrate

314. https://www.thehindubusinessline.com/business-laws/why-it-is-important-not-to-ignore-indias-anti-corruption-laws/article65639377.ece

dealing with similar allegations under the Code of Criminal Procedure, 1973.

In the case of the coal block judgment, the Supreme Court substituted its own judgment in place of the government's judgment, and undertook the analysis of arbitrariness on the touchstone of the argument of "*inter se*" merit of all the coal block applicants (successful and unsuccessful). The Supreme Court took note of the changing norms that were made applicable to various Screening Committee meetings covering allocations done from 2004 onwards till 2012. The Court observed that there was no consistency or uniformity in the considerations applied by the Screening Committee, that the Screening Committee Meetings did not disclose what criterion was used to allocate coal blocks, and further that no comparative analysis of merit was done amongst the various applicants contending for a particular coal block.

On a perusal of the minutes of the Screening Committee Meetings, it is revealed that in the 18th Screening Committee Meeting the issue of *"inter se"* merit was first highlighted when it was decided to allocate blocks in the captive list only after keeping them in the "public domain for a reasonable time" to allow "interested parties to apply" before adding the block to the list of identified captive mining coal blocks. And, it was in the 21st Screening Committee Meeting that the need for competitive bidding was felt.

The meetings of the Screening Committee from 1st to the 21st, and also several other subsequent meetings of the Screening Committee, were heavily criticised by the Supreme Court for lack of an "inter se" priority amongst all the applicants of a particular coal block, as well as the absence of an "objective criterion" in the guidelines to determine the merit of successful applicants.

However, what the Supreme Court seems to have lost sight of is that there exists no legal or constitutional mandate for treating a particular route of allotment to be constitutionally binding, as spelt out by a five-judge Constitution Bench of the Supreme Court while giving its advisory opinion in the "2G Presidential Reference" matter. Thus, if the *"inter se"* evaluation was not done in the initial meetings of the Screening Committee, but was adopted later on, the insistence

by the Supreme Court that such an evaluation ought to have been done in the previous meetings of the Screening Committee has no basis in law.

Furthermore, the Supreme Court's observations on how the coal blocks were allocated do not appreciate the fact that the Screening Committee was itself evolving new guidelines as per the changing circumstances with time. In this context, the position of the Supreme Court that the route of competitive bidding was not used in the allocation process is unfair. The Constitution Bench in the "2G Presidential Reference" matter opined that "auction, despite being a more preferable method of alienation/allotment, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources."

The focus of the Supreme Court ought to have been limited to testing the constitutionality of the law, while leaving the veracity of policy decisions taken within the ambit of such law to the government of the day. This is the fine line which tends to be corroded while applying the doctrine of arbitrariness.

The use of the doctrine of arbitrariness – which is the bedrock of the judgment passed by the Supreme Court of India while cancelling the coal blocks allocations – is not a new phenomenon in the Indian jurisprudence, and can be traced back to the case of *E. P. Royappa v. State of T.N. (1974) 4 SCC 3*. In the said landmark judgment, the Supreme Court held that "where the operative reason for State action, as distinguished from motive inducing from the ante chamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and this is hit by Articles 14 and 16 [of the Constitution of India]."

In fact, the doctrine of arbitrariness has been used as a dynamic tool by the Supreme Court on the touchstone of which it has tested the constitutionality of numerous legislative and executive actions. This doctrine of arbitrariness, as laid down by the Supreme Court in the *Royappa* case, suggests that the term arbitrariness is a voluntary action taken by a person in whom the said arbitrary power vested. However, the treatise on constitutional law authored by H.M. Seervai

categorically states that the difference between "arbitrariness" and "discrimination" has been wrongly appreciated by the courts. He argues that affixing "will" or "intention" to a legislature should not mean that anything that violates equality is necessarily arbitrary, even if arbitrary acts are normally in violation of the principle of equality.[315]

The conversation on the evolution and use of the doctrine of arbitrariness in Indian jurisprudence is a lengthy one, and is not the focus of this book, but since it has been heavily relied upon in the coal blocks judgment of the Supreme Court under discussion, it is necessary to present the above mentioned brief backdrop.

While the reliance on the doctrine of arbitrariness has been the basis of many celebrated judgments, the doctrine ought to be exercised with caution. The argument that the doctrine of arbitrariness is a check on the legislature, in that, it has a limiting effect on legislative/executive action must be distinguished from the temptation of making it an instrument for substantive review of administrative decisions. As much as the doctrine of arbitrariness is an important facet of equality, it is also capable of being an incoherent doctrine that can have dangerous effects, or rather the use of the doctrine needs to be done with caution as it tends to become a substantive review of the legislative/executive action in question leading to instability of the administrative acts.

An alternative that could have been adopted by the Supreme Court of India would have been to take a two-pronged decision where, on the one hand, the Court would have declared the coal block allocations to be illegal because they were violative of the extant coal legislation, and on the other, they would have delegated the matter to concerned government authorities to act as per this decision of illegality.

With respect to the suspicions of windfall gains, unjust enrichment resulting from acts of corruption ought to have been verified through a criminal inquiry first, rather than by litigating this issue in a proceeding emanating from public interest litigation where the rules of evidence and criminal procedure that are applicable to trial proceedings are absent, thus, making the route of PIL an

315. H.M. Seervai, *Constitutional Law of India*, 1991.

unfit platform for deciding the allegations of corruption. Such acts of crime require a conclusion which meets the test of "beyond all reasonable doubt", and such a conclusion can be satisfactorily arrived at only through a trial proceeding in a competent court of law. [316]

In terms of punishing the parties who made huge profits, the promoters and the old owners could have been asked to disgorge the windfall gains and deposit these in the treasury. Such deposits could be used for welfare of consumers by the state directly or through credible consumer organisations by creating funds like a consumer welfare fund.

To hold public servants to account, the doctrine of 'public accountability' and 'equal fault' could have been invoked. It is based on the premise that the power in the hands of administrative authorities is a public trust which must be exercised in the best interest of the people.[317]

However, the doctrine of public accountability needs to be balanced with reasoned decisions taken by civil servants in good faith. They need to be protected after their retirement. While the Prevention of Corruption Act has been amended and prior sanction of appropriate government is required for investigation and prosecution of serving public officials as well as retired public officials for alleged offences while in office, this amendment is prospective in nature.[318]

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316. The Supreme Court, while considering charges under Sections 7, 13(1)(d)(i) and (ii) of the Prevention of Corruption Act, 1988, in the judgments of B. Jayaraj v. State of Andhra Pradesh, (2014) 13 SCC 55, & C.M. Girish Babu v. CBI, (2009) 3 SCC 779, held that in order to prove the charge, the same had to be proved beyond reasonable doubt. In B. Jayaraj v. State of Andhra Pradesh, (2014) 13 SCC 55 it noted:

> "7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in C.M. Sharma v. State of A.P. [(2010) 15 SCC 1 : (2013) 2 SCC (Cri) 89] and C.M. Girish Babu v. CBI [(2009) 3 SCC 779 : (2009) 2 SCC (Cri) 1]."

317. https://www.researchgate.net/publication/228250952_Doctrine_of_Public_Accountability_in_Light_of_DDA_vs_Skipper_Construction_Co

318. The Telangana High Court, in Katti Nagaseshanna vs The State Of Andhra Pradesh, on 16 November, 2018, CRIMINAL PETITION NO.9044 OF 2018, noted "Section 19 (1) of the

For the fear of prosecution, most civil servants will not take even routine decisions to settle a matter.

To deal with such matters involving corruption, a law similar to the False Claims Act (FCA) in the US could be enacted in India. The FCA provides that any person who knowingly submits false claims to the government is liable for treble the government's damages plus a penalty that is linked to inflation. In addition to allowing the government to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called *"qui tam"* suits) against those who have defrauded the government. Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery.

While India has legislated Whistle Blowers Protection Act, 2014, it is yet to witness effective enforcement.[319] Though there have been attempts to amend and operationalise it, these have not been successful as yet.[320] There is a need to strengthen and immediately operationalise the legislation to protect whistle blowers in India.

Different alternative remedies, which the courts can look at, as discussed in the Epilogue chapter, could also have been thought of.

P.C.Act relates to procedure to be followed for prosecuting a public servant. When such amendment imposes new obligation or creating disability, in the absence of any provision giving retrospective effect, the same cannot be given retrospective effect to defeat all pending prosecutions against the retired Government Servants." Similarly, in the High Court of Karnataka, Justice P.S. Dinesh Kumar, held in January 2020 (T.N. Bettaswamaiah case), that: "A statute, which not only changes the procedure but also creates new rights and liabilities, shall be construed to be prospective in operation unless otherwise provided either expressly or by necessary implication. A careful reading of Section 17A as also Section 19 do not contain any express provision to show that they are retrospective in nature nor it is discernible by application."

319. https://www.mondaq.com/india/whistleblowing/1118060/whistle-blowers-protection-act-2014-a-cracked-foundation and https://thewire.in/rights/despite-20-rti-activists-killed-in-bihar-no-expedited-probes-rights-groups-point-to-disturbing-trend

320. https://prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015 and https://ethicontrol.com/en/blog/whistleblower-law-India-en

Annexures

Annexure 3.1

The specific interventions made by the members of the Committee constituted by the Supreme Court were as follows:

- The Adviser Projects assessed the technical competence of the applicant.
- The Joint Secretary & Financial Adviser studied the financial statements and assessed the financial capability of the applicants to execute mining and downstream projects. Representatives from the Ministry of Railways assessed the requirement and feasibility of railway infrastructure and its integration with the Indian Railways.
- Representatives from the Ministry of Power assessed the proposed project with reference to priority in the national plan and requirement of coal.
- Representatives of concerned State Governments presented the government's view on the projects and feasibility of providing basic infrastructure like land, water, power, etc.
- Director (Technical) from Coal India Limited examined if the proposed project would impact the ongoing operations of CIL.
- Chairman and Managing Director from CMPDIL examined and presented inputs on the status of exploration of the block and the technology to be adopted.
- Chairman and Managing Director of the concerned subsidiary of CIL reported on the impact of the proposed project on the subsidiary and support that can be provided to the proposed project and at what cost.[321]

321. Parakh, PC. (2017). *The Coal Conundrum : Executive Failure and Judicial Arrogance*. Secunderabad: PC Parakh.

Annexure 3.2

Under the petition before the Supreme Court it was alleged that the allocation of coal blocks was illegal and unconstitutional on the following grounds:

- Non-compliance with the mandatory legal procedure under the MMDR Act. Breach of Section 3(3)(a)(iii) of the CMN Act. Violation of the principle of trusteeship of natural resources by gifting away precious resources as largesse.
- Arbitrariness, lack of transparency, lack of objectivity, and non-application of mind; the allocation was tainted with *mala fides* and corruption and made in favour of ineligible companies.

Overall, two prayers were made in these matters. First, there was a prayer to quash the entire allocation of coal blocks that were made to private companies by the Central Government between 1993 and 2011. Second, there was a court-monitored investigation by the Central Bureau of Investigation and Enforcement Directorate or Special Investigation Team into the entire scheme of allocation of coal blocks.

The SC issued notice to the Union of India and required a counter-affidavit from Secretary, Ministry of Coal, on the following six issues:

- The details of the guidelines framed by the Central Government for the allocation of subject coal blocks.
- The process adopted for allocation of subject coal blocks.
- Whether the guidelines contain an inbuilt mechanism to ensure that allocation does not lead to the distribution of largesse unfairly in the hands of a few private companies?
- Whether the guidelines were strictly followed and whether by the allocation of the subject coal blocks, the objectives of the policy have been realised?
- What were the reasons for not following the policy of competitive bidding adopted by the Government of India way back in 2004 for the allocation of coal blocks?
- What steps were taken or proposed against the allottees, who have not adhered to the terms of allotment or breached the terms thereof?

Following was the track of the proceedings in the case:

- 14.09.2012: First writ petition was filed by Advocate Manohar Lal Sharma in the Supreme Court.

- 19.11.2012: Another Public Interest Litigation was filed by Common Cause,[322] a leading NGO (who have filed over 100 PILs in SC and Delhi High Court), in the SC. Additional reliefs were sought by Common Cause.
- 10.09.2013 to 26.09.2013: Arguments regarding a challenge to allocation of coal blocks. The Central Government argued that the allocation letter granted by them does not affect the rights of the State Governments under the MMDR Act.
- 26.09.2013: SC issued notices to the States of Jharkhand, Chhattisgarh, Odisha, Maharashtra, Andhra Pradesh, Madhya Pradesh and West Bengal to seek information regarding their roles in the allocation of coal blocks.
- 05.12.2013: Arguments by the States of Jharkhand, Chhattisgarh and Odisha concluded.
- 08.01.2014: Arguments by the States of Maharashtra, Andhra Pradesh, Madhya Pradesh and West Bengal concluded.
- 09.01.2014: Arguments by the Attorney General, Government of India concluded and arguments by Coal Producers Association, Sponge Iron Manufacturers Association and Independent Power Producers Association of India commenced.
- 16.01.2014: Arguments by the Associations, RTI activist Sudeep Shrivastav and arguments in rejoinder by Adv Manohar Lal Sharma and Common Cause concluded. Judgment Reserved.
- 07.2014: The Court appointed a special CBI Court for trying the coal allocation related cases.
- 25.08.2014: SC Judgment - Part 1
- 24.09.2014: SC Judgment - Part 2

322. https://www.commoncause.in/ This NGO was established by Mr. H. D. Shourie , IAS (Retired) to fight for justice on a variety of issues, including retirement benefits which got it wide support. It was able to get pensions linked to inflation which was otherwise not protected.

Annexure 3.3

Vinod Rai, in his book 'Not Just an Accountant' used data from the report and talked about how the calculations were worked out, which is as follows:

A) Average Coal India Limited selling price: ₹1028/MT
B) The average cost of coal mining: ₹583/MT
C) Financing cost: ₹150/MT
D) Financial benefit (a - b - c): ₹295/MT
E) Extractable reserves: 6282 MT
F) Financial gain: ₹1,80,000 Cr.

Annexure 3.4

Sector-wise Demand-supply Mismatch Due to SC Order

Sectors	*Coal Despatch sector share*	*Projected CIL supply*	*Projected demand*	*Annual GAP (due to SC Judgment)*
Steel	1.6%	8.48	12.8	4.32
Power Utility	75.2%	390.98	591.8	200.82
Power Captive	6.4%	33.05	50	16.95
Cement	1.1%	5.92	9	3.08
Fertiliser	0.5%	2.47	3.7	1.23
Others	15.2%	79.1	119.7	40.6
Total	100.0%	520	787	267

Source: Ministry of Coal, Annual Report 2013-14, SBI Research.

4

The 2G Case

A Labyrinth of Policies, Procedures and Ploys

Summary

Telecom is one of the most challenging businesses in the economy due to massive infrastructure costs, the brutal competition to acquire subscribers and the difficulties of procuring access to spectrum – a limited natural resource, and incidentally more expensive in India than in other countries. At the same time, telecom rates are one of the lowest in the world, while teledensity is high

Spectrum is also a public property and thus its allocation norms require utmost propriety. This case pertains to spectrum allocation and the loss to the exchequer in the process. In a report in 2010, the national auditor, CAG, estimated a presumptive revenue loss of ₹1.76 lakh crores to the exchequer, alleging wrongdoing in the course of awarding 122 licences in 2008 for Unified Access Service (UAS) bundled with spectrum at prices that had been discovered in 2001.

The case finally reached the Supreme Court which in 2012 cancelled all 122 telecom licences that were issued by the Department of Telecommunications (DoT).

The cancellation of 2G licences and spectrum by the SC caused an economic impact on several sectors and stakeholders. Critics opine that the apex court did not consider the fallout of its judgment on the telecom sector including operators and vendors, investments, banks, employees and consumers.

Disturbing as this already is, this case is also a commentary on the DoT's unforgivable conduct. To begin with, the First Cum First Served policy used by DoT in the allocation of natural resources was itself discriminatory – a fact also noted by the court. To make matters

worse, the DoT further tweaked the policy unilaterally to extend the advantage to a select few.

As if this was not enough, the DoT also overlooked the advice of the Law Ministry, PMO and TRAI (Telecom and Regulatory Authority of India) from time to time to find ways to act unilaterally. The case also deals with a dichotomous approach adopted by TRAI which enabled DoT to justify the allocation of spectrum at the price determined in 2001 and not 2008 prices when the market was far more mature.

In other words, by the time this case reached the SC, a substantive cost to the economy had already been incurred. Instead of rebuking the erring parties, department and the regulator, and finding ways to contain the damage, the SC's decision came as another blow to the telecom sector, pushing it many a step closer to the current malaise. Experts have also commented that instead of cancelling all 122 licences, only those licences should have been cancelled where companies unduly benefited. There can also be arguments that only ineligible applicants should have been disqualified. This is particularly interesting because out of 122 applications, 85 were found to be ineligible, even as per the claims of the petitioners. The court could have also found an alternate remedy as discussed in the Epilogue chapter of this book.

Introduction

The story of the Indian telecom industry is an intriguing one. Telecom is often invoked as a poster child of liberalised India but the last decade or so has been particularly difficult for the sector. For instance, just ten years ago, India's telecom space was crowded. About 11-12 players were jockeying for dominance including the regional players.[323] Ten years hence only a handful are left.

There are many complex reasons like market consolidation, mergers and bankruptcy that led to the present-day situation, each catalysed by different forces. One such force was the famous 2G scam in the earlier part of the decade. This long drawn 'political economy'

323. https://the-ken.com/the-nutgraf/the-camel-is-inside-the-tent/

saga traversed corridors of power, the Supreme Court and the Central Bureau of Investigation and should be categorised as one of the most complicated cases in terms of procedures and legalese in recent times.

Nevertheless, the fact is that it resulted in a significant loss to the economy in general and did not augur well for the health of the telecom sector in particular. This chapter will limit itself to the role of SC, the economic impact of its judgment and what transpired before it came up for the consideration of the SC. It will also attempt to spell out an alternative course of action that could have potentially contained economic harm to a certain extent.

History of Telecommunications in India

In 1839, the first telegraph link was tested between Calcutta and Diamond Harbour in Bengal covering 21 miles. Furthering the progress in telegraphs, in 1851, the telegraph lines were opened for the official work of the East India Company. With time, the telegraphy services were also made available to the public. This led to the enactment of the Indian Telegraph Act, 1885.[324]

The Act established exclusive privilege of establishing, maintaining and operating telegraph with the Central Government and empowered the government to grant telegraph licences on conditions and considerations as it deemed fit, to any person in any part of India.

After Independence, the Government of India took control of the telecom sector and brought it under the Post & Telegraph Department. To develop and improve telecommunication services in the country, Indian Telephone Industries Ltd., a public sector telecommunications equipment manufacturing facility was established in Bangalore. However, comprehensive reforms in telecommunications only started in 1984 after the Government set up the Centre for Development of Telematics (C-DoT) to develop indigenous technologies. It did this pretty well and soon India saw its first telecom revolution when subscriber trunk dialling was introduced, instead of the trunk calls assisted by a laconic staff at the

324. Centre for Public Interest Litigation and Ors. vs. Union of India and Ors. (2012) 3 SCC 104.

DoT. Furthermore, telecom services were made available to the public at large at low cost through telephone kiosks or Public Call Offices containing landline connections in cities and towns. This revolution happened due to the dynamic Sam Pitroda's leadership.[325]

It also generated huge employment directly and indirectly. Furthermore, the private sector was permitted to manufacture telecom equipment because the public sector unit did not have the capacity and imported technology and equipment was not allowed. Later, in 1986, Mahanagar Telephone Nigam Ltd. and Videsh Sanchar Nigam Ltd. were set up by the Government. Post liberalisation, the telecom sector grew exponentially after the industry saw participation from the private sector and the arrival of mobile telephony.

Spectrum – Meaning, Governance and Relevant Bodies[326]

Spectrum or Radio Frequency Spectrum (RFS) is a finite, non-perishable, and self-renewing natural resource[327] which should be utilised optimally, efficiently and effectively in the larger public interest[328]. It is at the heart of all communications around us (Telecom, TV, Radio, etc.) and has the potential to provide significant economic, social and cultural benefits. It is for this reason that its effective governance at the global and national levels is crucial.

At the global level, the United Nations agency International Telecommunications Union (ITU) coordinates the governance of the spectrum. Allocation of different (spectrum) frequencies is governed by an international treaty formulated under its aegis.

In India, the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 provided the broad legal framework for spectrum management. The Wireless Planning and Coordination Wing (WPC) under the DoT in the Ministry of Communications is responsible for frequency spectrum management and caters to the needs of all wireless users, government and private, in the country.

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325. https://en.wikipedia.org/wiki/Sam_Pitroda

326. Only such bodies/departments have been described as are relevant for this chapter

327. https://www.voicendata.com/spectrum-management-new-realities/

328. https://indiankanoon.org/doc/539407/

The National Frequency Allocation Plan (NFAP) forms the basis for the development and manufacture of wireless equipment and spectrum utilisation in the country. NFAP is revised from time to time. Factors affecting the revision of NFAP vary and may include changes in the Telecom Policy and ITU recommendations, amongst other things.

Then, there is the Digital Communications Commission, formerly known as Telecom Commission, which is responsible for formulating the policy of DoT, preparing the budget for the Department and implementing the Government's policy in all matters concerning telecommunication.

Finally, with regards to regulation, the Telecom Regulatory Authority of India (TRAI) set up in 1997 looks after the regulation of all telephone services, including broadcasting, spectrum, licensing, internet & broadband, interconnection, etc. and comes up with recommendations from time to time.

It may be noted that optimal spectrum pricing is one of the tools for ensuring continued efficient usage of spectrum. Besides, an appropriate mechanism to incentivise efficient use is often needed to be put in place. Ideally, such a mechanism should include objective and measurable criteria backed up by a rigorous oversight mechanism.

Background on Gs - 1G, 2G, 3G, 4G, 5G

The G refers to the Generation of wireless technology. The advancement of generation signifies that it can support more users and better data transfer capabilities. The 1G referred to the analogue phones which functioned on copper wires, while the 2G ushered in the use of digital phones which could function on either copper or fibre and a move into the digital world.[329] 2G allowed for call and text encryption, as well as transmission of SMS, picture messaging and multimedia messaging service (MMS), which were not available on 1G. The advent of 3G networks introduced the increased use of data,

329. https://www.companeo.co.uk/phone-system/FAQ/differences-between-analogue-and-digital-phone-systems

video calling and mobile internet. The 4G standard of the cellular network is almost 500 times faster than 3G and can support high-definition mobile TV, video conferencing, etc. The fifth-generation standard, 5G will potentially support almost a million devices per square kilometre in comparison to 4G's capacity of only 0.1 million devices per square kilometre.[330]

CDMA vs. GSM

Code Division Multiple Access (CDMA) and Global System for Mobiles (GSM) are radio systems that are used in mobile phones. Simply, both these technologies allow multiple phone calls or internet connections on a single radio channel. While the GSM spread across the globe, the adoption of CDMA was restricted to a few countries including the US, Japan, Russia, and South Korea. The growth and spread of GSM can be attributed to Europe mandating the technology by law in 1987 and its origin from an industry consortium. On the other hand, CDMA technology is owned by Qualcomm and thus, all the handsets that used CDMA had to pay significant royalties to Qualcomm for utilising its patented technology. Overall, building GSM equipment was less expensive than CDMA.[331]

Also, importantly it is easier to swap phones on the GSM network as customer information is saved on the removable SIM card. However, such is not the case for CDMA, where the customer information is assigned to a handset.[332] Both these technologies are related to 2G telecommunications standards.

Waning of CDMA in India

In India, only four operators provided CDMA services: BSNL, Reliance Communications, Tata Tele, and MTS. Even though most CDMA developments were operating on the 850 MHz bands providing better voice quality and fewer call drops in comparison

330. https://connect.altran.com/2018/03/eight-reasons-why-5g-is-better-than-4g/

331. https://in.pcmag.com/cell-phone-service-providers/42987/cdma-vs-gsm-whats-the-difference

332. https://www.wirefly.com/guides/gsm-vs-cdma-whats-difference

to GSM, CDMA had an inherent disadvantage that worked towards its downslide. First and foremost, all the CDMA handsets that were manufactured paid a royalty to Qualcomm for its patents and this primarily discouraged manufacture of the CDMA handsets. For GSM connections, the consortium key was held by manufacturers such as Nokia, Motorola, that cross-licenced each other's patents, and thus, did not require royalty of any sorts.[333]

In addition to this, the CDMA user base started waning due to lack of handset choice as compared to GSM and lack of handset interoperability (as handsets were locked with the operator).[334] The sales of handsets in India were completely de-linked from the process of getting mobile connections, which also limited the market for CDMA handsets and incentivised producers to produce more GSM handsets which would work with all the carriers. The vendors eventually stopped supplying CDMA handsets and equipment and with subsequent technological advances of 4G and 5G, the CDMA technology is at the end of the road in India.

National Telecom Policies

National Telecom Policy 1994

After economic liberalisation, the first National Telecom Policy (NTP) 1994 was announced by the Central Government on May 13th, 1994 to allow private sector participation in the telecom sector.

After the NTP 1994 was introduced, telecom licences[335] were granted in two phases. In the first phase in November 1994, the licences were issued to eight Cellular Mobile Telephone Service (CMTS) operators, two each in Delhi, Mumbai, Kolkata and Chennai for 10 years. The licensees were selected on the basis of the technical and financial parameters set out by the DoT in the tender.

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333. https://techpp.com/2016/06/06/death-cdma-india/

334. https://www.thehindubusinessline.com/info-tech/cdma-services-set-to-hang-up/article22056462.ece1

335. Section 4 of the Indian Telegraph Act prescribes for a licence to operate telecom services in the country.

In the second phase, the Government followed a competitive bidding process and as a consequence, in December 1995, 14 CMTS licences were awarded to 18 state circles, 06 Basic Telephone Services (BTS) in 06 state circles and paging licences in 27 cities and 18 state circles. DoT has classified the entire Indian territory into 22 telecom circles/service areas.[336] However, the cellular and basic operators fell short in regard to generating revenues and financing their projects and the outcome of privatisation was not satisfactory.

In the meantime, the Parliament of India in 1997 enacted the Telecom Regulatory Authority of India Act, 1997, under which TRAI was established. This Act was amended in 2000[337] to inter alia establish Telecom Disputes Settlement and Appellate Tribunal (TDSAT). TRAI recommends the need and timing for introducing new service providers in a service area and the terms and conditions of the licence. It has made various recommendations to the Central Government, either suo moto, or on the request of the government.

National Telecom Policy 1999

On November 20, 1998, Atal Bihari Vajpayee, the then Prime Minister of India constituted a high-level Group on Telecommunications (GoT) to review the existing telecom policy and suggest further reforms. The recommendations made by the GoT were considered to draft the New Telecom Policy 1999 (NTP 1999). The new policy came into effect after Cabinet's approval on April 01, 1999.

336. CBI vs A Raja, 1/11: 45 (A) 2009.

337. This amendment was quite unique that it overhauled the whole Act in order to get rid of the Chairman and the Deputy Chairman who could not be sacked because there was no such ground offered by them. The government did not see eye to eye with TRAI because they threw the rule book at the DoT rather than progress gradually in changing the system. Both of them even landed up at the gates of the Supreme Court thus causing the government some amount of discomfort.

Chronology of Events in Policy and Governance around Telecom Licencing and Spectrum Allocation[338]

In the early 2000s, the Government of India notified detailed guidelines for the issue of CMTS including the bidding process for the selection of the new service providers. The TRAI made recommendations for filling up vacant slots of CMTS licences.[339] The government accepted TRAI's recommendations and granted 17 new CMTS licences. DoT also issued guidelines for the issues of licence for Basic Telephone Services.

This was followed by TRAI making suo moto recommendations to the DoT in October 2003 vide D.O. No. 101-29/2003-MN[340] noting that the process of Unified Licensing should be initiated in India. TRAI referred to international practices, NTP 1994, NTP 1999 and the growth of telephone density, highlighting the national objective and priority. In its recommendations, TRAI noted that spectrum is a scarce resource and thus needs to be regulated separately and must be allocated optimally to the most efficient user:

> "7.2 The Guidelines would be notified by the licensor based on TRAI's recommendations to include nominal entry fee, USO, etc. The spectrum charges shall be determined separately. The operator shall be required to approach the licensor mainly for spectrum allocation. Since, spectrum is a scarce resource, it needs to be regulated separately. Spectrum should be distributed using such a mechanism that it is allocated optimally to the most efficient user."[341]

In the meanwhile, in September 2003, a GoM was constituted with the approval from Prime Minister Vajpayee to:

1. Recommend ensuring the release of adequate spectrum needed for the growth of the telecom sector;
2. Recommend measures for ensuring adequate resources for the realisation of the NTP targets of rural telephony;

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338. *Ibid.*

339. https://trai.gov.in/sites/default/files/14_2.pdf

340. https://www.trai.gov.in/sites/default/files/Letter_to_Secy_%20DOT_27102003.pdf

341. https://www.trai.gov.in/sites/default/files/Recomodifiedfinal.pdf

3. Resolve issues relating to the enactment of the Convergence Bill[342];
4. Chart the course to a Universal Licence;
5. Review adequacy of steps and enforcing limited mobility within the Short Distance Charging Area (SDCA) for Wireless Local Loop (Mobile) services of basic operators, and recommend the future course of action;
6. Appraise foreign direct investment (FDI) limits in the telecom sector and give recommendations thereon;
7. Identify issues relating to mergers and acquisitions in the telecom sector and recommend the way forward; and
8. Consider issues relating to imposition of trade tax on telecom services by the State Governments.

The very next month, the GoM recommended enhancing the scope of NTP 1999 to provide for licensing for UAS[343] for basic and cellular licence services and unified licensing comprising all telecom sectors, which was accepted by the Council of Ministers on October 31, 2003.

In furtherance to this, DoT in November 2003 issued an Office Memorandum with amendments to NTP 1999 including new guidelines for UAS licences. The guidelines specified that existing operators would have the option either to continue under the existing licensing regime or migrate to a new UAS Licence.

Following this, the TRAI Chairman made *suo moto* recommendations on the entry fee to be charged from the new UAS licensees which were accepted by Arun Shourie, the then Minister of

342. The Convergence Bill was initially introduced in 2001 and envisaged to set up a single regulator called the Communications Commission of India and repealing five major laws - the Indian Telegraph Act, 1885, the Indian Wireless Telegraphy Act 1933, Telegraph Wire (Unlawful Possession) Act, 1950, Telecom Regulatory Authority of India Act, 1997. However, the Bill did not see any traction post 2003. https://cablequest.org/pdfs/conv/The-Communication-Convergence-Bill-2001.pdf

343. Since 2003, a telecom licence has been called a Unified Access Service (UAS) Licence and is governed by UAS licence guidelines that came in 2005. To obtain an UAS licence, a company applies to DoT and is issued a Letter of Intent (LoI) containing compliance conditions up to a specified period. After the licence is granted, the company applies to DoT for allocation of spectrum/radio waves for mobile services. Thus, the licence finally becomes functional.

Communications and Information Technology (C&IT). The Minister also decided vide F. No. 20-231/2003-BS-III (LOIs for UASL) that the grant of UAS licence could be made continuously and was required to be processed within 30 days.

UPA-1 takes charge!

On May 22, 2004, the UPA-1 took charge in the Centre headed by Prime Minister, Manmohan Singh. In the following year, on May 13, 2005, TRAI made recommendations on the Spectrum Policy, specifically on issues such as efficient utilisation of spectrum, spectrum allocation, spectrum pricing, spectrum charging, and allocation for other terrestrial wireless links. It also recommended that the current regime of spectrum pricing should continue, and telecom services should not be viewed as a source of revenue by the Government.[344]

However, these recommendations were not placed before the Telecom Commission, though the Secretary, DoT submitted the file with TRAI's recommendations to Dayanidhi Maran, the then Minister, C&IT in August 2005 for his information and to take appropriate policy decisions. However, the file was returned after almost a year without any action taken.

On February 23, 2006, Singh approved the formation of a GoM to suggest a Spectrum Pricing Policy and examined the possibility of the creation of a spectrum allocation fund. The GoM consisted of the Ministers of Defence, Home Affairs, Finance, Parliamentary Affairs, Information and Broadcasting and C&IT with a special invite to Deputy Chairman, Planning Commission. After five days, Maran wrote to Singh expressing concerns about the Terms of Reference (ToR) being too wide and highlighting that it could impinge upon his ministry's work. In his letter, the Minister also suggested revising the ToR without mentioning the issue of Spectrum Pricing. This request was approved by Singh and was conveyed by the Cabinet Secretary on December 07, 2006. Interestingly, the revised ToR excluded Spectrum Pricing.

344. https://www.trai.gov.in/sites/default/files/SpectrumReco.pdf

In August 2007, on DoT's request, TRAI made recommendations for spectrum management, increasing spectrum efficiency, allocation of spectrum, and compliance with roll-out obligations by the access service providers. The recommendations were based on underlying principles of fair competition and did not restrict the number of access service providers in any service area. It recommended that in the future all spectrum except in 800, 900 and 1800 MHz bands in 2G services should be auctioned to ensure a level playing field between incumbents and new entrants. Thus, rather than being auctioned it recommended that 800, 900 and 1800 MHz bands in 2G services be allocated based on rates decided in 2001.

Allocation and Cancellation of Telecom Licences and 2G Spectrum[345]

On May 16, 2007, A Raja of the DMK, a coalition partner of the Congress in the UPA, became the Minister C&IT, after his predecessor and party colleague, Dayanidhi Maran had to leave due to some scandals. It was apparent that the DMK got its pound of flesh by getting the 'lucrative' telecom ministry. Mind you the DMK was a coalition partner with BJP in the National Democratic Alliance before the Congress-led UPA came into power in May 2014. These shenanigans were captured pretty well by former Chairman of TRAI, Pradip Baijal in his book - *A Bureaucrat Fights Back: The Complete Story of Indian Reforms*.

Baijal noted that the appointment of Maran was a case of conflict of interest as TRAI was appointed as the broadcasting regulator and Maran was previously a broadcaster. When Baijal expressed his opinion to Prime Minister Manmohan Singh, he rejected the observation clarifying that since TRAI is an independent regulator and the Ministry of Information and Communications and Telecommunications are separate ministries, there is no conflict of interest.[346]

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345. The chronology of events has been reproduced from the facts of the case as illustrated primarily in the Centre for Public Interest Litigation and Ors. vs. Union of India and Ors. (2012) 3 SCC 104 and also other sources.

346. Baijal, Pradip. 2016. *A Bureaucrat Fights Back: The Complete Story of Indian Reforms*. HarperCollins.

Baijal also revealed that in his very first official meeting with Maran, he asked Baijal to not make recommendations for UAS Licencing as directed by the cabinet of the NDA government in December 2003. However, when Baijal refused to cooperate, even Singh asked him to obey Maran.[347]

Interestingly, Baijal pointed out that he had notified Singh that if he would not give recommendations, the spectrum would be sold at old rates and that there would be a big scandal too big to handle.[348] Since the number of mobile users increased between 2004 and 2006, the value of the spectrum line should have also increased before the second round of spectrum allocation. In principle, Baijal meant to replace the old system of UAS Licencing of giving out permits on a first-come-first-serve basis. According to Baijal, his recommendations were not considered and the old regime continued which subsequently led to the 2G scam.[349,350]

On June 3rd, 2005, Maran even wrote a letter to Singh mentioning that Baijal did not make recommendations on Universal Service Levy (USL) to the government.[351]

Baijal notes that Maran's letter was a larger part of a conspiracy to later start the 2G scam and also to censure him. While Baijal reported on USL in January 2005, however, this fact was suppressed by Maran. Moreover, Baijal remarked that TRAI recommendations on USL were also not taken before the Cabinet as desired by the earlier cabinet in 2003 or any other inter-ministerial forum, thus laying the ground for the 2G loot. Baijal retired as Chairman of the TRAI in March 2006.

Coming back to the allotment process of 2G spectrum along with UAS Licences, the same was initiated by the DoT in August 2007.

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347. *Ibid.*

348. https://www.youtube.com/watch?v=WVw6F0Qfn6U

349. Baijal, Pradip. 2016. A Bureaucrat Fights Back: The Complete Story of Indian Reforms. HarperCollins.

350. https://www.thehindu.com/news/national/manmohan-singh-warned-me-of-harm-in-2g-issue-baijal/article7247791.ece

351. https://economictimes.indiatimes.com/news/politics-and-nation/manmohan-singh-warned-me-of-harm-on-2g-issue-ex-trai-chairman-pradip-baijal/articleshow/47429533.cms?from=mdr

In the process, the TRAI recommendations were first considered by an Internal Committee of DoT; then the report of the Committee was placed before the Telecom Commission (TC) and got approved. Interestingly, the four external members of the TC namely the Secretaries from the Ministry of Finance (MoF), Department of Industrial Policy and Promotion, Department of Information Technology, and Planning Commission were not informed about the meeting so that they could not voice their views or dissent on the proposals. The meeting was attended only by the officials of DoT, who had to obey the Minister's whip. Raja accepted the recommendations of the committee on October 17, 2007, and thereby also approved the recommendations made by TRAI.

Mind you, Raja belonged to a coalition partner, the DMK from Tamil Nadu, who treated the Ministry as a cash cow. He did face corruption charges later but did not get convicted by the CBI court due to lack of evidence[352] and was acquitted on December 21, 2017. Both CBI and Enforcement Directorate filed appeals in March 2018 in the Delhi High Court. No decision on the appeals has been made to date.

In the meanwhile, in September 2007, Deputy Director General (AS), DoT, prepared a note that 167 applications were received for 2G licence and spectrum from 12 companies for 22 service areas and highlighted the difficulty in handling such a large number of applications at any point of time. He suggested setting October 10, 2007, as the cut-off date for receipt of new UAS Licence applications. The devious Raja, with a clear personal interest in mind, did not accept the suggestion and directed that October 01, 2007, be fixed as the cut-off date. Thus, a press note was issued by DoT on the very next day that no new application for UAS Licence will be accepted after October 01, 2007. Between the note made by Deputy Director General (AS) and the cut-off date, i.e. October 01, over 300 applications were received for grant of UAS licences.

On account of such a large number of applications, on October 24, 2007, the Member (Technology), Telecom Commission, and Ex-officio

352. https://en.wikipedia.org/wiki/2G_spectrum_case#:~:text=On%2021%20December%202017%2C%20the,accused%20in%20those%207%20years.

Secretary to Government of India wrote to Secretary, Department of Legal Affairs, Ministry of Law and Justice, seeking the opinion of the Attorney General of India (AG)/Solicitor General of India on the mechanism to deal with a large number of applications for grant of UAS Licence. On November 01, 2007, the Law Secretary placed the papers before H. R. Bhardwaj, Minister of Law and Justice. Bhardwaj made a note that considering the importance of the case, the issue should be first considered by an empowered GoM and in that process opinion by the AG could be obtained.

On the next day, on November 02, 2007, when Bhardwaj's note was placed before Raja requesting to discuss the issue, Raja did two things:

1. He approved the note prepared by the Director (AS-1) and made a note that "LoIs (Letter of Intent) be issued to the applications received up to September 25, 2007".[353] The note prepared by Director (AS-1) covered the following topic:
    - Issuing of LoIs to new applicants as per the existing policy
    - Number of LoIs to be issued in each circle
    - Approval of draft LoI
    - Consideration of the application of TATAs for dual technology after the decision of TDSAT on dual technology, and
    - Authorisation of Shri R.K. Gupta, ADG (AS-1) for signing the LoIs on behalf of the President of India.
2. He wrote to the Prime Minister, Manmohan Singh vide D.O. No. 20/100/2007-AS. criticising Bhardwaj's suggestion as totally out of context. Mr. Raja also indicated that *"DoT has decided to continue with first-come-first-served policy for processing of applications received upto September 25, 2007, and the procedure for processing the remaining applications will be decided at a later date, if any spectrum is left available after processing the applications received up to September 25, 2007"*

353. Centre for Public Interest Litigation and Ors vs. Union of India and Ors (2012) 3 SCC 104.

On the same day itself, Singh replied to Raja that after receiving representation from existing telecos, a fair and transparent method should be adopted for the grant of licences. In response, Raja wrote that adoption of the auction process for new applicants would be unfair, discriminatory, arbitrary, capricious and would deny a level playing field[354].

Subsequently, in November 2007, the Secretary, DoT made a presentation on the spectrum policy to the Cabinet Secretary and Finance Secretary. In response, the Finance Secretary expressed doubt regarding using the rate that was determined in 2001 of ₹1600 crores for a licence and allocation of 2G spectrum to be given in 2007. He cautioned that given financial implications, the Ministry of Finance should have been consulted.

The Secretary, DoT promptly replied to the Finance Secretary on November 29, 2017 saying that as per the Cabinet Decision dated October 31, 2003, DoT had been authorised to finalise the details of the implementation of the recommendations of TRAI. Accordingly, TRAI's recommendations dated August 28, 2007 did not suggest any change in licence fee.

With regard to the letter dated November 22, 2017, by the Finance Secretary, the Member (Finance), DoT also submitted a note suggesting that the issue of revision of rates should be examined in depth before any final decision was taken. When the said note was placed before Mr. Raja, it was observed that the matter of entry fee had been deliberated in the department several times in light of various guidelines and TRAI's recommendations. Accordingly, it was decided that there would be no revision in the entry fee.

Consequently, Raja sent a letter to Singh on December 26, 2007, in an apparent bid to show that he had secured Singh's approval before changing the policy of first-come-first-served.

After 12 days, DDG (AS), DoT prepared a note incorporating the changed first-come-first-served policy, referencing the letter by Raja which was approved by the Minister on the same day. Interestingly, a meeting of the full Telecom Commission to discuss the performance

354. Centre for Public Interest Litigation and Ors vs. Union of India and Ors (2012) 3 SCC 104.

of the telecom sector and pricing of a spectrum that was to be held on January 09, 2008 was postponed to January 15, 2008 for unknown reasons.

The next day itself, on January 10th, 2008, the DoT issued a press release under the signature of DDG (AS), DoT that the Department would issue LoI to all eligible applicants who had applied up to September 25, 2007 and that a policy of first-come-first-served would be implemented.

On the same day, DoT issued another press release asking all applicants to assemble within 45 minutes to collect the response(s) by the DoT. All applicants, even the ones not eligible for a UAS licence, collected their LoIs. On the same day, acceptance of 120 applications and compliance with terms and conditions of LoIs of 78 applications was also received.

Soon after obtaining the LoIs, three of the successful applicants offloaded their stakes for thousands of crores, and justified it in the name of infusing equity (see box).

Equity Offloading

Swan Telecom Capital Pvt. Ltd. (also known as Etisalat DB Telecom Pvt. Ltd.) was incorporated on November 13, 2006 and received a UAS licence after paying licence fee of ₹1537 crores transferred approximately 45 percent of its equity in favour of Etisalat Mauritius Limited, a wholly-owned subsidiary of Emirates Telecommunications Corporation of UAE for over ₹3544 crores.

Unitech which had obtained licence for ₹1651 crores transferred 60 percent of its equity in favour of Telenor Asia Pte. Ltd., a part of Telenor Group (Norway) for ₹6120 crores between March 2009 and February 2010.

Tata Tele Services transferred 27.31 percent of its equity worth ₹12,924 crores in favour of NTT DOCOMO. Tata Tele Services (Maharashtra) transferred 20.25 percent of equity worth ₹949 crores in favour of NTT DOCOMO.

The CAG report in January 2008 alleged that 2G licences had been issued to telecom operators at throwaway prices causing a presumptive or likely loss of ₹1.76 lakh crores (on the higher side) to the exchequer. Following litigation in the Supreme Court and political pressure in the Parliament and outside, Raja resigned as Communications Minister on November 14, 2010. In the next month, on December 23, 2010, Raja was directed to appear before the CBI and the next day CBI examined him. Raja was arrested by the CBI on February 02, 2011, and exactly one year later, on February 02, 2012, the SC cancelled 122 2G licences and allocations.

The Controversy[355]

As per the CAG report, in January 2008, DoT issued 122 new licences on the same day for UAS. Essentially, the UAS licence authorises a licensee to roll out telecom access services using any digital technology which includes wire-line and/or wireless (GSM and/or CDMA) services. These services include internet telephony, internet services and broadband services.[356]

The licences were issued at a price which was discovered in 2001. The issuance of 122 licences in just one day and at a price discovered in 2001 drew the attention of the media, parliamentarians and informed members of civil society. It caused huge stink and prima facie appeared as a big corruption scam. Several questions were raised regarding the transparency in the allocation process and the failure of the government to maximise revenue from the allocation of spectrum.

Given this, the CAG felt compelled to review the entire process of issuance of licences, award of the spectrum and the implementation of the UAS regime. The need for doing so was further justified as six years had passed since the introduction of the UAS regime in 2003.

In its major findings, the CAG noted nine key points, discussed below:

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355. https://cag.gov.in/content/report-no-19-2010-performance-audit-issue-licences-and-allocation-2g-spectrum-union

356. Centre for Public Interest Litigation and Ors. vs. Union of India and Ors. (2012) 3 SCC 104.

First, it noted the gap in the policy implementation itself. In 2003, TRAI recommended a roadmap for the allocation of Telecom licences. TRAI's recommendation formed the premise of UAS policy which was approved by the Council of Ministers in the same year. As per the recommendation, the UAS regime was to be carried out in two phases. The first phase entailed six months in which existing operators namely Basic Service Operators (BSO) and Cellular Mobile Service Operators (CMSO) were to migrate to a new regime. Interestingly, only BSO had to pay migration fee as CMSOs had already entered the market through a multi-stage bidding process in 2001 and had paid the market-determined price.[357]

The entry fee for the migration of BSOs was equal to the fees paid by the fourth cellular operator through a multi-staged bidding process introduced in 2001. The second phase entailed the start of the UAS regime with a nominal entry fee for the licence and a separate licence for the spectrum.

The audit revealed that DoT implemented only the first phase. In the words of CAG, *this became the underlying factor, quite erroneously, to value spectrum in 2008 at 2001 prices*. It is pertinent to emphasise here that the whole objective of the UAS policy was to delink the licence from spectrum allocation so that an efficient allocation formula for spectrum along with an appropriate price could be devised. However, the DoT action rendered it unachievable. The Cabinet in 2003 decided to authorise the Ministry of Finance to participate in deciding the efficient allocation of spectrum and price fixation, but this was not accepted by the DoT. To further highlight this, the CAG notes that the 2001 prices represent a nascent market while in 2008 substantive market transformation had taken place and therefore, the 2001 prices were totally out of place for 2008 market conditions and mentioned that this issue was never put up before the cabinet for review.

Second, the CAG audit revealed that the Telecom Commission which also included part-time members from the Department of Finance, IT, Industry and Planning Commission, was also not allowed

357. https://www.thehindu.com/migration_catalog/article14665446.ece/binary/PAC%20draft%20report%20on%202G-3G%20allocation

to comment on the merits of TRAI recommendations in 2008. At the same time, the Telecom Commission was also not consulted for granting 122 UAS licences. Further, in August 2007, TRAI recommended that there should be 'no cap' on the number of licences in any service area to facilitate open competition. This information too was not shared with the Telecom Commission.

Third, following TRAI's recommendation of 2003, introducing UAS and a separate spectrum allocation, Union Cabinet suggested that the DoT and the MoF should discuss and finalise the pricing formula for spectrum including incentive for efficient use and disincentive for sub-optimal usages.

However, when a GoM was constituted in February 2006 to deliberate on matters of Telecom Licences, its ToR were modified at the instance of the DoT to keep the issue of spectrum pricing outside its purview. The report states:

> "The GoM's role in December 2006 was confined to issues concerning spectrum vacation. The ToRs left out the other two issues of efficient allocation and pricing, while all three were pronounced in the policy decision of 2003. Thus by getting the spectrum pricing issue deleted from the ToR, the DoT completely side-tracked the pricing issues".[358]

Further, the CAG audit also revealed that the Ministry of Finance had, as early as 2007, questioned the sanctity of continuing with 2001 prices without the latest valuation and indexation.

> "This advice of the Ministry of Finance was overlooked by the DoT ostensibly based on a four-year old Cabinet decision (October 2003) on the premise that it was authorised to calculate the entry fee for licences as per the recommendations of TRAI in 2003. DoT maintained that spectrum pricing was within the normal work carried out by them".[359]'

Fourth, DoT had sought on its own volition to obtain and communicate an opinion from the Attorney General of India on

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358. https://cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010.pdf

359. https://cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010_exe_sum.pdf

how best to handle an unprecedented rush of applications fairly and equitably, which would be legally tenable. The law ministry in its response advised that the whole issue be first considered by an Empowered Group of Ministers (EGoM) and in that process, the legal opinion of the Attorney General could be obtained. The DoT, however, overlooked this opinion ostensibly to ensure that final decision-making stayed with DoT. It was mentioned in the report that:

> "Surprisingly, this opinion, which the DoT had sought of its own volition, was felt to be 'out of context' at the level of the Hon'ble MoC&IT and hence the benefit of a discussion in the EGoM was also forgone. Thus, such important decisions seem to have been taken in DoT without the issues being deliberated and discussed at an inter-ministerial forum".[360]

Fifth, on November 2, 2007, the Prime Minister too wrote to the Telecom Minister and expressed concern that in the backdrop of the inadequate spectrum and the unprecedented number of applications for fresh licences, spectrum pricing through a fair and transparent method of an auction for revision of entry fee, which was benchmarked on an old figure, needs to be reconsidered. This too was overlooked. It was stated in the report that the Ministry informed that:

> "... it will be unfair, discriminatory, arbitrary and capricious to auction spectrum to new applicants as it will not give them a level playing field. He had thus justified the allotment of spectrum to a few new operators in 2008 without reconsidering the old entry fee discovered in 2001".[361]

Sixth, the TRAI report of August 2007 recommended 'no cap' on the number of licences to be issued in any service area. This was to promote fair competition amongst the players. However, despite this, DoT decided to fix an artificial cap on the number of licences to be awarded. This was done by advancing the cut-off date.

It was also speculated that to avoid legal implications with respect to the shortage of spectrum for GSM services, the DoT advanced the earlier set date to restrict the issuance of Letters of Intent (LoIs) only

360. *Ibid.*

361. *Ibid.*

to applications received up to September 25, 2007, from October 01, 2007.

Seventh, the First-Come-First-Served (FCFS) policy, earlier adopted internally in DoT for allocation of spectrum, was extended for the issue of new UAS licences in 2008. Under this policy, all applications were registered in the Central Registry Section of DoT where the date of receipt and serial numbers were normally posted on it. The priority of applications was determined based on the date of receipt in the Central Registry. The report says that this was even informed to the Prime Minister:

> "In a communication dated 2nd November 2007, the Hon'ble MoC&IT had even confirmed to the Hon'ble Prime Minister that the processing of applications was to be on the FCFS basis".[362]

However, the CAG audit found that DoT deviated even from the FCFS policy in letter and spirit. The applications submitted between March 2006 and September 2007 were issued the Letters of Intents simultaneously on a single day, viz. January 10, 2008. A notice was issued through a press release giving less than an hour to collect the same.

By changing the FCFS criteria, some licensees, who could proactively anticipate such procedural changes were ready with the Bank Demand Drafts drawn on dates before the notification of the cut-off date by DoT. Thus, they could avail the benefit of the first right to the allocation of spectrum, having jumped the queue. The entire process followed lacked transparency and objectivity and eroded the credibility of the DoT.

Eighth, the CAG report also revealed that the process followed by the DoT for verification of applications for UAS licences to confirm their eligibility lacked due diligence, fairness and transparency leading to the grant of licences to applicants who were not eligible.

"Eighty five out of the 122 licences issued in 2008 were found to be issued to Companies which did not satisfy the basic eligibility conditions set by the DoT and had suppressed facts, disclosed

362. https://cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010_exe_sum.pdf

incomplete information and submitted fictitious documents for getting UAS licences and thereby access to spectrum".[363]

Ninth, in ascertaining the value of the loss to 122 licences, the CAG put forth a 'presumptive' or notional loss. This was because any precise value could have been arrived at only through an efficient market discovery process entailing scarcity value, the nature of competition, business plans, number of operators and growth of sector amongst other things.

Since the market discovery process was not an option, the presumptive value was arrived at after considering various indicators that could be culled out from the records rather than by following an econometric model. These indicators were mainly based on prices offered by applicants, auction rates of 3G spectrum and investments attracted by companies by having acquired licences and access to spectrum.

In the final analysis, CAG estimated that the 2G licences had been issued to telecom operators at throwaway prices causing a presumptive or likely loss of ₹1.76 lakh crores (on the higher side) to the exchequer. In contrast, the actual realisation of the revenue to the exchequer was only ₹12,386 crores.

Table 3

Prices Offered by Applicants, Auction Rates of 3G Spectrum and Investments Attracted by Companies

Category	*Criteria for working out potential loss to exchequer (value ₹ in crores)*			
	$ Tel rate	*Rates on the basis of 3G auction*	*Sale of equity by the new licensees*	
			Unitech	*Swan*
New Licences	38950	102498	40442	33230
Dual Technology	14573	37154	15132	12433
Beyond contracted quantity of 6.2 MHz	13841	36993	14052	12003
Total	67364	176645	69626	57666

Source: Comptroller and Auditor General of India.

363. *Ibid.*

Role of the Supreme Court[364]

Relying heavily on the CAG report, two writ petitions were filed in the SC by the Centre for Public Interest Litigation and Subramaniam Swamy in 2010 and 2011 respectively. While the former was represented by Senior Counsel Prashant Bhushan, Subramanian Swamy, appeared as a petitioner-in-person. The respondents included the Union of India, represented by the Attorney General, and private companies represented by distinguished lawyers including Harish Salve and A M Singhvi, to name a few.

The key questions before the court were:

1. Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of equality under Article 14 enshrined in the Constitution?
2. Whether the recommendations made by the TRAI in August 2007 for grant of UAS licence at the price fixed in 2001 approved by the DoT, were contrary to the decision taken by the Council of Ministers on October 31, 2003?
3. Whether the exercise undertaken by the DoT from 2007 to 2008 for grant of UAS Licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and *mala fides* and is contrary to the public interest?
4. Whether the policy of first-come-first-served followed by the DoT for grant of licences is ultra vires the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the then Telecom Minister without consulting TRAI, to favour some of the applicants?
5. Whether the licences granted to ineligible applicants and those who failed to fulfill the terms and conditions of the licence are liable to be quashed?

364. Centre for Public Interest Litigation and Ors. vs. Union of India and Ors. (2012) 3 SCC 104

Arguments by Petitioners and Respondents

Petitioners

The petitioners contended that the decision of Raja to advance the cut-off date from October 01, 2007, to September 25, 2007, eliminated a large number of applications and resulted in discrimination against many eligible applicants who lost out. The FCFS policy was manipulated by Raja to favour some of the applicants including those who were not even eligible, for obvious reasons. The applicants acquired an advantage and priority from the insider information obtained either from Raja or the officers of DoT about the change of the criteria in the first-come-first-served policy.

It was further contended that the recommendations made by TRAI on August 28, 2007 were contrary to the public interest as well as the financial interest of the nation. TRAI recommended against auctioning 2G band spectrum under a misplaced theory of ensuring a level playing field between incumbents and new entrants. Most importantly, petitioners emphasised the transfer of equity immediately after the issue of licences by Swan Telecom Capital Pvt. Ltd, Unitech, and Tata Tele Services for substantial gain. If the policy of auction had been followed, the nation would have been enriched significantly more, the petition asserted.

Respondents

The respondents argued that the decision not to auction UAS Licences was based on the recommendations of TRAI and as the petitioners have not challenged the recommendations for two years, the exercise undertaken by the DoT for grant of UAS Licences in 2008 and subsequent allotment of the spectrum should not be nullified. The TRAI recommendations of August 28, 2007, were a continuation of the old policy and, therefore, the petitioners were not entitled to question the method adopted for grant of UAS Licences according to the 2007 recommendations.

Respondents submitted that cancellation of licences and spectrum would have a far-reaching adverse impact on the availability of telecommunication services in the country. To this end, the

people of India had been hugely benefited because of affordable and competitive telecom services.

Findings of the Supreme Court

Having considered the arguments on both sides, the SC observed the following:

With regard to the first question, the court invoked the public trust doctrine which puts an implicit embargo on the right of the State to transfer public properties to private parties if such transfer affects public interest or exerts short-term private gain over long-established public rights. In driving home these points, the SC relied on some precedents and cases, showing continuity in approach and stance.

"72. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."

On the second question, the SC spelt out the dichotomous approach adopted by TRAI. The court highlighted that as per TRAI's assessment the existing system of spectrum allocation criteria, pricing methodology and the management system suffered from several deficiencies and yet it decided to recommend the allocation of spectrum at the price determined in 2001. This was justified by invoking the doctrine of a level playing field for several new entrants and in the name of growth, affordability, penetration of wireless services in semi-urban and rural areas.

The court held that this was also in violation of NTP 1999 which envisaged that spectrum should be utilised efficiently, economically, rationally, and optimally through a transparent process of allocation. In the court's view, to say the least, the entire approach adopted by TRAI was lopsided and contrary to the decision taken by the Council of Ministers in 2003. Interestingly, while ruling against TRAI's recommendation the court noted that even though the scope

of judicial review in matters of expert regulatory bodies like TRAI is extremely rare (as has been pointed out in many judgments), the fact is that it caused a great national loss, and therefore recommendations made by TRAI were fundamentally flawed.

With regards to the third and fourth question, the court pointed out that there is also a fundamental flaw in the first-come-first-served policy as it involves an element of pure chance in matters involving the award of use of the public property. The court noted that in the case of spectrum, which is a scarce public resource, the usage of first-come-first-served policy has inherently dangerous implications.

In doing so, the court again took recourse to its previous judgments where it has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of participation.

Therefore, the SC held that the exercise undertaken by the officers of the DoT in 2007-08 under the leadership of the then Communications Minister A Raja was wholly arbitrary, capricious and contrary to public interest apart from being violative of the doctrine of equality enshrined under Article 14. To further strengthen this argument, SC also relied on several examples that showed that instead of public interest, it was the private interest that got served better. For instance, the court cited examples of how firms that acquired the licence and access to spectrum attracted equity investments worth thousands of crores. Similarly, in many cases, firms that had no experience in telecom (like real estate companies) hugely benefited from a sudden surge in their valuation. In light of such examples, the court also held a view that the DoT needed to take the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.

Against the backdrop of the above arguments, on February 02, 2012, the SC cancelled all 122 telecom licences and allocation of 2G spectrum that were issued on or after January 10, 2008 by the DoT. These 122 licences were allocated to essentially nine companies

namely Unitech Wireless, Sistema Shyam Teleservices, Loop Telecom, Videocon Telecommunications, Etisalat DB Telecom (formerly Swan Telecom), Idea Cellular, Spice Idea, S Tel and Tata Teleservice.

Besides, the SC ordered that TRAI should make recommendations for the grant of fresh licences as was done in the case of 3G allocation. This perhaps explains why the presumptive loss figures of ₹1.76 lakh crores became popular.[365] The court also penalised companies that got undue benefit from the acquisition of licence and access to spectrum, but such penalties ranged between ₹50 lakh and ₹5 crores, a rather insignificant amount compared to the gains accrued.

Finally, the court made clear that the observations made in the case should not affect pending investigation in the matters by the CBI and Enforcement Directorate.

Economic Impact

Critics have pointed out that 2G spectrum allocation in 2008 marked the entry of several new players in the telecom sector, doubling the total number of companies in the sector. Not only did the new companies deploy newer technologies, consumers also benefited as a result of reduced charges. The cancellation of 2G licences and spectrum by the SC in 2012 caused an economic impact on some sectors and stakeholders. During the deliberations in the apex court, it did not consider the fallout of its judgment on the telecom sector including operators and vendors, investments, banks and consumers, and the whole economy in fact as the sector is one of the multipliers in any economy.

Senior advocate Harish Salve blamed the Supreme Court for India's current economic slowdown, saying that the decline began in the 2G spectrum case in 2012, when in one stroke, Supreme Court cancelled 122 spectrum licences issued to telecom operators, redrawing India's telecom industry.[366]

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365. This figure was based on auction rates of 3G spectrum, also shown in the table above.

366. https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-responsible-for-current-slowdown-in-india-senior-lawyer-harish-salve/articleshow/71168723.cms

Former Attorney General Mukul Rohatgi said, *"Lakhs and Crores of foreign investments, lakhs and crores of equipment, infrastructure and lakhs of jobs were thrown overboard when the court set aside and cancelled all the licences for the 2G spectrum, because the government did not follow the law correctly. It should have seen the economic impact*."[367]

Impact on Domestic and Foreign Investments

The cancellation of the licences also dented the confidence of foreign investors in the telecom sector. In its submission to TRAI, CUTS,[368] the organisation which I head, highlighted that the foreign investors invested and collaborated in India based on licences procured from the government under a legal contract. Thus, the court actions only added to the policy uncertainty which put off investors and thus affected the whole investment climate and not only the telecom sector. Furthermore, such actions also lead to a loss of face by the government in its international diplomacy.

Russia's Sistema had to write off US$1.2bn of investment in a joint venture called Sistema Shyam Teleservices Limited formed in 2007 between Sistema and Shyam Group. UAE's Etisalat booked US$827mm in impairment charges after the verdict and Norway's Telenor had written down US$721mm in licences and goodwill. Telenor which had joined hands with Unitech in 2008 made its entry by buying a controlling stake in Unitech Wireless for US$1.3bn. Uninor had launched full-fledged operations in 13 of the 22 telecom circles. The company participated in the November 2012 auction to acquire six licences, but exited the market selling the venture to Airtel in February 2017 as a consequence of growing pressure in the telecom industry, more significantly after the entry of Reliance Jio. The CEO of Telenor Group, Sigve Brekke had said on the exit of Telenor from India that *"after thorough consideration, it is our view that the significant investments needed to secure Telenor India's*

367. https://www.thehindu.com/news/national/supreme-court-lost-its-way-while-cancelling-coal-blocks-2g-licences-former-attorney-general-rohatgi/article31602365.ece

368. https://trai.gov.in/sites/default/files/CUTS_plimanry.pdf

future business on a standalone basis will not give an acceptable level of return."[369]

The licences and spectrum allocation to nine companies brought in an investment of approximately ₹40,000 crores and a base of about 7 crores subscribers or 8 percent of market share in terms of the subscriber base.[370] In addition to the penalty imposed by the SC, investors such as Telenor Group (of Uninor) had already invested over ₹6,100 crores in equity and over ₹8,000 crores in corporate guarantees as a foreign investor, that trusted a telecom licence stamped by the Government of India. The company had 3.6 crore customers, 17,500 workforce and 22,000 partners which were vulnerable to adverse impact as a result of the judgment.[371]

Impact on Competition

Post the SC judgment, the government started allocating spectrum by letting the market decide the price of the natural resource instead of allotting it to telecom operators bundled with their licences. The first auction after the SC order in 2012 yielded bids worth only approximately ₹9400 crores as compared with the CAG's estimate of a notional loss of ₹1.76 lakh crores to the exchequer. However, the later auctions, led by competition and the government's focus on maximising revenues pushed up the prices of the spectrum to an extent that has put the sector in a combined debt of around ₹5 lakh crores.[372]

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369. https://timesofindia.indiatimes.com/business/india-business/norways-telenor-to-exit-india-sells-telecom-business-to-bharti-airtel/articleshow/57305426.cms

370. https://www.rediff.com/business/report/how-2g-case-impacts-telecom-sector-to-this-day/20171222.htm

371. Guru Acharya, India: Case Study on the Supreme Court Ruling on the 2G Spectrum Scam, February 2012, https://www.researchgate.net/publication/255726320_India_Case_Study_on_the_Supreme_Court_Ruling_on_the_2G_Spectrum_Scam.

372. Pranav Mukul, 'What changed after 2G allegations: Govt moved to auction of airwaves, operators faced high cost', Indian Express, 21 December 2017, https://indianexpress.com/article/business/2g-spectrum-allocation-case-airwaves-government-telecom-operators-4992717/.

According to analysts, the SC order took the number of operators in the market back to the level corresponding to the period just before the giving away of licenses by the then Communications Minister Mr. Raja. A report by Citigroup also highlighted that the biggest losers of the verdict were the new entrants like Swan, Sistema, Essar, Loop, Uninor and Videocon as they lost their licence in most of the circle areas, while Bharti Airtel, Vodafone and Reliance Communication were seen as the biggest gainers due to an increase in the shifting of several customers of the indicted companies to them.

The SC's decision forced operators such as Etisalat, which owned a 45 percent stake in Swan Telecom, C Sivasankaran - promoted S-Tel, and Loop Telecom, to shut shop. It has been reported that Loop also wrote to the Prime Minister of India asking the government to refund the licence fee paid by the company with interest. Other operators like Videocon, Telenor and Sistema, having lost their licence after SC's order, returned to participate in future auctions but only as niche players, not as the strong pan-Indian operators that they earlier hoped to become. The cancellation of licences ultimately offset the competition in the market and helped the big players.

Experts have also suggested that the CAG report and the fallout from the 2G spectrum judgment, and the fear of another scam pushed the government into a rather long period of policy paralysis. At the same time, the SC judgment also adversely impacted the telecom vendors who were managing IT networks of licensees, as they are likely to have lost deals worth millions of dollars. These include vendors such as Nokia, Siemens, Ericsson, Huawei and Wipro.[373]

It's hardly surprising that almost the entire industry is struggling with high debt, and is, in turn, posing high risks to an already depressed banking system. It's also not surprising that only three large companies are likely to remain standing at the end of the bloodbath. This is in addition to the two public sector companies: BSNL and MTNL.

373. https://www.thehindubusinessline.com/info-tech/2g-ruling-it-telecom-vendors-may-lose-deals-worth-millions/article23070473.ece.

Impact on Consumers

Given that India had 89.4 Crore mobile users at the time of the decision, close to 4.5 Crore subscribers had to change their service providers through mobile number portability.[374] It would be important to note that many of the subscribers were holding more than one number, hence 89.4 Crore mobile users may not be the right number. As competition subsided due to the cancellation of licences, there was a moderate hike in headline tariffs.

Additionally, as a result of a new auction and high spectrum bids, the input cost of mobile companies increased, causing operators to increase call-rates to keep up with profit margins.[375] The investments required to maintain and improve service quality were also presumably reduced which may have led to an increase in call drop rates.

Impact on Banking Sector

Loans to the telecom sector accounted for 3% of the portfolio of the banking industry.[376] Banks that were exposed to the firms whose licences got cancelled include SBI, PNB, IDBI Bank Ltd, Central Bank of India, Bank of Baroda, Allahabad Bank, Canara Bank, Corporation Bank and Yes Bank Ltd. It has been reported that approximately ₹30,000 crores were exposed to the banking sectors and were at risk as a result of the judgment.[377]

PNB has a total telecom exposure of ₹10,923 crores, of which ₹8,802 crores were funded exposure, the bank said. The bank didn't lend any money directly against 2G licences but gave around ₹508 crores for 2G service roll-out. The bank's total exposure to the telecom sector was 2.75 percent of its loan book.[378]

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374. https://www.firstpost.com/business/2g-scam-verdict-thumbs-down-for-fdi-telenor-warns-it-may-quit-india-202084.html

375. https://www.businesstoday.in/sectors/telecom/bharti-airtel-vodafone-ariff-hike/story/205110.html

376. https://www.livemint.com/Companies/XG0nNJjRAo4L3svz1SXeAL/Banks-play-down-cancellation-impact.html

377. https://trai.gov.in/sites/default/files/CUTS_plimanry.pdf

378. https://www.livemint.com/Companies/XG0nNJjRAo4L3svz1SXeAL/Banks-play-down-cancellation-impact.html

According to Fitch Ratings, the Indian banking sector was in a position to absorb loan losses stemming from the cancellation of 2G licences without materially impairing credit quality, although it mentioned that annual profits would take a hit.[379] The verdict impacted the bank books, loans to telecom companies and infrastructure providers, comprising nearly 3.0 percent of the portfolios for lenders at that time. According to the Reserve Bank of India, as of December 30, 2012, Indian banks' exposure to the telecom sector was ₹90,970 crores.[380]

Higher spectrum price

Under the fear of another scam, and to play safe, the price of spectrum in all subsequent auctions of 2G spectrum was benchmarked to 3G rates. The high price forced the telecom operators to borrow money, leading to a burgeoning debt burden for many. The government's pursuit of higher revenues through auctions, which is seen to be a direct result of the CAG's observations on the loss of revenue through administrative allocation, has also resulted in spectrum becoming costlier, adversely impacting the financial condition of these companies.[381]

In the 2016 auction, despite a clear lack of intent from the industry, the highly-priced spectrum in the 700 MHz frequency was put under the hammer. In its internal pre-auction estimates, even the DoT did not expect the 700 MHz spectrum to be fully sold. Throughout the auction, not a single bid by any operator was placed.

The auction of the 700 Mhz spectrum failed because of the high price. The example has been used to highlight the government's unhealthy infatuation with auctions, costing the industry and consumers dearly.

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379. https://www.domain-b.com/finance/banks/20120203_Indian_banks.html

380. https://www.livemint.com/Companies/XG0nNJjRAo4L3svz1SXeAL/Banks-play-down-cancellation-impact.html

381. https://indianexpress.com/article/explained/after-the-scam-broke-how-the-2g-controversy-shaped-telecom-policy-impacted-industry-4992047/

Telecom Debt

Parag Kar, who once headed the regulatory division of Qualcomm India, argued that *"The real impact of the scam was the distortion in spectrum price, amid lack of curation by regulators (to correct anomalies) for fear of being accused of causing loss to the exchequer."*

Similarly, Rajan S Mathew, Director-General of the Cellular Operators Association of India (COAI) highlighted that *"This was the beginning of the burgeoning debt problem for the industry, as they had to borrow significantly to pay for the high price of spectrum, as well as a period of policy paralysis in the government."* Mathew pointed out that many decisions like spectrum sharing were shelved for a long time. The overall debt of the telecom industry was around ₹2.4 lakh crores in 2012-13, which more than doubled to ₹4.6 lakh crores in 2016-17.[382] In 2017, on account of high debt in the sector, the Reserve Bank of India also raised red-flags on the telecom industry. Accordingly, the RBI asked the banks to review their exposure to the telecom sector.[383] In 2019, the total debt on the telecom sector stood at ₹7 lakh crores.[384]

Chawla Committee Report

Following the brouhaha over several scams, the Ashok Chawla Committee on Allocation of Natural Resources, headed by the former Finance Secretary, was set up in 2011 to suggest a transparent and corruption-free process for allocation of natural resources. The Committee was entrusted with the mandate of identifying key natural resources being allocated by Central Government or its key agencies; examining the efficacy and suitability of existing legal and regulatory framework and rules being employed in the allocation

382. https://www.rediff.com/business/report/how-2g-case-impacts-telecom-sector-to-this-day/20171222.htm

383. https://indianexpress.com/article/business/2g-spectrum-allocation-case-airwaves-government-telecom-operators-4992717/

384. https://theprint.in/economy/why-supreme-court-should-take-blame-for-indias-economic-crisis/315307/

processes; make recommendations for enhancing the sustainability, transparency and effectiveness of the allocation processes; and, finally to suggest changes in the legal, institutional and regulatory framework to implement the above recommendations.

For the allocation purpose, the Chawla Committee suggested the use of market-related mechanisms such as auctions according to the best-suited circumstances. One of the significant recommendations of the Committee was that all future telecom licences should be unified licences and thus should be de-linked from the spectrum. Finally, it recommended that effective measures should be taken to ensure continued efficient usage of spectrum *inter alia* through re-defining the appropriate geographical units for allocation.[385]

The Chawla Committee also suggested that there should be a clear road map indicating the type of spectrum, and how much of the spectrum would be up for grabs at various points in time. This would help companies to effectively plan the quantity and price of their bids in auctions, and prevent hoarding and unrealistic premiums.[386]

However, the report was not made public and was under extensive debate across ministries, industry associations, businesses, economists and other experts. Reportedly, 69 out of 81 recommendations were accepted (with some modifications) by the Group of Ministers headed by the Minister of Finance[387].

Table 4 shows various issues related to the spectrum and the major recommendations of the Committee:

385 . http://www.cuts-ccier.org/pdf/Report_of_the_Committee_on_Allocation_of_Natural_Resources.pdf

386. https://www.businesstoday.in/magazine/features/chawla-committee-report-on-pricing-allocation-of-natural-resources/story/16519.html

387. https://parfore.in/wp-content/themes/parfore/pdf/6-2012-Why_is_the_Government_afraid_of_releasing_the_Chawla_Committee_Report_on_Natural_Resources.pdf

Table 4

Spectrum Issues and Major Recommendations of the Committee

Select Issues	*Select Recommendations in Brief*
A Study of global practices revealed that allocation of spectrum falls in one of the three categories: administrative allocation, allocation on the basis of a 'beauty contest' and market-related processes including auctions	Spectrum for telecom access services should be made available through suitable market-related processes
In line with the recommendations of TRAI, spectrum should be de-linked from licences and a unified licence covering all telecom services should be evolved	All future licences should be unified licences and spectrum should be delinked from licences
Creation of a spectrum market for access services by liberalising merger and acquisition (M&A) guidelines and by permitting spectrum trading are being discussed	Uses of spectrum should provide for incentive/disincentive measures including rollout obligations with strict oversight
Spectrum is a scarce resource and should be utilised optimally, effectively and efficiently. For this, a mechanism to include objective and measurable criteria backed by a rigorous mechanism is being discussed	There is a need for more liberal M&A guidelines keeping a minimum number of service providers to ensure competition allowing scope for spectrum sharing and spectrum trading
	A comprehensive and integrated legislative framework for spectrum management should be in place for optimal and efficient use of spectrum resources

Source: Parliamentarians Forum on Economic Policy Issues (PARFORE) Issue Note [388]

Presidential Reference: Natural Resource Allocation Case[389]

In August 2012, the Union Government filed a Presidential Reference in relation to the SC judgment in the 2G case. The Presidential Reference sought clarity on whether the SC could interfere with policy decisions. In that regard, the Presidential Reference may conclusively determine the Court's jurisdiction. However, it has been urged by a few experts that this amounts to an appeal against the decision of the Court, which could be done only through a Review Petition.

In this regard, the advisory jurisdiction of the Court invoked through the Presidential References is governed by Article 143 of the Constitution. Under the said Article, the President is empowered to

388. https://parfore.in/wp-content/themes/parfore/pdf/6-2012-Why_is_the_Government_afraid_of_releasing_the_Chawla_Committee_Report_on_Natural_Resources.pdf

389. In Re: Special Reference No. 1 of 2012 (27.09.2012 - SC) : MANU/SC/0793/2012.

refer to the Supreme Court any matter of law or fact. The opinion of the Court in that regard may be sought about issues that have arisen or are likely to arise. Additionally, these are generally matters of grave public importance that require immediate and expedient deliberation and opinion of the Supreme Court.

The basic question before the SC was *"whether auction as a method of distributing natural resources under the government's control enjoyed a constitutional mandate."* The Court in that regard stated that revenue maximisation - something expected from auctions - may not lead to the common good.

The Supreme Court clarified that *"the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all [the] natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources."* Since the 2G spectrum cancellation order used the word "perhaps" in its paragraph 96, holding, *"[i]n our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and. . . . . ", the Supreme Court in its clarification in the 2G Presidential Reference observed that "[t]he choice of the word 'perhaps' suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable". The Court further clarified that "[m]oreover, if the[2G cancellation] judgment is to be read as holding auction as the only permissible means of disposal of all [the] natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction, e.g., the MMRD Act."*

The Supreme Court also dealt with the question of constitutional mandate of Article 14 under the Constitution of India *vis-a-vis* the method of auction. Article 14 of the Indian Constitution secures to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to our Constitution. Article 14 addresses the State, and does not directly confer any right on any person like some of the other Articles in our Constitution do, e.g. the right to freedom of speech and expression afforded under Article 19(1)(a). As has been the trend of judicial decisions, the

action of the State is always to be tested on the yardstick of Article 14, whether the action relates to grant of contracts, distribution of largesse, or allotment of land. While deciding the question of whether auction as a method of disposal of natural resources is a constitutional mandate under Article 14, the Supreme Court held that it would "unhesitatingly answer it in the negative". This is so for two important reasons.

One, the language of Article 14 is in the negative form, meaning that Article 14 acts as an injunction of sorts to the State against taking certain type of steps, and not a command to the State to take any particular type of actions. Thus, in words of the Supreme Court, *"[r]eading the mandate of auction into its scheme would [thus,] be completely contrary to the intent of the Article apparent from its plain language."*

And, second, an absolute principle such as a constitutional mandate needs to be applied in all situations, and cannot be left untested in some situations while being used only in some others. Therefore, the meaning of equality as enshrined in Article 14 cannot be interpreted in the limited sense to include auction without testing it in each and every circumstance.

The Supreme Court also observed that *"[r]evenue maximization is not the only way in which the common good can be subserved. Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method"*. The Court also observed that it was not its domain to embark upon an unchartered ocean of public policy in the attempt to analyse whether a particular public policy was wise or not, and whether a better one could be evolved. In fact, it observed that the Court should have a stronger tendency to give judicial deference to legislative judgment when it comes to questions of economic regulation, as compared to other fields where human rights are involved.

Lastly, the Court opined that the methodology of disposal of natural resources *"is clearly an economic policy. It entails intricate economic choices and the court lacks the necessary expertise to make them.*

It cannot, and shall not, be the endeavour of this court to evaluate the efficacy of auction vis-à-vis other methods. The court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate."[390]

Moreover, in a prior judgment passed by the Court on the method of distribution of natural resources, namely, Sachidananda Pandey vs State Of West Bengal & Ors, AIR 1987 SC 1109, the Court held that the use of auction for disposing public property was not an invariable rule. The said case pertained to the granting of lease by the Government of West Bengal of the Begumbari land (4 acres of land that belonged to the Zoological Garden) to the Taj Group of Hotels for the construction of a five-star hotel in Calcutta. A public interest litigation had been filed in the Supreme Court challenging the said grant of lease on the ground that the State Government bartered away 4 acres of public property in an arbitrary fashion, without inviting tenders and without holding a public auction, but rather negotiating straightaway with the Taj Group of Hotels. The Supreme Court upheld the action of the State of West Bengal by observing as follows:

> "State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

Further, the Court held that it was satisfied that the Government of West Bengal acted in a bona fide manner, and held that:

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390. *Ibid.*.

> "The Government of West Bengal did not fail to take into account any relevant consideration. Its action was not against the interests of the Zoological Garden or not in the best interests of the animal inmates of the zoo or migrant birds visiting the zoo. The financial interests of the State were in no way sacrificed either by not inviting tenders or holding a public auction or by adopting the 'nett sales' method."

Thus, it becomes evident that the SC has accepted the fact that it lacks the expertise to make economic policy and decisions. This intrinsic thought process of the SC is problematic in itself, as it portrays that it shall not 'endeavour' to evaluate the efficacy of methods or the impact of its decision. Presumably, if the Court would undertake such an endeavour, this book would have no purpose or standing.

The CBI Order: 180 Degrees

Subsequent to SC cancelling 122 spectrum licences issued to telecom operators, the Special CBI Court in 2017 gave its Order, wherein all accused in the 2G case were acquitted. The matter was placed before the CBI as there were allegations of corruption leading to the popularly known '2G scam'. In fact, in 2011, Time magazine included India's 2G spectrum allocation scam in its list of "Top 10 abuses of power".[391]

The entire case created a lot of political and economic turmoil in India. The verdict by the SC is estimated to have impacted 5.3 Crore phone connections. Politically, the scam became a lineage for Congress' alleged corruption practices. The alleged 2G scam was actually what fuelled India Against Corruption movement led by Anna Hazare.[392] This movement had wide ramifications for the society and the economy.

However, in November 2017, Judge O. P. Saini, who presided over the CBI court, said that amongst all the brouhaha, there was simply no scam. Everybody was going by *"public perception created by rumour,*

391. http://content.time.com/time/specials/packages/completelist/0,29569,2071839,00.html

392. https://scroll.in/article/862349/if-there-was-no-2g-scam-why-did-the-supreme-court-cancel-122-licenses-in-2012

gossip and speculation", the CBI court ruled.[393] *"Some people created a scam by artfully arranging a few selected facts and exaggerating things beyond recognition to astronomical levels."*[394]

The allegation against Raja was that he had chosen an arbitrary and non-transparent method of spectrum allocation in an attempt to favour certain companies, in exchange for kickbacks/bribes.[395] Additionally, it was also alleged that Raja arbitrarily changed the cut-off date from October 01 2007 to September 25, 2007, which meant that a large number of applications received after September 25, 2007, were ineligible. At the same time, as was observed in the case before the SC, the prices of the spectrum were fixed at the market price discovered way back in 2001. Raja also failed to take into account the recommendations made by TRAI, to favour select players (like Swan and Unitech).

A pertinent question raised after CBI's order was that if there was no 2G scam, to begin with, why did the SC cancel 122 telecom licences, thus drastically affecting the telecom industry?

Justice G. S. Singhvi, sitting in a division bench with Justice Ashok Kumar Ganguly, who had cancelled the 122 licences allocated, said that the cases related to the 2G spectrum allocation presented before the SC and the CBI were completely different[396]. He said that, *"The issue before the Supreme Court was the allocation of spectrum without auction - the fundamental principle of distribution of natural resources through auction. Whether there was a conspiracy in spectrum allocation and any corruption was not before us - that was for the CBI court to decide."*[397]

However, one of the specific fundamental questions that the SC looked into was whether A. Raja had acted to *"favour some of the*

393. *Ibid.*

394. *Ibid.*

395. https://scroll.in/latest/862236/2g-spectrum-scam-special-court-acquits-all-accused-in-the-case-including-kanimozhi-a-raja

396. https://en.wikipedia.org/wiki/2G_spectrum_case

397. https://scroll.in/latest/862414/sc-judge-who-scrapped-2g-licences-in-2012-says-cases-before-him-and-the-cbi-court-were-different

applicants". In its order, the SC was scathing when commenting on Raja's conduct. It stated that it was clear from the material provided to the court that Raja wanted to favour some companies at the cost of the Public Exchequer and that he *"virtually gifted away the important national asset at throw away prices."*[398]

The SC also stated that Raja's corruption was proven by the actions of the companies who had been allotted the licences. In that regard, the SC order reads:

> "This becomes clear from the fact that soon after obtaining the licences, some of the beneficiaries off-loaded their stakes to others, in the name of transfer of equity or infusion of fresh capital by foreign companies, and thereby made huge profits."

The apex court also criticised the FCFS method adopted by Raja, while stating that auctioning was the "only rational transparent method for distribution of national wealth."

On the contrary, the CBI Court order found no irregularities or evidence to hold the accused guilty. The order stated that:

> "There is no evidence on the record produced before the court indicating any criminality in the acts allegedly committed by the accused persons relating to fixation of cutoff date, manipulation of first-come-first-served policy, allocation of spectrum to dual technology applicants, ignoring ineligibility of STPL (Swan Telecom Pvt. Ltd.) and Unitech group companies, non revision of entry fee and transfer of ₹200 crores to Kalaignar TV (P) Limited as illegal gratification."

The decision by the CBI court received mixed responses. While some people followed the preliminary opinion of Justice Singhvi, in that the mandate before the SC and the CBI were different, others believed that the CBI failed to undertake and understand the detailed nuances of the case (including economic factors) while giving its decision.

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398. https://scroll.in/article/862349/if-there-was-no-2g-scam-why-did-the-supreme-court-cancel-122-licenses-in-2012

For instance, Siddharth Luthra, a senior advocate in the Supreme Court and former Additional Solicitor General of India, argued that both judgments held their ground and that there is no contradiction between SC's case and CBI's judgment. In his view, the parameters in a civil and a criminal case are different. He says that in 2012, the SC simply went on the material placed before it whereas the trial court looked at a larger range of evidence and found dishonest elements missing.[399]

The matter, however, was not closed. In March 2018, the ED approached the Delhi High Court challenging the Special CBI Court order of 2017, acquitting all the accused. A day later, the CBI too challenged the acquittals. The ED and CBI urged for urgent and out-of-turn hearings in the appeals. The Delhi High court recently rejected these appeals.[400]

The Supreme Court subsequently also dismissed appeal filed by Loop Telecom seeking refund of entry fee of ₹1454.94 crores. The bench invoked the doctrine of in pari delicto and observed that Loop Telecom was at equal fault.[401]

Separately, the then CAG Vinod Rai issued a written apology to Congress MP Sanjay Nirupam for having "incorrectly stated" that the MP had pressurised him to not mention the then Prime Minister, Manmohan Singh's name in the CAG report. Anil Swarup, coal secretary from 2014 to 2016, took to Twitter to wonder whether Rai does not "owe an apology to the nation for his wrong calculations". Swarup added that extracts from his book "Not Just a Civil Servant" outlined "where Vinod went wrong in his 'rai' as CAG".[402]

With the recently concluded auction of 5G spectrum at ₹1.5 lakh crores, questions are being raised on the estimated loss of the 2G

399. https://scroll.in/article/862349/if-there-was-no-2g-scam-why-did-the-supreme-court-cancel-122-licenses-in-2012

400. https://economictimes.indiatimes.com/news/india/2g-scam-casehc-rejects-appeal-against-dismissal-of-challenge-to-legality-of-cbi-appeal/articleshow/91007743.cms

401. https://www.livelaw.in/top-stories/2g-scam-acquittal-in-criminal-case-first-come-first-serve-policy-was-arbitrary-supreme-court-loop-telecoms-193322

402. https://www.outlookindia.com/website/story/india-news-2g-spectrum-back-in-news-with-ex-cag-vinod-rais-apology/399187

case. The CAG report had pegged the losses to the exchequer for 2G spectrum at ₹1.76 lakh crores.[403] It is notable that CAG had calculated the presumptive loss in the 2G auction in the range of ₹58,000 crores and ₹1.76 lakh crores, but the highest amount was only quoted by the media and it remained in public memory. The current 5G auction and the allotment rates do not fall in place with the amount quoted by the then CAG.[404] Mr. A Raja, the primary accused in the 2G scam case has questioned the estimated loss, and demanded a probe into the 5G auction, in light of the estimate of ₹5 lakh crores presented by the government.[405] However, noted expert Parag Kar commented that the auction of 5G airwaves was conducted with the utmost professionalism, blended with transparency and openness — the mandatory prerequisites needed for driving such outcomes.[406]

Conclusion

If the essence of CBI court is anything to go by, then all the 122 licences cancelled by the SC were on the wrong footing. Be that as it may, many experts have subsequently commented and held a view that differed from that of the SC. For example, Mohan Guruswamy, economist and former advisor to the Finance Minister, has pointed out that the Supreme Court should have restricted itself to singling out corrupt officers, rather than quashing the licences and allocations altogether. He notes that the court should just restrain itself as it is not qualified to make economic policy decisions.

Experts have also commented that instead of cancelling all 122 licences, only those licences should have been cancelled where companies unduly benefited. There can also be arguments that only ineligible applicants should have been disqualified. This is particularly interesting because out of 122 applications, 85 were found to be

403. https://www.downtoearth.org.in/news/science-technology/from-2g-to-5g-spectrum-how-chawla-panel-put-value-to-natural-resources-84110

404. https://indiaaheadnews.com/business/years-after-ex-cag-vinod-rai-suggested-1-76-lac-cr-loss-in-2g-spectrum-lesser-bids-pour-at-5g-auction-226818/

405. https://thewire.in/politics/a-raja-5g-spectrum-auction-telecom-minister

406. https://www.thehindubusinessline.com/opinion/5g-auctions-transparent-and-well-executed/article65747613.ece

ineligible, even as per the claims of the petitioners. Ineligibility is also very subjective. Just because the applicant company has no background in the telecom sector does not mean that it cannot run a telecom business. Telecom business requires deep pockets; therefore it was important to check the financial status of the applicant and determine whether it could mobilise the resources to run a telecom business.

Airtel's history shows that Sunil Bharti Mittal was in the business of assembling telephone instruments, fax machines, etc. in 1984. When the telecom sector was opened up for private participation in the mobile telephony sector, it applied for a telecom service licence in 1992. To cover up its lack of experience in the telecom sector it partnered with a French telecom company Vivendi and thus secured its first licence to operate in two circles. Since then it has not looked back.

On similar lines, further investigation of entities and individuals unfairly benefitting, both within and outside the government, could have been undertaken. These could have included entities offloading their stakes in successful applicants (such as Swan, Tala Tele Services, Unitech). Even if the CBI did not find criminal conspiracy, the doctrine of 'public accountability' and 'equal fault' could have been invoked to bring them to account. While miniscule penalties were imposed on these entities, the objective should have been disgorgement of unfair gains and the amount of penalty should have been accordingly decided.

The doctrine of public accountability was used by the Supreme Court in *DDA v. Skipper construction case*.[407] It is based on the premise that the power in the hands of administrative authorities is a public trust which must be exercised in the best interest of the people.[408]

In the Skipper matter, the court enhanced the scope of this doctrine. It said that in the matters where a public servant has caused a loss to public exchequer, the state can recover such loss

407. Delhi Development Authority v. Skipper Construction Company, 1996 SCC (4) 622.

408. https://www.researchgate.net/publication/228250952_Doctrine_of_Public_Accountability_in_Light_of_DDA_vs_Skipper_Construction_Co

from the erring officer, by way of attachment of properties of such public servant. The burden of proof to establish that such attached properties were not acquired with the aid of monies/properties received in the course of corrupt deals is on such an officer. Moreover, this doctrine applies to legislature, executive and judiciary.[409] The breach of duty gives rise in public law to liability which is known as "misfeasance in public office".[410] A public officer who abuses his official position can be directed to pay compensation damages or costs, under this doctrine. However, the doctrine of public accountability needs to be balanced with reasoned decisions taken by civil servants in good faith.

Moreover, to collect key evidence in the 2G matter, the Supreme Court could have constituted a team of former police officers, CVCs, and others with impeccable integrity. They could have identified whistle-blowers, potential insider approvers and traced the money trail through the money laundering, FEMA and Income Tax routes.[411]

After such investigation was conducted the information could have been provided to the Court about the identity of the parties who were unduly benefitted; subsequently an offence of corrupt practices under the Prevention of Corruption Act, 1988 (PC Act) could have also been established, if the relevant elements are fulfilled. Section 9 of PC Act provides that when the offence is committed by a commercial organisation, it is punishable only with a fine, except if the offence has been committed with the consent or connivance of any director, manager, secretary or other officer of the commercial organisation, in which case relevant persons can be held guilty and can be punished with imprisonment and fine.[412]

The court could have also found an alternate remedy as discussed in the Epilogue chapter of this book. In terms of punishing the

409. https://ylcube.com/l/blog-posts/blogs-collection-0/2020/06/28/doctrine-public-accountability/

410. https://www.lawcom.gov.uk/app/uploads/2016/01/apb_tort.pdf

411. https://www.thehindu.com/opinion/lead//article60547512.ece

412. https://www.thehindubusinessline.com/business-laws/why-it-is-important-not-to-ignore-indias-anti-corruption-laws/article65639377.ece

licensees who made huge profits by getting the licence, the promoters and the old owners could have been asked to disgorge the windfall gains and deposit these in the treasury. Such deposits could have been used for welfare of consumers by the state directly or through credible consumer organisations by creating funds like a consumer welfare fund.

It is also pertinent that while punishing the non-worthy parties who received the spectrum, and made windfall gains, it should have been ensured that the licences were awarded to the worthy through a fresh, fair, speedy, and efficient process. This would have ensured that the overall loss to the economy was minimised, while the errant players were penalised. To this cause, the SC in its order of cancellation did direct the government that the cancellation of the licences would become operative only after four months. It further provided that within two months, the TRAI would have to make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 service areas by auction. The Central government was directed to consider the recommendations of the TRAI and take an appropriate decision within the next one month, and to grant fresh licences by auction.[413] Such corrective actions were the need of the hour.

Herein, the Court ought to have appreciated the scope for variation in methods for the allotment of "natural resources", such as those suggested by the Ashok Chawla committee. It is, however, laudable that the Supreme Court has sent a clear message on the topic of transparency, in that, if a government policy is not fair and transparent then it is liable to be struck down.

In any case, the decision to cancel all the 122 licences issued by the government for the use of the 2G spectrum by the Supreme Court, without going into the details of each license allotment, is in itself rather problematic. Any decision on the subject of cancellation of the licences already allocated should have been taken after the finding of criminal intent given by a court of law. The best alternate

413. https://www.outlookindia.com/website/story/2g-verdict-fate-of-122-cancelled-licences-depends-on-investigative-agencies-next/305812

remedy available to the Supreme Court, that was also least restrictive on the economic aspect of the spectrum allocations, was to give a declaration on the point of transparency, or the lack thereof, in the process of allocation of the 2G spectrum, while delegating the issue of cancellation/criminality to appropriate governmental authorities to decide in this respect after examining each case of the allotment of 2G licenses on merits.

Further, it does not help the situation that the trial court has found no evidence that suggests the presence of a criminal intent in the manner in which the 2G spectrum was allocated. All the accused persons in the 2G trial case, including private players and government actors, have been acquitted by the trial court which observed that everybody was going by "public perception created by rumour, gossip and speculation". Interestingly, the ED had ordered freezing of bank accounts and attachment of immoveable properties of five companies in connection with the alleged bribe of about ₹200 crores illegally paid to Kalaignar TV.[414]

To sum up, in the entire episode two things stand out. First, judicial credibility has taken a serious hit and second, there were no obvious attempts by the SC to estimate and rein in the economic fallout of its decision in this case. In many ways, Senior Advocate Harish Salve is right: the seeds of woes of the Telecom Sector today were perhaps sown at the time of the 2G judgment.

However, one needs to acknowledge that efforts of judiciary, while necessary, might not be sufficient to address the issue of corruption in dealings of national resources and public money. The legislature and executive will also need to play their part in this regard.

For instance, experts have suggested that a law should be enacted making all contracts involving corruption, or a loss to the exchequer, void and unenforceable, and enforced strictly. This will remove all incentives to bribe any public official. The risk of losing the bribe amount as well as the benefit or favour received through corruption, is likely to act as strong incentive against corruption.

414. https://www.thehindu.com/news/national//article60482165.ece

Also, a windfall profit tax could be imposed on all those who secured a licence or mining lease or other natural resource, and made huge profit (through sale, etc) without value addition. This will ensure that excess profits made out of a vital public resource are retained with the exchequer, and aren't appropriated by private interests. A mere private monopoly of public assets shouldn't be a source of unusual profits, even if there is no corruption in the transfer of asset. Such a windfall profit tax was imposed in the UK in 1997, in respect of North Sea Oil, and the monopolies in electricity, telecom, airports, gas, water, and railway sectors.

In addition, a law similar to the False Claims Act (FCA) in the US could be enacted in India. The FCA provides that any person who knowingly submits false claims to the government is liable for treble the government's damages plus a penalty that is linked to inflation. In addition to allowing the government to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called "qui tam" suits) against those who have defrauded the government. Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery. Under the FCA, settlement and judgments since 1986 in the U.S. now total more than $70bn.[415] In the fiscal year 2021, $5.6bn in settlements and judgments was reported by the US Government.[416] Of these, over $1.6bn arose from lawsuits filed under the qui tam provisions. During the same period, the government paid out $237 million to the individuals who exposed fraud and false claims by filing these actions.[417]

While India has Whistle Blowers Protection Act, 2014, it is yet to witness effective enforcement.[418] While there have been attempts to

415. https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year

416. https://www.justice.gov/civil/false-claims-act

417. https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year

418. https://www.mondaq.com/india/whistleblowing/1118060/whistle-blowers-protection-act-2014-a-cracked-foundation and https://thewire.in/rights/despite-20-rti-activists-killed-in-bihar-no-expedited-probes-rights-groups-point-to-disturbing-trend

amend and operationalise it, these have not been successful as yet.[419] There is a need to strengthen and immediately operationalise the legislation to protect whistle blowers in India.

Issues related to alleged fraud in business deals can also be matter for arbitration, the Supreme Court has ruled, while referring to a dispute between Swiss Timing and the organising committee of the 2010 Commonwealth Games over unpaid fees to an arbitral panel.[420]

Postscript

While I was writing this chapter, the Nobel Prize in Economics for 2019[421] was awarded to two economists, Paul Milgrom and Robert Wilson from the USA, for their work on auction theory, Their advice helped the US Federal Communications Commission to auction spectrum radio waves and earn US$7bn. *"Since then, auctions have become the gold standard for the distribution of all sorts of natural resources, from exploration permits to mining leases to railway franchises. It is almost taken for granted that, if properly designed, auctions will find the ideal balance between efficiency and revenue generation"* writes Mihir Sharma of Bloomsberg.[422]

"The example set by the FCC auction has in many ways turned out to be very unhelpful, particularly in emerging markets...." Economists generally don't object because revenue is easier to measure than consumer utility, making their job simpler. In India, for example, the government has grown addicted to using telecom spectrum revenue to help finance its deficits. But the more a company pays for spectrum, the lower its profits and the less it has left to invest in new infrastructure. In India, high fees have led to high levels of debt.

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419. https://prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015 and https://ethicontrol.com/en/blog/whistleblower-law-India-en

420. https://economictimes.indiatimes.com/news/politics-and-nation/cwg-scams-disputes-over-fraud-can-be-arbitrated-says-supreme-court/articleshow/35747595.cms?from=mdr

421. https://economictimes.indiatimes.com/news/economy/indicators/this-years-nobel-prize-in-economics-celebrates-an-idea-that-has-failed-india/articleshow/78631221.cms

422. https://www.livemint.com/news/india/this-nobel-winning-idea-has-failed-india-11602547074155.html

"Indians at least should have known this would happen. The country's telecom revolution — which drove its years of high growth in the 2000s — only took off after the government moved away from auctions and started assigning spectrum to licensees in return for a share of their revenue.

"Worse, for those who imagine that auctions designed to maximize government revenue would at least maximise government revenue: The new system brought in twice as much in fees as the auction bids would have".

Given this excellent analysis, many have therefore held that auctions are not the best way to allot spectrum. Even a first-come-first-served-policy if implemented transparently and fairly maybe a better option. In this case, too, the apex court held that they are not prescribing auctions as the only way forward which could otherwise lead to a high cost and thus impact the economy and consumers adversely. The Chawla Committee also said that there are various modes of allocation of natural resources which can be tailored to be used in India.

5

Adjusted Gross Revenue Case

In Search of Destination without Definition

Introduction

This matter relates to a critical economic multiplier like telecom services, which cuts across all sections of the society as it is the base of communications and connectivity, and is becoming more pervasive than any other sector. One noted expert has quantified the overall impact of the Adjusted Gross Revenue (AGR) Case as a staggering ₹1,69,000 crores (US$22.8bn).[423]

According to the London-based telecom trade body GSMA, the telecom sector accounted for 6.5 percent of India's GDP in 2015, or about ₹9 lakh crores (US$130bn), and supported direct employment for 22 lakh people in the country. The sector is expected to contribute 8.0 percent to India's GDP in 2022 from approximately 6.5 percent currently. The sector contributes directly to 2.2 million and indirectly to 1.8 million jobs.[424]

As per GSMA, India is on its way to becoming the second-largest smartphone market globally by 2025 with around 1 billion installed devices and is expected to have 920 million unique mobile subscribers by 2025 which will include 88 million 5G connections. It is also estimated that 5G technology will contribute approximately US$450bn to the Indian economy from 2023-2040.[425] Alas, this has lagged because of several problems with the sector and delay in 5G rollout in the country.

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423. https://www.linkedin.com/pulse/DoT-agr-demand-operator-impact-parag-kar

424. https://www.investindia.gov.in/sector/telecom

425. https://www.investindia.gov.in/sector/telecom

Total telephone connections rose to 118.9 crores in September 2021 from 93 crore in March 2014, with a growth of 28 percent in the said period. The number of mobile connections reached 1165.97 million in September 2021. The teledensity which was 75.23 percent in March 2014 has reached 86.89 percent in September 2021.[426]

Urban telephone connections rose to 66 crores in September 2021 from 55 crore in March 2014, a growth of 20 percent while the growth in rural telephone connections was 40 percent, rising from 38 crore in March 2014 to 53 crores in September 2021. The rural tele-density jumped from 44 percent in March 2014 to 59 percent in September 2021.[427] While substantial progress has been made, a lot more ground needs to be covered. Telecom services offer both voice and data facilities, which are now being used in a million different ways for both living and running businesses.

India is well known for providing offshore back-office services to customers in the west through internet, which is powered by good telecom services. Such businesses still continue to function with aplomb. Small farmers are using mobile phones to check the weather and produce prices across the country and world. Telemedicine too is offering easier ways for healthcare.

Due to the pandemic, education among other things is being offered virtually. E-commerce too has expanded rapidly because people may not wish to visit a shop for fear of the COVID pandemic and rather prefer shopping online. The list is endless. We need to ensure that the sector is healthy and competitive, providing quality services to customers and consumers.

This case of SC dealing with the matter of 'adjusted gross revenues' of telecom companies is, therefore, a very critical one for our economy, the impact of which was not aptly recognised by the executive and the judiciary.

On October 24, 2019, the SC delivered a lethal blow to the telecom sector while deciding on the definition of revenue in the AGR

426. https://pib.gov.in/PressReleseDetailm.aspx?PRID=1785452

427. https://pib.gov.in/PressReleseDetailm.aspx?PRID=1785452

case. As a result, telecom companies have had to pay a fortune in the form of unpaid license fees and that too with interest and penalties. The final judgment was delivered on September 01, 2020, asking the telecom companies to pay up the arrears in 10 years.

Post this, the telcos also sought re-assessment of their AGR dues after rectification of arithmetical errors in the calculation of AGR, which was unceremoniously declined by the SC on July 23, 2021.

The survival of Vodafone Idea seemed difficult due to exorbitant AGR dues, which would have adversely impacted the competition in the telecom sector. However, in September 2021, Government of India (GoI) announced structural and procedural reforms such as a 4-year moratorium on payment of AGR dues, prospective exclusion of non-telecom revenues from AGR definition, among others, to give some respite to the telcos. Although, the effect of such reforms on the sustenance of the telecom sector would be seen in the medium to long term, the foundation for its downfall was set in motion by the judiciary and bureaucracy.

After all, the dues had been accruing for close to two decades and hence additional penalties and interest must come along. Right? Well, only if things were so simple.

This needs a little bit of more discussion. First, it raises questions on the role of the court as a public institution. In other words, public institutions must uphold the public interest. In this case, the SC seem to have fallen short in upholding larger public interest under strict interpretation of statutes.

Mind you, the fact that the telecom sector was liberalised in the 1990s and ended up boosting our connectivity and economy was not considered germane to the issue of protecting competitors to save competition. Furthermore, it also made available cheap and reliable service to millions of Indians, who were otherwise dependent upon a moribund and archaic telecom system owned and operated by the GoI.

Now, one would say that SC also has to uphold the law and nudge the system to follow the tenets of propriety and ignore the bigger

picture. So, what if there was a series of risks or conflicts on that count?

Contrary to what the judgments suggest, the nature of conflict is still debatable. The judgments could have upheld the importance of processes and propriety, thereby holding to account those who violated these tenets.

Let's see how.

Background

After the telecom sector was liberalised under the National Telecom Policy, in 1994 various licenses were issued to the companies under section 04 of the Indian Telegraph Act, 1885. Under the NTP, 1994, the licences had a fixed annual license fee, which was the basis for the award of the licences to bids by the operators. However, once the operators started running the services they found it difficult to pay, as the amounts were too high considering the revenues. This resulted in many licensees defaulting in payments. By early 1998, eight service providers had defaulted and many others were struggling.[428]

Given this, the licensees made a representation to the GoI for relief against the steep licence fee. Accordingly, a new migration package under the National Telecom Policy, 1999 was introduced by the Central Government under the leadership of Atal Behari Vajpayee, otherwise the sector would have collapsed. It gave an option to the telecom licencees to migrate from fixed licence fee to revenue sharing arrangement effective from August 1999. In all, 21 licencee companies migrated to the new regime.[429]

As per the migration package, the quantum of the revenue share as a licence fee was to be decided by the Government after obtaining recommendations from the TRAI. The final decision with regard to the percentage of revenue and definition of revenue rested with the Central Government. Initially, the gross revenue share of the licencee

428. https://cis-india.org/telecom/resources/licensing-framework-for-telecom

429. https://cag.gov.in/sites/default/files/audit_report_files/Chapter%201%20Introduction.pdf

to the Government was provisionally decided at 15 percent without conferring with TRAI. However, as per the migration package and TRAI's recommendations, the revenue sharing proportion was later reduced to 13 percent and thereafter to 08 percent in 2013.[430]

Interestingly, there is a background story to the reduction of revenue sharing proportion from 15 percent to 13 percent. In the early 2000s, amongst the private players, only Reliance Infocomm and Tata Teleservices were providing Wireless Local Loop (WLL) services. However, some cellular operators complained to TRAI that Reliance was providing roaming service on their WLL phone beyond their Short Distance Charging Area jurisdiction.[431]

In response to this complaint, an assessment was conducted in which the report of the Telecom Engineering Consultants and the Ministerial Group on Telecom and Information Technology found Reliance Infocomm in violation of the limited mobility condition of its WLL licence and thus, was fined by the Government.[432] While the cellular operators were enraged, the Government, sought to allay their rage by reducing the revenue sharing proportion from 15 percent to 13 percent.

Coming to the migration package, the DoT sought the recommendation of TRAI in the year 2000, to which TRAI made detailed recommendations in August 2000 on the terms and conditions for issuance of licences to new Basic Operators, and specifically on revenue sharing of 12 percent, 10 percent, 08 percent for different circle categories – A, B and C circles.[433] But even before that i.e. in 1999, it also hired a consultant for an independent analysis of scope of revenue. Strangely, the DoT neither disclosed the identity of an independent consultant nor placed its report before TRAI. The report was received by DoT on November 02, 1999.

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430. https://dot.gov.in/sites/default/files/29.6.12_0_0.pdf?download=1

431. https://eparlib.nic.in/bitstream/123456789/759770/1/lsd_13_12_05-03-2003.pdf

432. https://timesofindia.indiatimes.com/business/india-business/No-violation-on-WLL-Reliance/articleshow/202230.cms

433. India is divided into 22 Licenced Service Areas categorised into circles A, B and C consisting of 18 telecom circles and 4 metro circles.

The consultant was identified as Kamal Gupta, Ph.D and FCA of Noida, UP (adjoining city of New Delhi), in an affidavit of the DoT filed on July 22, 2019, nearly a decade later, during the hearings. In its appeal to the Apex Court the DoT inter alia said:

> "As it was apprehended that the definition of "AGR" can be misused by resorting to accounting jugglery, the DoT sought the advice of experts in the field of accountancy, to decide upon a "broad definition" of Gross Revenue. The view of experts has been reproduced as under:

Revenue: Concept, Measurement and Validation

> "Defining 'revenue' in a broad, comprehensive and inclusive manner is likely to pose fewer problems of interpretation (and consequently lesser disputes and litigation) than would be the case otherwise. Further, exclusion of certain items from the definition of 'revenue' may sometime encourage companies to design their tariff and payment schemes in such a manner that their license fee liability is reduced to the minimum. Of course, the comprehensiveness of definition of revenue would need to be duly considered in determining the percentage of revenue to be charged as license fee, so that the amount of license fee is appropriate in the context of the present stage of evolution of telecom companies.
>
> "To ensure consistency, we may lay down uniform accounting policies to be followed by telecom companies for presenting their annual accounts as well as periodical statements of revenue to be sent to the government supporting their payments". (Emphasis Supplied)

Let me analyse the emphasis supplied by DoT in its appeal and point out how naive its arguments were as well as the opinion provided by the experts. For example, it says that *"defining 'revenue' in a broad comprehensive and inclusive manner is likely to pose fewer problems of interpretation (and consequently lesser disputes and litigations) than would the case be otherwise."* Note that a broad definition without any boundaries can never be inclusive and that has led to long litigation causing huge economic loss to the nation. The presumption that all companies will lower their tariffs to reduce license fee liability, without any evidence, seems problematic. Such

concerns could have been addressed through ex-post monitoring and stringent accountability measures.

In my opinion, this was a case of bureaucratic torture of the sector because it appeared to them that the sector is making bumper profits and not sharing it with the government. Alas, the Apex Court also fell for it hook, line and sinker, when it should have looked at the bigger picture and larger public interest. Making profits is not sinful and in this case, consumers were and are getting amongst the lowest prices in the world. Developing reserves out of good profits is imperative for a sector whose technology is evolving fast and where the appetite for new investment in technology and infrastructure will always be growing.

Be that as it may, let me go back to 2001 when the Association of Basic Telecom Operators (ABTO) submitted their comments on the Draft License Agreement on the revenue to be levied as the licence fee. This was followed by the issuance of licences to the telecom operators under the migration package.

In the same year, the GoI finalised the concept of gross revenue and AGR and DoT issued a letter declaring various elements of revenue in the definition of AGR.

Disagreement over AGR

In 2003, after DoT raised multiple demands on the operators to pay their dues, the ABTO and telecom operators filed a petition[434] before the TDSAT stating that that DoT did not consult TRAI on the definition of the revenue share and alleged that the department included various elements of income in the definition of AGR that should be outside the purview of its scope, specifically *"dividend income, interest income on short term investment, discounts on calls, revenues from other activities separately licensed, reimbursements under the Universal Service Fund (USF), etc."*

In 2006, TDSAT remitted the matter to TRAI observing that adequate consultation was not done with TRAI on finalising the AGR

434. Petition No. 7 of 2003.

and directed that the matter be listed for a later date or after the recommendations from TRAI are received. The TDSAT also held that the revenue of the licensee from activities beyond the scope of the licence will be outside the scope of section 4 of the Telegraph Act.[435] In effect, TDSAT ruled in favour of telecom licencees fairly.

This order was challenged by the DoT before the SC but the court dismissed the appeal[436] on January 19, 2007 and directed the department to raise all their contentions before TDSAT. Doing so, the case was remitted back to TDSAT for hearing once again.

Following the SC order, DoT submitted before TDSAT that it should reopen the issue of the definition of AGR. In saying so, it contended that AGR can also include revenue from activities outside the license. However, TDSAT did not permit the DoT to raise the issues, and in August 2007 held that its order of 2006 was final and could not be reopened by the DoT. In other words, it again ruled in favour of telecom licensees.

The TDSAT also considered and decided on the recommendations made by TRAI regarding the heads of revenue to be included or excluded from AGR. Most of the recommendations of TRAI, which were in line with the arguments of telecom licensees, were accepted by TDSAT.

First Round of Litigation in the Supreme Court

Against the above order of TDSAT, another appeal was made by the DoT before the SC. The SC held that the DoT was eligible to raise the following contentions:

- The TDSAT's judgment and order of August 2006 are wrong and erroneous.
- TDSAT failed to appreciate that the migration package and terms and conditions of licence were unconditionally accepted and acted upon by the licensees which included the definition of AGR.

435. Union of India v Association of Unified Telecom Service Providers of India and Ors, MANU/SC/1468/2019.

436. Civil Appeal No. 84 of 2007.

- TDSAT had no jurisdiction or power to examine the correctness of the terms of the licence.
- Under section 04 of the Telegraph Act, 1885, the DoT has the exclusive privilege to establish, maintain, operate telecom/telegraph and allocate it to the private parties on such terms and conditions as it thinks fit and appropriate.

The SC deliberated on the following issues:

1. After the dismissal of the civil appeal by the SC, can DoT agitate against TDSAT's order on the issue of AGR?
2. Do the TRAI and TDSAT have jurisdiction to decide the validity of terms and conditions of the licence finalised by the DoT including the definition of AGR as incorporated in the agreement with the licensees?
3. Can a licensee challenge computation of AGR and if so, at what stage and on what grounds?

On the first issue, the SC took note of the expressed language in its order issued in 2007 and held that it was open for the DoT to raise all the contentions before TDSAT.

On the second issue, the SC observed that TDSAT had not just decided a dispute on the interpretation of AGR in the licence agreement but also the validity of the definition of AGR in the licence agreement. It had no jurisdiction to examine the validity of definition of AGR since the licence was already granted to the telcos, apparently agreeing to its terms.

It also held that TRAI has statutory powers to make recommendations on the terms and conditions of the licence to the service provider and DoT is bound to seek such recommendations. However, the recommendations are not binding on the DoT and the final decision regarding terms and conditions of the licence rests with it.

On the third issue, the Apex Court held that licensee could raise the issue if the computation of AGR made by the licensor and the demand raised based on computation is not as per the licence agreement. However, from TDSAT's order of 2006, it appeared that

the licensees did not challenge the demands made by the DoT but only questioned the validity of the definition of AGR.

The SC, therefore, held that the TDSAT failed to consider the dispute with facts and materials.

In short, the licensees were precluded from challenging the definition of AGR since DoT is empowered to choose the terms and conditions of the agreement including the definition, as per the Telegraph Act.

Ultimately, the Apex Court held that the August 2006 order of TDSAT was erroneous and remitted the matter to TDSAT to pass a fresh order in accordance with the law. Post the above judgment, the telecom operators again challenged the demand notices issued by the DoT. However, in its order dated April 23, 2015, the TDSAT again ruled in favour of the telecom licensees. This order of TDSAT became the subject matter of the final case before the SC.[437]

Final Litigation in the Supreme Court

Issues

The SC examined the scope of the definition of gross revenue under the licence agreement between the DoT and the Telecom Service Providers.

Specifically, the court considered 19 contentious issues relating to the definition of gross revenue. These included discounts and commissions, gains arising out of foreign exchange fluctuations, monetary gains on the sale of shares, insurance claims in respect of capital assets, amount of negative balance of prepaid customer, reimbursement of the infrastructure operating expenses, waiver of late fee, gains from roaming charges and PSTN pass-through charges, non-refundable deposits, licence fee demand where spectrum is not granted, income from dividend and interest, bad-debts written off, liability is written off, inter-corporate loans, revenue under IP-1

437. https://DoT.gov.in/sites/default/files/TDSAT%20Judgment%2023-04-2015.pdf?download=1

registration, income from management consultancy services, res judicata, and levy of interest, penalty, and penalty interest.

Arguments

Telecom Service Providers (Licensees)

The licensees contended that the meaning of gross revenue should be in accordance with Accounting Standards (AS-9) recommended by the Institute of Chartered Accountants of India (ICAI) constituted under the Chartered Accountants Act, 1949 and therefore should only include the gross inflow of cash, receivables that arise out of ordinary activities of the telecom companies.[438]

Additionally, they also emphasised that the Companies Act, 1956 casts an obligation on companies to maintain their books of account following the accounting standards and hence these accounting standards were mandatory. Therefore, the meaning of gross revenue must be determined in line with the provisions of AS-9.

> The licensees also highlighted the reply filed by DoT in 2003 i.e. when it had first made the demand on licensees, that the definition of gross revenue was in line with AS-9 and thus they emphasised that the government cannot take a contradictory stand at different stages of the case. The licensees pleaded that a method of fair valuation should be adopted as in the case of J.K. Industries Limited v. Union of India.[439]"Today the revised AS seeks to arrive at the true accounting income. In the age of globalisation the attempt is to reconcile the accounts of Indian companies with their joint venture partners abroad. The aim is to harmonise Indian Accounting Standards with International Accounting Standards.
>
> "Similarly, today, the capital market all over the world knows no fiscal distance and barriers, facilitated by developments in transport, communication and e-commerce. Against this backdrop, Convergence of Accounting Standards is aimed at removing barriers in the flow of financial information and capital. Based on the above developments

438. Union of India v Association of Unified Telecom Service Providers of India and Ors, MANU/SC/1468/2019

439. (2007) 13 SCC 673.

> in the global economy and the Indian economy, the conceptual differences and consequent deviations in the National Accounting Standards and IFRS have got to be eliminated.
>
> "For the following reasons, we hold that the impugned Rule which adopts AS-22 neither suffers from the vice of excessive delegation nor is the said Rule incongruous/inconsistent with the provisions of the Companies Act, 1956."

In the case of *J.K. Industries Limited v. Union of India*, the judgment recognised the fact that India is an emerging economy. It also recognised that globalisation has helped India to achieve the GDP rate of around 8-9 percent and in that regard, Indian Accounting Standards must be harmonised with International Accounting Standards. I referred this here to show that some judges in the Apex Court were *au fait* with the economic situation of India and somewhere recognised that there is a need to do everything desirable to ensure that the growth does not suffer and that India does not become a pariah in the global economy.

Reverting to the case, the licensees argued on the issues of penalty, interest and interest on penalty, that the parties are in litigation over since 2003. Throughout the litigation, demands were stayed by the SC/TDSAT. Moreover, licensees had paid about 80 percent of the demands raised by the DoT and the dispute pertained to only 20 percent of the demand.[440]

Most importantly, licensees submitted that it is only if the demand is not paid within the stipulated period that the question of payment of interest would arise. They further submitted that the penalty is for failure to pay the demand within the specified period. The penalty requires mens rea, contumacious conduct, or deliberate disregard of the person's statutory liability to be imposed justly, which does not exist now.[441]

In effect, the licensees argued that TRAI and TDSAT had ruled in their favour and therefore the question of interest does not arise.

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440. Union of India v Association of Unified Telecom Service Providers of India and Ors, MANU/SC/1468/2019.

441. *Ibid.*

Department of Telecommunications

The DoT submitted that the gross revenue has been clearly defined in the licence agreement. Further, to highlight acceptance of conditions by the licensees, DoT mentioned that deliberations for the licence agreement were held with licensees and experts before the migration package was finalised, of which the definition of AGR was a part. Thus, licensees were part of the agreement finalisation process. Therefore, the licensees were bound by the licence agreement as the agreements had already been executed.

This was the crux of the argument and the precise bone of contention. In all likelihood, it may have been a bureaucrat's over-enthusiasm to define the revenue in such a sweeping manner without proportionality, as is the wont of our bureaucracy. This was also substantiated by the opinion of an accounting expert, who was appointed by the DoT, in his report dated November 02, 1999.[442] At that crucial juncture, operators perhaps agreed to it without any thought on how to get more just and fair terms of payment to the government.

DoT also submitted that no connection exists between the AS prescribed under the Companies Act and the definition of AGR as laid out in the agreement. DoT clarified that while AS-9 deals with the definition of revenue, however, it cannot prevail over the definition in the agreement. Moreover, the provision of Section 211 (3B) of the Companies Act clarifies that AS is not sacrosanct.

The plea made by telcos using the AS-9 argument was a red herring as it was not a part of the agreement between them and DoT. The issue simpliciter was on the definition of revenue which was not clarified properly in time or arrived at through proper consultative process involving TRAI as well.

The Judgment

On October 24, 2019, the SC ordered the defaulting parties to pay their dues in full within three months i.e. by January 23, 2020. In

442. Union of India v Association of Unified Telecom Service Providers of India and Ors, Civil Appeal No. 6328-6399/2018.

its judgment, it held that the contractual definition of gross revenue is binding and that the definition in the agreement is unambiguous, clear, and beyond the pale of doubt, and there is no confusion in the definition of gross revenue, which is the basis for realisation of the licence fee.[443]

The court held that the discounts and commission, and many other disputed things are also part of the gross revenue for the payment of licence fee and thus, the DoT can impose the late fee, penalty, interest, and interest on penalty on the licensees based on the terms of the agreement.

Such a view displays a lack of sense of proportionality on the part of the Apex Court also. It could have taken a view that non-operational revenues are not a part of the AGR and perhaps the operators were coerced at the time of transition to sign on to it without proper application of mind. They were quite obliged to the government to have agreed to change the terms midstream and get relief from a burdensome payment. There are many analogies under a law that the income to be assessed for revenue sharing should be net of all other incomes which the operator gains. A few examples come to mind.

In terms of Public-Private Partnership (PPP) contracts on airports, revenue share to the Government is only on aeronautical revenues and not on non-aeronautical revenues such as parking charges, or franchising fees from shops and restaurants within the airport premises. In the competition law jurisprudence, it has often been contended that the penalty to be levied on a company's turnover, which has been caught indulging in a cartel, would only be applied on the turnover of the product line division or the portfolio that participated in the cartel and not the whole company's turnover. Quite often competition authorities have erred in levying penalty on the whole turnover and the appellate bodies had turned it down on the fact that penalty can only be levied on the portfolio or turnover of the relevant product line.

443. *Ibid.*

Rationale

The Apex Court in its 2011 judgment had observed that a licensee could have transferred the ancillary activities, which do not require a licence to other firms or companies. Therefore, contracting parties in an agreement cannot avoid the consequences of the terms accepted by them and thus, they are bound to share the revenue as per the terms of the agreement. The court pointed out that since the government rejected TRAI's recommendations, its decision on the definition of AGR was final and binding.[444] As per the court's observation even if the ancillary activities were hived off to a subsidiary or associate it would still show up in the balance sheet of the licensee.

Relying on the correspondence and agreement reached between the parties, the court held that licensees had enough clarity about what constitutes AGR. Further, the court also highlighted that licensees benefited immensely from the revenue sharing as against fixed licence fees – a fact evident from their revenue figures.[445] (Annexure 1)

Critique of the Judgment

The judgment of the SC has been critiqued by many on several counts, with many questions emerging in this entire saga.

For instance, it overlooked the fact that the DoT adopted the undefined and unagreed definition of AGR without holding any consultations with the industry. Second, it has expanded the definition of AGR further by including items such as capital receipts from the sale of shares, scrap, and even insurance. This could be tantamount to operators paying licence fees on the same income multiple times.

Moreover, there are allegations that the government approached the matter in bad faith and the definition of AGR was never really examined by a neutral body like the TDSAT. Although, TDSAT ruled in favour of the telecom operators on various occasions but did not

444. *Ibid*

445. *Ibid*

get to make a final ruling on the matter because the SC had prevented it from doing so, citing legal and technical reasons.[446] One wonders why the Apex Court could not have relied on TDSAT's views since it is a specialised body headed by a retired SC judge and accompanied by two experts. It would have saved much time and money for the government, courts, and the telcos.

Airtel's review petition in the SC had argued that all AGR orders given by the government were set aside by various courts in 2006, 2007, 2011, and 2015. So, if the SC judgment was the first time the government's AGR definition was upheld by the court, how could it levy penalties and interest upon this? This has resulted in what Airtel calls 'unjust enrichment' since the government is now getting more than 300 percent of what it would have got had it won the original appeals.

It was also contended that the issue over AGR had persisted for far too long making the actual disputed amount appear as a tiny fraction of the outstanding dues. If this logic was to be considered then licensees had already paid 85 percent of the demand raised by DoT.[447] In November 2020, Airtel and Vodafone Idea rekindled the issue of anomalies in DoT's assessment of AGR. Both these telecom operators have sought clarity from DoT on the methods that were used to calculate the AGR dues.[448]

Nevertheless, on its part, the government had argued that private telecom operators like Airtel and Vodafone Idea always knew that they had to pay the AGR dues and therefore it was shocking that they did not make provisions for this in their accounts. This however is critiqued on the ground that the same standards were not sought

446. https://www.financialexpress.com/opinion/why-isnt-govt-at-sc-on-agr-ruling-threatening-of-telcos-like-airtel-vodafone-idea/1775075/

447. https://www.businesstoday.in/sectors/telecom/agr-verdict-fallout-can-airtel-vodafone-idea-survive-the-rs-92000-Crore-blow/story/387333.html

448. https://economictimes.indiatimes.com/industry/telecom/telecom-news/airtel-vodafone-idea-seek-clarity-on-methods-used-to-calculate-agr-dues/articleshow/79158274.cms?utm_source=newsletter&utm_medium=email&utm_campaign=NewsDigest&utm_content=Industry&utm_term=3&ncode=821190406dcc4ee9601a66fe2184050e4249229231ad602558108a2896684f1235b1c82f35e6af664cde2bdb852865ddb202145426d09cd333f91cba359bfb9053a5483ccc94209aa95753e706921c7b

from PSUs like MTNL and BSNL who also did not pay the dues each time the government sent a notice to them.[449] This would have violated the doctrine of competitive neutrality.

Recently, the TDSAT have ruled the government cannot exempt state-owned companies from paying their share of AGR on the basis that they get only a small portion of their revenues from telecom-related services. It also said that an exemption can be given to the PSUs only if the same is extended to private sector players.[450]

Perhaps, Airtel and Vodafone Idea made no provisions for clearing licence fees outstanding to the government and rather treated them as contingent liabilities in their books because they did not account for the dues as future payables in the form of debt or liabilities.[451] However, this was later changed and they made liability provisions in their accounts: for instance, ₹38,000 crores, were included in the case of Airtel.[452]

It is also suggested that the Centre should step in to find a solution, else the digital revolution unleashed across the country could come to a grinding halt. Of the 16 operators against whom DoT had raised the demand for payment of AGR dues, 11 have already shut operations. Two are struggling public sector undertakings and two are debt-laden private operators.

No wonder therefore that for the beleaguered telecom sector, immediate payment of dues as directed by the SC in its order on October 24, 2019 was not possible as it would have run some of the top operators into bankruptcy.

The operators, therefore, tried to persuade the DoT as well as the SC to get more time for payment. Initially, all such attempts were

449. https://www.financialexpress.com/opinion/why-isnt-govt-at-sc-on-agr-ruling-threatening-of-telcos-like-airtel-vodafone-idea/1775075/

450. https://www.business-standard.com/article/economy-policy/agr-dues-tdsat-says-public-pvt-sector-firms-cannot-be-treated-differently-122030201502_1.html

451. https://economictimes.indiatimes.com/industry/telecom/telecom-policy/paving-way-for-a-two-telco-market/articleshow/71749490.cms?from=mdr

452. https://www.timesnownews.com/business-economy/companies/article/our-entire-net-worth-wiped-out-in-last-15-years-vodafone-idea-to-sc-during-agr-case-hearing/624331

futile. However, later perhaps DoT realised that it too was fighting a lost battle.

The SC after its judgment of October 2019 repeatedly maintained that any change in the timeline could be done only by the SC. However, on January 23, 2020, i.e. the cut-off date set by the SC for telcos to comply with its October 2019 order, the DoT issued a notification stating that there would be no coercive action against the telcos for non-payment of AGR dues, until further notice.

This enraged the SC further and it came down heavily on all parties while again instructing telcos to pay full AGR dues by March 17, 2020. On the other hand, an apology had to be rendered by DoT to the SC for issuing the notification.

What is clear from this is the fact the DoT was now past the stage where it could undo the damage on its own. Accordingly, in March 2020, it moved the SC with a plea that the telcos be given up to 20 years to complete the payment of pending dues as calculated by the Telecom Department.

This plea was made for various reasons, one suspects. Firstly, there was its guilt about how it had handled the whole matter for many years and complicated the issue of the definition of revenue. Secondly, it wanted to protect the process of competition in the sector, which would have diminished if one or two of the private players had shut shop. One must remember that generalist officers decide such matters and they move on. The new generalist officers, when faced with the situation, often prefer the status quo, being fearful of vigilance and corruption inquiries, unless ordered by the courts. In my own experience, I have often seen and suffered from negative and irrational notings made by an officer, who locks the matter in complex knots that cannot be easily opened up by the successors. In its statement before the Apex Court, the DoT also cited concerns voiced by banks that feared high NPAs. In effect, it appealed that if telcos are forced to pay AGR dues immediately, the companies could face bankruptcy/insolvency which would have a severe ripple effect on the overall economy, as well as the overall service quality of all telcos.

Given this, the government proposed a period of 20 years for telcos to clear their dues. This was based on the telecom ministry's calculation. Citing this as unreasonable, the SC finally allowed 10 years' timeframe for clearance of dues. Some observers believe that while this is beneficial for companies like Airtel, Vodafone Idea would have preferred 20 years and hence a differential treatment based on the time allowed could have been effective.

According to the business newspaper, Mint, "The Supreme Court had expressed reservations about granting 20 years, voicing doubt about the recovery of dues, especially from Vodafone Idea which has been battling a liquidity crunch."[453] On DoT's part also, it is not fully clear as to why it prayed for 20 years staggered payment schedule when, as per some experts, it was unlikely to allow operators to use the full 20-year period to pay their AGR dues. On the other hand, reportedly Airtel and Vodafone Idea had pleaded for 15 years. In other words, experts feel that a telco cannot use the 20 years to pay dues if its licence expires before that. Payments need to happen while the licences are valid.

Be that as it may, telcos were given a 10-year window for the payment of AGR dues based on the definition that essentially came from the DoT, having not followed a fully transparent and participatory process, as assured by it to the telcos when shifting to the new revenue share regime. However, such relief of staggered payment over a 10-year period was not enough for the telecom companies to pay their liabilities and ensure their sustenance with decent profits.

Moreover, the telcos also appealed before the SC in regard to rectification of ostensibly computational errors in computation of AGR dues by the DoT such as double counting of some revenue items, payments towards AGR made but not accounted for, and accrued deductions not being given effect to. More importantly, the telcos sought permission from the GoI to verify their accounts and rectify the defects in the computation of AGR dues, if any and not for

453. https://www.livemint.com/industry/telecom/sc-allows-10-years-for-staggered-payments-of-agr-dues-11598940135343.html

reassessment of dues or any other dispute that was already settled by the court.

On July 23, 2021, the SC dismissed the petition to rectify any arithmetical errors stating that telcos are seeking AGR recalculation in the guise of correction or rectification of defects or errors.[454] According to the Apex Court, as the AGR matter had dragged on for years, AGR dues payable by the telecom operators could be a subject matter for any future litigation.

Such a hard stance by the SC, even when a possibility of error exists, shows apathy towards businesses and the larger economic thinking. Shouldn't this be called a the travesty of justice?

Overall, what was alarming is that the Apex Court accepted DoT's broad definition of AGR dues rather than give the benefit of doubt to the telcos or promote fairness based on the history narrated above. It disregarded the uneven bargaining power between the government and the licensees, despite the existence of copious jurisprudence against standard format contracts and the need for meeting of minds for an agreement to come into effect.

Economic Impact

Impact on the Economy

The telecom sector contributes about 6.2 percent to the GDP with the potential to grow every year, and is also a key contributor to consumer benefits, employment and revenue generation. It has investments of over ₹10 lakh crores with world-class mobile networks built over the last 20 years. Importantly, the telecom tariffs in India are amongst the lowest in the world.[455]

The telecom penetration, also known as teledensity, has been growing consistently over the years. While the industry has grown with effective competition, lower tariffs, and investments, the SC decision may have forced many telecom operators to shut shop. This

454. Union of India Vs. Association of Unified Telecom Service Providers of India and Ors. (2021) 9 SCC 445.

455. http://www.businessworld.in/article/Telecom-In-Deep-Financial-Mess-/23-12-2019-181020/

may adversely impact competition in the industry, consumer choice, quality of services, and result in increased tariffs. The reputation of India as an investment destination will also be tarnished severely.

Vodafone Idea has a gross debt of ₹1.2 lakh crores, of which around ₹90,000 crores is the government's deferred spectrum debt, while around ₹25,000 crores is bank debt. Motilal Oswal Financial Services' research for institutional equities suggested that a default of such a large scale could increase India's fiscal deficit by nearly 40 bps, thus having the deepest impact on government receipts despite winning the suit, while creating ripples in the banking sector.[456]

Noted telecom expert Mahesh Uppal, cautioned that given the operators have huge liabilities, they would struggle to further borrow capital towards the upcoming 5G spectrum auctions. The judgment could not have come at a worse time than this for the telecom sector, as the industry was already weighed down by ₹7 lakh crores of debt.[457]

Apart from the lakhs of jobs that will be lost if any of the telecom licensees shut down, and the chilling impact this will have on investments in India, the government too stands to lose around ₹1.70 lakh crores over the next decade. It has been pointed out that if government-owned banks find it prudent to reduce the penalties and interest-upon-interest component when they are negotiating settlements with firms that owe them money, surely the government should be doing the same as well.[458]

Given the looming exit of a telecom operator from the market and to preserve competition in the sector, the GoI on September 15, 2021, introduced several procedural and structural reforms for the telecom industry to provide some breathing against the adverse impact of the AGR matter. Among the measures, a 4-year moratorium on AGR and spectrum dues with an option to convert interest on penalty dues into equity after it ends, was announced.

456. https://thewire.in/business/agr-airtel-vodafone-idea-payment

457. https://economictimes.indiatimes.com/industry/telecom/telecom-policy/paving-way-for-a-two-telco-market/articleshow/71749490.cms?from=mdr

458. https://www.financialexpress.com/opinion/why-isnt-govt-at-sc-on-agr-ruling-threatening-of-telcos-like-airtel-vodafone-idea/1775075/

Most importantly, non-telecom revenues have now been excluded from the disputed definition of the AGR. To encourage investment in the telecom sector, 100 percent foreign direct investment under the automatic rules has also been permitted.

However, concerns have been raised with respect to persisting ambiguity in such reforms. The government has shied away from defining telecom revenues, leaving the room for interpretation. Once bitten twice shy, the operators feel that since DoT has not defined telecom activities, many revenue streams which may appear to be ancillary or incidental to telecoms services may also be included in AGR.[459]

In addition, it has been pointed out that revenues that are generated without using the licensed spectrum should not be included in AGR for paying spectrum usage charges. These include revenues generated through leased circuits, wireline calling services, port charges, bandwidth services, infrastructure sharing charges, among others.[460]

Impact on the Telecom Sector

With a total due of ₹1.47 lakh crores that telecom service providers owed to the DoT, Vodafone Idea and Airtel were most impacted. Both the companies reported a consolidated statutory loss of approximately ₹74,000 crores in September 2019, out of which Vodafone Idea reported a loss of ₹50,921 crores — the highest ever quarterly loss by any corporate in India and Airtel reported a loss of ₹23,045 crores.[461] Besides, Airtel posted a loss of ₹1,035 crores, while Vodafone Idea reported a loss of ₹6,438 crores in the December 2019 quarter,[462] raising concerns about sustainability.

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459. https://www.financialexpress.com/industry/keep-handset-ott-revenues-out-of-agr-telcos/2384106/

460. https://telecomtalk.info/telecom-companies-want-agr-to-be-redefined/484142/

461. https://economictimes.indiatimes.com/markets/stocks/earnings/voda-idea-airtel-post-rs-74000-Crore-loss-in-q2-on-agr-provisioning/articleshow/72064194.cms

462. https://www.livemint.com/industry/telecom/airtel-will-comply-with-sc-s-order-pay-rest-of-the-agr-dues-expeditiously-says-11582220229820.html

Table 5

Impact on Vodafone Idea and Bharti Airtel

(In ₹ Crore)	*Bharti Airtel*	*Vodafone Idea*
Deferred Spectrum Liabilities	43,349	88,530
Other Debt	73,963	27,320
Total Debt	1,17,312	1,15,850
Pending AGR Dues	25,976	44,680
Total Debt including AGR Dues	1,43,288	1,60,530
Debt Owed to Government	69,325	1,33,210
% of Total Debt	48.4	83

Sources: CapitalMind Analysis (based on latest available financial data).

Capitalmind[463]

In February-March 2020, Airtel and Vodafone Idea made a self-assessment to verify the correctness of the amount and found that the amount owed is lower than what was claimed by the DoT. The SC rejected the self-assessment. As a consequence, Airtel paid ₹18,004 crores and Vodafone Idea paid ₹7,854 crores to the DoT.[464]

Vodafone Idea has just settled 12 percent of its total AGR dues to the DoT, while Airtel and Tata Group have deposited 41 and 25 percent of their respective dues. SBICAP Securities had estimated that if the operators are not given 15-20 years to repay the dues, the telecom companies will not be able to invest in 4G capital expenditure, thus impacting market shares.[465] This was worrying as the telecom sector is already facing challenges to raise revenue from low tariffs, high statutory dues and increasing debt.[466] However, with a recent tariff hike, the operating profits of telcos could be increased by as much as 40 percent, which would help them to support 5G

463. https://www.capitalmind.in/2020/06/can-vodafone-idea-survive-even-with-a-favourable-payout-time-in-agr-case and https://www.livemint.com/companies/news/vodafone-idea-pays-additional-rs-1-000-Crore-to-govt-towards-agr-dues-11595071559808.html

464. *Ibid.*

465. https://economictimes.indiatimes.com/markets/stocks/news/vodafone-idea-doubled-in-a-month-but-agr-case-outcome-is-key/articleshow/76312614.cms

466. https://www.livemint.com/budget/news/budget-2020-agr-dues-to-more-than-double-telecom-revenues-to-rs-1-33-trillion-11580551404443.html

investments, improve their credit profile, and reduce liabilities owed to the government.[467]

Vodafone Idea

Vodafone Idea is facing an acute financial crunch since the SC ordered it to pay more than ₹58,000 crores as AGR dues to the DoT. The company has been generating negative free cash flow from the time the merger process was completed and since then has also been struggling to repay its existing debt.[468] It has pleaded that payment instalment spread over 20 years is the only viable way to keep the company afloat. It is estimated that even a staggered payment for 20 years with 8 percent interest rate would lead to an annual payout of ₹4,899 crores by Vodafone Idea.[469] Until June 11, 2020 Vodafone had paid ₹7,854 crores out of the ₹58,254 crores it owes the government in AGR dues.[470]

After the SC judgment, Vodafone Idea's net worth went down by nearly 70 percent in November 2019, from the numbers reported at the end of June 2019.[471] The company's net debt also increased by 7 percent during the same period to ₹1.07 trillion.[472] According to analysts, this triggered a rating downgrade and hit its ability to raise additional debt.[473]

Additionally, CRISIL has downgraded Vodafone Idea's ratings based on non-convertible debentures of ₹3,500 crores, expectation of a significant deterioration in the company's financial risk profile, and potential payout against the AGR related liability.[474]

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467. https://www.thehindu.com/business/Industry/tariff-hikes-moratorium-on-government-dues-to-help-telcos-invest-more-aggressively-in-5g-tech-report/article37766048.ece

468. Supra Note 409.

469. *Ibid.*

470. *Ibid.*

471. https://www.business-standard.com/podcast/economy-policy/why-vodafone-idea-is-in-trouble-despite-being-india-s-no-2-telecom-firm-119111500872_1.html

472. *Ibid.*

473. *Ibid.*

474. https://telecom.economictimes.indiatimes.com/news/crisil-downgrades-vodafone-ideas-debt-on-agr-liability/73630173

The ability of Vodafone Idea to rebound in the market by acquiring new subscribers seems to be a tough challenge. The company has lost 1.5 crore customers in the June 2020 quarter and additionally lost close to 11.7 crore customers in the financial year ended March 2020, reducing its total subscriber base to 29.1 crore.[475] Its subscribers have migrated to different telecom operators, namely Airtel and Jio. As a consequence, the liquidity profile of the company is expected to remain poor, with negative free cash flow from operations, significant AGR dues, and debt repayment obligations.

Vodafone Idea has pointed out it has lost whatever it earned in the last decade and a half in the running of telecom infrastructure, expressing its inability to immediately shell out the dues.[476] It paid ₹4.95 lakh crores of revenue out of the total ₹6.27 lakh crores in the last ten years towards operational costs. The telecom operator said that its tangible assets were secured with banks and none of the lenders will extend any loans to it. Over ₹1 lakh crore of equity brought in by promoters has been eroded.[477]

Despite attempts during the past year, Vodafone Idea had failed to conclude its planned ₹25,000 crore fund raising. The telco has blamed unviability of the telecom sector as the chief reason for its inability to raise money. It had said that if the government were to take steps such as fixing a floor price for tariffs and easing the AGR payment, and a moratorium on the next instalment of spectrum dues, it will be able to rope in investors.[478]

Even when the Vodafone Idea entered its end game, as a last resort to save the company, its former non-Executive Chairman Kumar Mangalam Birla, stepped down and reportedly offered his stake to any government or domestic financial entity, just to keep the

475. https://www.lightreading.com/asia-pacific/can-vodafone-idea-survive-in-india/d/d-id/757150

476. https://www.timesnownews.com/business-economy/companies/article/our-entire-net-worth-wiped-out-in-last-15-years-vodafone-idea-to-sc-during-agr-case-hearing/624331

477. *Ibid.*

478. https://economictimes.indiatimes.com/industry/telecom/telecom-news/govt-mulls-ways-to-let-telcos-pay-agr-dues-over-20-years/articleshow/85579420.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

company afloat. However, with post-government incentives (reforms) and tariff hike, the company's cash flow is expected to improve giving it a chance to survive.

In October 2021, Vodafone India opted for a four-year moratorium on AGR payments, announced with the package of telecom reforms by the government. Its bank guarantee of around ₹2,500 crores was also released by the government, as a part of its reforms. The company has accepted both spectrum and AGR moratorium, which in turn will help it to save about ₹1 lakh crore cumulatively. Concurrently, it announced a hike in its prepaid tariff plans by 20-22 percent and 25 percent in base entry-level voice plans in November 2021. The new tariffs are expected to improve VIL's average revenue per unit (ARPU) as well as top line and bottom line.[479]

Bharti Airtel

Bharti Airtel reported a pre-tax loss of ₹31,334 crore for the September 2019 quarter, as compared to the pre-tax loss of ₹1,998 crores during the same quarter in 2018.[480] According to DoT estimates, Airtel owed nearly ₹35,586 crores, including licence fee, spectrum usage charges with interest on the unpaid amount, penalty and interest on penalty till July 2019.[481]

To pay the AGR dues, Bharti Airtel sought approval from its shareholders to raise US$3bn (approximately ₹21,000 crores). The operator received approval on January 03, 2020, during the company's Extraordinary General Meeting towards raising US$2bn[482]

479. https://www.fortuneindia.com/enterprise/vodafone-idea-repays-1500-crore-with-interest/106372

480. https://www.business-standard.com/article/companies/agr-provisioning-bharti-airtel-posts-pre-tax-loss-of-rs-31-334-Crore-in-q2-119111401793_1.html

481. https://economictimes.indiatimes.com/markets/stocks/news/bharti-airtel-vodafone-idea-shares-gain-as-DoT-seeks-20-year-window-for-agr-payment/articleshow/74667284.cms?from=mdr

482. Qualified institutional placement, public issue, preferential shares or private placement.

in equity and another US$1bn[483] in debt to pay for statutory dues arising out of the SC ruling.[484]

As reported in March 2020, Bharti Airtel's share price fell up to 5.03 percent to ₹431.25 compared to the previous close of ₹454.10 on BSE.[485] Airtel's operating profit margin had declined from around 38 percent in FY17 to 32.5 percent in FY19.[486]

In 2022, Bharti Airtel also opted for the moratorium to defer the payment of AGR dues up to FY 2018-19 (of approximately ₹3,000 crores), that are not tabulated in the Supreme Court's order, by up to four years.[487]

Impact on Vendors of the Telecom Sector

Experts have cautioned that if Vodafone Idea shuts down its operations, then in a duopoly market, the business could also become difficult for vendors such as Nokia, Ericsson, Huawei, and ZTE. The business case for suppliers will shrink and consequently, it will force them to review their India operations.[488] Jio buys its gear only from Samsung, and thus future business and revenue streams of the remaining vendors could be at risk if they are cumulatively dependent solely on Bharti Airtel.[489]

Moreover, it has been reported that Vodafone Idea has defaulted on rental and energy payments for June 2020 to telecom tower companies citing payment of AGR to the government and cash flow

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483. Foreign Currency Convertible Bonds (FCCB) or debentures.

484. https://www.business-standard.com/article/pti-stories/bharti-airtel-seeks-shareholders-nod-for-raising-usd-3-billion-119121001563_1.html

485. https://www.businesstoday.in/markets/company-stock/vodafone-idea-bharti-airtel-share-price-crash-sc-relief-agr-dues/story/398541.html#:~:text=Share%20price%20of%20Vodafone%20Idea,gross%20revenue%20(%20AGR%20)%20dues.&text=Similarly%2C%20Bharti%20Airtel%20share%20price,of%20Rs%20454.10%20on%20BSE.

486. https://www.fortuneindia.com/enterprise/indias-call-drop-moment/104361

487. https://www.financialexpress.com/industry/bharti-airtel-defers-payment-of-agr-dues-up-to-fy19-after-telecom-departments-moratorium-offer/2578777/

488. https://economictimes.indiatimes.com/industry/telecom/telecom-news/for-vodafone-idea-vendors-rs-4000-cr-dues-are-at-stake/articleshow/74166807.cms?from=mdr

489. *Ibid.*

crunch.[490] Since the payments run into ₹700 crores, it is estimated that defaulting the payment will further impact payment by tower companies to its suppliers including fuel companies.[491] More importantly, Vodafone Idea owes approximately ₹4,000 crores to its network vendors.[492]

The exit of Vodafone Idea from the market will cause a jolt to the American Tower Corp (ATC), since it bought 20,000 standalone towers for over a cost of ₹7,850 crores a few years ago.[493] In a duopoly market, ATC would have a tough time to find tenants for its towers since Reliance Jio has its towers and Airtel operates through Bharti Infratel and Indus.

Currently, Airtel has a joint venture tower company with Vodafone Idea called Indus Tower. It's the largest tower company in the country with 125,649 towers where Bharti Infratel, Vodafone India and Vodafone Idea hold 42 percent, 42 percent and 11.15 percent share, respectively. It has been reported that Airtel and Vodafone Idea are currently in the process of merging Bharti Infratel (53.51 percent owned by Airtel) with Indus Towers. Airtel hopes to monetise the assets of the Indus Towers-Bharti Infratel joint entity at some point of time in the future. If Airtel remains the only player using the tower assets of this joint entity, the attractiveness of this entity to investors would be substantially low.

Impact on Consumers

In December 2019, Bharti and Vodafone Idea announced a tariff revision of about 15-50 percent. DoT mentioned that an increase in tariffs could provide big relief to the operators. In effect, consumers may have to shell out more from their pockets going forward. Reliance Jio announced revised tariffs with the new plans priced up to 40 percent higher. Analysts believe that the tariff hikes will

490. https://www.communicationstoday.co.in/vodafone-idea-defaults-on-rental-energy-payments-for-june-to-tower-firms/

491. *Ibid.*

492. Supra Note 429.

493. *Ibid.*

enable the telecom companies to protect their profitability after huge provisions for settling their AGR dues.[494]

According to a CRISIL report, going ahead, the telecom sector can witness further steep tariff hikes by around 50 percent which can double the potential of the industry's EBITDA next fiscal to around ₹60,000 crore.[495] However, this increase in tariff would impact consumers' interests and their pockets.

It has also been pointed out that Vodafone Idea has 33.2 crore customers and over half of them are still on voice-driven 2G networks.[496] However, most of Airtel and all of Jio customers are on 4G. These two operators can instantly absorb Vodafone Idea's 33 crore subscribers. Moreover, Vodafone Idea's 2G subscribers would have to change handsets, etc., to use Reliance Jio, which could be a hardship since most 2G users are in the lower-income bracket. In such a scenario, the two remaining players would also need to take over Vodafone Idea's assets, including its spectrum, on an emergency basis, which would be complex in terms of the legalities as well as the financials.[497]

On the contrary, it has been pointed out that the network of Airtel, Reliance Jio, or BSNL/MTNL can unlikely serve additional 33.6 crore subscribers.[498] To this end, these operators would require additional investment in network expansion, and more spectrum almost immediately. However, this could make multi-SIM subscribers discard some SIMs, and in absence of fresh investment, inclusion of new subscribers could deteriorate the quality of telecom services for everyone.

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494. https://www.ndtv.com/business/airtel-vodafone-idea-reliance-jio-announce-higher-tariffs-amid-agr-payment-cut-throat-competition-2141826

495. https://www.fortuneindia.com/enterprise/indias-call-drop-moment/104361

496. https://www.business-standard.com/article/economy-policy/5g-rollout-bad-optics-sc-order-on-agr-dues-to-have-a-far-reaching-impact-120061800871_1.html

497. *Ibid.*

498. https://www.businesstoday.in/industry/telecom/story/agr-dues-who-hurts-if-vodafone-idea-goes-down-250311-2020-02-18

The functioning of all the telecom operators is vital for healthy competition in the telecom sector.[499]

Noted economist, Rajat Kathuria, writes in Indian Express on September 16, 2020: *"Strengthening competition in telecom is key to realising India's digital ambitions."*[500] The dominant narrative in the policy circles today is how to preserve competition in the telecom market by way of the number of players. The threat of oligopoly is real and palpable as incumbent private operators, Airtel and Vodafone Idea, struggle to keep pace, due to the AGR judgment, with the curtains being brought down on a case that has been under litigation since 2003.

Giving various options to protect competition in the sector, Kathuria says that we need to take many steps including providing financial support to the two stressed players, to fortify competition in Indian telecom without which our US$1tn digital ambition will remain on paper. Somewhere along the way, the DoT recognised the debilitating consequences of the monetary demand being placed on operators, and jointly, with the Indian Banks Association (IBA), pleaded before the SC that telcos be given 20 years to pay off dues of nearly ₹1.47 lakh crores. The IBA's interest was to reduce potential NPAs since banks are heavily exposed in telcos, while DoT's interest was to protect competition.

Impact on the Banking Sector

Analysts suggested that lending banks: Yes Bank, State Bank of India, Union Bank, Bank of India and IndusInd Bank were affected by the verdict as the debt repayment capability of Vodafone Idea might have been impacted. According to the Reserve Bank of India, the banks' exposure to the telecom sector amounted to ₹90,600 crores as of November 2018.[501]

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499. http://www.smartgovernance.in/competition-in-telecom-sector-vital-for-consumers/

500. https://indianexpress.com/article/opinion/columns/telecom-sector-operators-jio-airtel-market-monopoly-6597556/lite/

501. https://economictimes.indiatimes.com/industry/telecom/telecom-news/big-blow-for-telcos-as-supreme-court-backs-DoT-definition-of-agr/articleshow/71749343.cms?from=mdr

SBI's funded exposure to telecom companies stood at ₹29,000 crores, but its largest exposure is to Vodafone Idea with ₹11,200 crore. Private sector banks led by IndusInd Bank (₹5,000 crores) and ICICI Bank (₹1,700 crores) are the other major lenders to the beleaguered firm. Among public sector banks, Punjab National Bank has — at ₹1,000 crores — the second-highest exposure to the telco.[502]

The SBI chairman, Rajnish Kumar, has indicated that not just lenders, but the entire ecosystem would have to "pay the price" if any telecom firm went bankrupt. Stating that no such company had yet communicated to SBI their intention to shut shop, he said: *"If there is a negative impact on any enterprise (in telecom or elsewhere), it impacts a larger ecosystem, whether it is banks, employees, vendors, consumers, etc. Everybody gets impacted. So, that impact, when it comes, we will have to pay the price."*[503, 504]

As per the results of the third quarter of 2019-20, Vodafone Idea's gross debt, excluding deferred spectrum payment liabilities of ₹88,530 crores (above), stood at ₹27,320 crores, with cash and cash equivalents of ₹12,530 crores. Banks have a total exposure of ₹1,15,850 crores towards Vodafone Idea which is substantial enough to shake up the banking system, and hurt investors' confidence.

A Goldman Sachs' report in January 2020 pointed out that banks like State Bank of India (₹11,200 crores), IndusInd Bank (₹3,995 crores), IDFC First Bank (₹2,500 crores), ICICI Bank (₹1,725 crores) and Punjab National Bank (₹1,027.7 crores) have a sizeable exposure to Vodafone Idea and there may be a cascading effect.

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502. https://economictimes.indiatimes.com/industry/banking/finance/banking/with-agr-ruling-banks-fear-surge-in-bad-loans/articleshow/74144032.cms?from=mdr

503. https://www.financialexpress.com/industry/agr-dues-banks-will-pay-price-if-telcos-shut-says-sbi-chief-rajnish-kumar/1869238/

504. https://economictimes.indiatimes.com/industry/banking/finance/banking/with-agr-ruling-banks-fear-surge-in-bad-loans/articleshow/74144032.cms?from=mdr

Impact on the Mutual Fund Sector

It has been reported that the total exposure of mutual funds to Vodafone Idea's securities is to the tune of ₹3,389 crores. The highest exposure is that of debt funds from Franklin Templeton India for ₹2,074 crores, followed by Aditya Birla Mutual Fund and UTI Mutual Fund at over ₹500 crores each.

Franklin Templeton India MF marked down its exposure to Vodafone Idea's securities as zero. Due to this write off, the NAV of its six funds like Low Duration Fund (maximum drop in NAV at 6.87 percent), Dynamic Accrual Fund, Credit Risk Fund, Short Term Income Plan, Ultra Short Bond Fund, and Income Opportunities Fund has come down between 4–7 percent.[505] No other fund has yet written down the exposure.[506]

Impact on Government

It has been pointed out that Vodafone Idea owes ₹88,530 crores to the DoT for the spectrum that it has bought in the previous auctions. This is in addition to the AGR liability of ₹53,039 crores. The government will be impacted to the tune of ₹1.41 lakh crores in case Vodafone Idea decides to shut shop.

This, in turn, means 5G auctions and further to that, 5G network rollouts can be indefinitely delayed and India will fall behind the rest of the world in this technology. The government will also have to shelve its plans of raising money in a difficult year through these spectrum auctions. The government, despite winning the suit, could see the biggest impact through deferred spectrum debt default of ₹90,000 crores.[507]

The loss to the government could even be more if we take into account the fact that both industry revenues, as well as demand for spectrum, will be a lot more muted than they were some years ago

505. https://groww.in/blog/vodafone-idea-agr-issues-and-the-impact-on-debt-mutual-fund-investors/

506. https://timesofindia.indiatimes.com/blogs/toi-editorials/telecom-disaster-government-must-pursue-a-legislative-route-to-bail-out-the-sector-from-its-agr-mess/

507. https://thewire.in/business/agr-airtel-vodafone-idea-payment

when the industry was in better health and the number of prospective bidders much greater. Government revenues from the sector fell from ₹70,241 crores in FY17 to ₹39,345 crores in FY19; the biggest fall in revenues took place because there were no new auctions in 2017, 2018, or 2019 as the industry was cash-strapped.

Moreover, while the government has plans to hold spectrum auctions, it's highly unlikely that remaining telecom operators would be able to buy spectrum as much as Vodafone Idea currently holds. Vodafone Idea has 923 MHz (megahertz) of the spectrum, the highest amongst all operators, to serve its large subscriber base. Experts suggest that Jio's 553 MHz and Airtel's 866 MHz of spectrum holding would be insufficient to cater to extra (over) 30 crore subscribers. This was further aggravated by telcos' exorbitant dues, which could impact their ability to make additional investments.

It has, therefore, been suggested that in this scenario, the government should act as a prudent banker, and restructure the dues by reducing the penalty/interest, and giving the telecom operators more time to make the payment because the losses due to not doing this will be very high.[508]

Impact on Employment

According to the rating agency ICRA, AGR judgment has caused a significant degree of uncertainty in the telecom sector, and it may have a long-term bearing on the structure and recovery of the industry.[509] The agency reported that there were rounds of job cuts, combined with a freeze on hiring and increments after the SC broadened the definition of AGR.[510]

Prominent global public and consumer policy research and advocacy group CUTS International, which I head, has highlighted

508. https://www.financialexpress.com/opinion/govt-is-big-telecom-loser-over-1-7-lakh-Crore-of-payments-at-risk-if-vodafone-idea-folds/1767366/

509. https://telecom.economictimes.indiatimes.com/news/agr-a-deadlier-virus-for-telecom-industry-than-covid-19-expertspeak/75192423

510. https://economictimes.indiatimes.com/industry/telecom/telecom-news/agr-ruling-to-herald-more-job-cuts-hiring-freeze-in-telecom/articleshow/71797129.cms?from=mdr

that the AGR dues would trigger a 'gargantuan fall' in the telecom sector, as public sector firms in telecom sector were nearly decimated, and the ruling had overlooked the larger economy as well as job loss and consumer interest issues.[511]

According to CIEL HR Services, as many as 40,000 job cuts were expected in the telecom sector in the current telecom crisis. Airtel and Vodafone Idea were forced to slash costs, especially on staffing and capital expenditure. This would reduce investments in the network and is further expected to have a cascading effect on the broader ecosystem, including equipment makers and tower vendors.[512] Additionally, bonuses and salary increment seems unlikely in a looming hiring freeze in the telecom industry.

The headcount of Vodafone Idea's direct employees is currently about 10,000 down from the previous tally of over 17,000. Reliance Jio Infocomm, the only profitable carrier, and Airtel's India unit have over 15,000 and 16,000 employees, respectively. Employee costs make up some 05 percent of revenue for the industry.[513] Vodafone India has stated that if payment over a longer period is not allowed, it will have to shut operations which will impact 11,000 employees.[514]

There will be enormous job losses and an economic impact on the GDP. Vodafone Idea provided direct employment to 13,520 people as of March 31, 2019. The magnitude of indirect employment would be at least six times higher. In the past two years, the telecom sector has seen the shutting down of large operators such as Reliance Communications, Telenor, MTS, and Aircel. Some employees of these defunct telecom operators are still looking for jobs. It's hard to

511. https://cuts-ccier.org/agr-supreme-court-verdict-to-be-a-colossal-fall-for-telecom-sector-says-consumer-group/

512. https://economictimes.indiatimes.com/industry/telecom/telecom-news/agr-ruling-to-herald-more-job-cuts-hiring-freeze-in-telecom/articleshow/71797129.cms?from=mdr

513. *Ibid.*

514. https://www.moneycontrol.com/news/telecom/agr-hearing-today-live-updates-idea-agr-supreme-court-verdict-news-latest-5569831.html

imagine the impact on the job market if more people join this pool of unemployed (trained) workforce.[515]

Conclusion

The AGR case will go down in judicial history as one that is fraught with contradictions and contestations at every step of the way. The telcos appealed to the government to give them relief from the high license fee. The government obliged and changed it to a revenue-sharing formula. Both were happy.

Then DoT set the expectation of a fair, transparent, participatory and consultative process to determine the definition of revenue to determine the revenue share. Again, both were happy.

Accordingly, DoT asked TRAI and an independent consultant for their views but opinions collided. The consultant's opinion came with a flavour of distrust for the private sector as reported because the report was never made public until filed by the DoT in the hearing of the case in the Apex Court. On the other hand, TRAI's recommendations seemed balanced and neutral.

DoT went with the consultant's opinion and expanded the definition of revenue to include non-telecom revenue as well to which the telcos had no option but to submit to. This marked the beginning of a contest. Litigation ensued for nearly two decades. The matter was finally decided by the SC favouring the DoT.

Outstanding dues had gone through the roof and operators in the telecom sector had shrunk. DoT realised it was fighting a lost battle itself and asking for the full recovery of dues on its terms would be futile as that would run the operators into bankruptcy. Taking a pragmatic approach, the DoT wanted to go soft on its target but that enraged the SC. The court did not want to relent from its stand that operators should pay in full and that too within a matter of months. Then an appeal was made to the court to see the larger picture i.e. the impact on the economy and consumers. The SC finally relented from

515. https://www.businesstoday.in/sectors/telecom/agr-dues-who-hurts-if-vodafone-idea-goes-down/story/396456.html

its stance and gave time to the so-called defaulters to stagger the payment of dues in instalments.

The Communications Ministry calculated 20 years for such a time frame. However, telecom experts contended that dues should be paid during the validity of the licence which may expire before 20 years. The SC, on the other hand, settled on a 10-year time frame and that is what the settlement looks like for now. It has been pointed out that though the ten-year period granted by the Supreme Court may give some respite to the telecom companies, the brunt may ultimately be borne by the end consumer, who may be subjected to paying higher tariffs for the TSPs to comply with the order of the Supreme Court within the stipulated ten-year period.[516] Moreover, even after an appeal was made by the telcos to highlight the arithmetical errors in the calculation of AGR dues by the DoT, it was also rejected by the SC.

But just look closely and what one can observe are various contests and contradictions that unfolded during this case. In short, they have been summarised at the beginning of this chapter. However, a noted telecom expert, Parag Kar, has analysed the whole matter dispassionately and described it simply. His article published on LinkedIn on September 14, 2020[517] does make a good reading.

All players in this game have to realise that the telecom sector is very crucial in today's economy where digitisation of the economy is assuming an important dimension. However, better late than never, the telecom reforms announced by the Central Government in September 2021 towards sector's sustenance seem to have motivated the telcos to raise tariffs, adversely impacting consumers. Bharti Airtel and Vodafone Idea announced a tariff hike by 20-25 percent, while Reliance Jio has announced a price hike of 20 percent.[518]

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516. https://www.barandbench.com/columns/a-missed-connection-the-supreme-courts-agr-judgment

517. https://www.linkedin.com/pulse/indian-telecoms-agr-tangle-who-fault-parag-kar/

518. https://www.zeebiz.com/market-news/news-goldman-sees-annual-free-cash-flow-to-rise-by-1-billion-amid-tariff-hike-in-telecom-sector-vodafone-idea-jumps-14-171888

Most importantly, the Central Government's perspective and approach on reforms is critical to building a directional understanding of the telecom sector's trajectory. Ashwini Vaishnaw, Minister of Communications and Information Technology made an important remark that, "the government would like the industry to focus on new investments, innovation, connecting the unconnected, which is the basic tenet of our government, rather than litigating. So much of the simplification that needs to be done will impact litigation, Already, many cases have become defunct after the change in the definition of AGR."[519]

Be that as it may, such reforms are welcome news to the dispirited telecom sector as they laid a second chance for fostering competition in the industry. Vodafone Idea seems to have sparked that fighting spirit with a projected four-fold increase in capex.[520]

Vodafone Idea's chairman Himanshu Kapania noted that the recent telecom reforms have changed global investors' perception of the government, which seems to be now viewing the sector as a key infrastructure provider rather than purely a revenue generator for the national exchequer.[521] It will serve both the government as well as constitutional courts well to acknowledge the macro realities and contribution of sectors like telecom to national economic growth.

However, the risks for the telecom sector persist and necessitate next round of reforms by the Central Government including overhauling the predated colonial regulatory structure and privatising state-run telcos. Most importantly, in times to come the 5G services will take the sector forward on a fast track. In the larger interest of the nation and the future of telecom in the country, the current licensing norm must be overhauled, which largely continues from 1990s when there were no services in addition to telephony and SMS,

519. https://www.livemint.com/industry/telecom/less-litigation-easy-norms-in-next-phase-of-telecom-reform-11640284113825.html

520. https://economictimes.indiatimes.com/industry/telecom/telecom-news/vodafone-idea-plans-to-get-back-in-the-game-with-4x-rise-in-capex-to-2-billion/articleshow/88308573.cms

521. https://telecom.economictimes.indiatimes.com/news/global-investors-have-noted-govts-telecom-relief-package-vodafone-idea-chairman/88179665

whereas now internet-based services exist on a large scale.[522] The impending issue of setting levies such as spectrum usage charges, etc. as a proportion of AGR could soon become contentious, if not addressed collaboratively.[523]

Therefore, decisions by the executive and judiciary have to be made which will not impact the sector adversely but to ensure that there is propriety without the consumer interest suffering.

Even Airtel's Chairman Sunil Mittal recently highlighted that the regulatory regime needs to be simple to avoid fresh litigations in the telecom sector. He noted that the "temperature" of the industry needs to be lowered when it comes to litigations and appealed to the government to look into the matter.[524]

The country would greatly benefit from close collaboration of the government and industry, instead of court battles. Given that some scope of clarity still exists in the definition of AGR, it will be useful for the government, industry and experts to work closely to arrive at a consensus.

522. https://www.financialexpress.com/opinion/making-sense-of-the-telecom-tariff-rise/2384018/

523. https://www.financialexpress.com/industry/reforms-2-0-review-telecom-licensing-norms-say-experts/2382380/

524. https://www.financialexpress.com/industry/bharti-airtel-chairman-sunil-mittal-flags-high-litigation-in-telecom-sector-says-new-cases-must-be-avoided/2384437/

Annexures

Annexure 5.1

Financial Year (ending in March)	*Gross Revenue of Telecom Service Providers (in ₹ Crores)*
2004	4,855
2006	2,666
2007	89,108
2008	1,05,061
2009	1,43,044
2010	1,44,232
2011	1,60,251
2012	1,82,637
2013	2,04,221
2014	2,24,430
2015	2,37,676

6

Shivshakti Sugars Limited v. Shree Renuka Sugar Limited & Ors. When the SC cited the importance of Law and Economics

Introduction

So far in this book, we have discussed a variety of cases where the Supreme Court has played a substantive role in impacting the Indian economy, albeit adversely. Most of those cases showed that the SC did not approach the issues at hand holistically, even in the sense of achieving overall justice, and hence their decisions caused avoidable losses to the economy. We are not questioning their right and duty to entertain such matters which were laced with impropriety and/or dishonesty.

This final case, however, is on a different note. In this case, the same court adopts an enlightened and sympathetic approach towards the economic implications of adjudication. Even though the scale of financial impact was much lower in this case compared to the previous ones, the court decided in the larger public interest, taking a holistic view. It thus established a healthy precedent for the judiciary to follow in cases that straddle law and economics.

The case pertains to two contending parties, namely, Shivshakti Sugars Limited (hereinafter referred to as Shivshakti Sugars) and Shree Renuka Sugar Limited & Ors.[525] (hereinafter referred to as Renuka Sugar). While rendering the judgment, the SC applied the lens of equity and economics and illustrated the importance of the interface between law and economics.

525. *Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd.*, (2017) 7 SCC 729.

The case is built upon a petition by Renuka Sugar against Shivshakti Sugars before the Karnataka High Court (HC) alleging non-compliance with certain provisions of Sugarcane (Control) Amendment Order, 2006 (Order), which stipulates that minimum distance between two sugar factories should be at least 15 km.

The HC ruled in favour of Renuka Sugar and ordered Shivshakti Sugars to cease its operations as they were allegedly in violation of the said Order. Aggrieved with the HC judgment, Shivshakti Sugars appealed before the SC. Disagreeing with the HC, the Apex Court provided relief to Shivshakti Sugars citing that economic considerations outweigh the technical arguments. Not only did this prevent an explicit adverse impact on investments worth ₹300 crores and employment of 7377 people (377 directly employed and 7000 indirectly employed), it also created a precedent for Indian courts to follow, on how to adjudicate matters which have the potential to cause substantive economic impact.

The finding of the Apex Court was the result of the judges on the bench taking a liberal approach to statutory interpretation. *"It is time to consider the inter-discipline between law and economics as a profound movement on a sustainable basis"*, the court opined.[526] Additionally, the court also stated that an economic analysis of law is a valid jurisprudential approach to interpretation, which can be observed through its far-reaching influence in the USA. Even in the Indian context, if the court finds some technical violation, it has both the power and the responsibility under Article 142 of the Indian Constitution to bypass the strict requirements of the statute, as long as it is in the economic interests of the nation.[527]

> *"The court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or economy, or the revenue of the state."*
>
> –Justice A. K. Sikri and Justice A. M. Sapre

526. *Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd.,* (2017) 7 SCC 729, pg 54, para 39.

527. *Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd.,* (2017) 7 SCC 729, para 37.

The Apex Court's judgment also sets a precedent about ease of doing business and enforcing contracts, as projects worth billions of rupees remain stuck for years in the judicial system, where the number of pending cases seems to be increasing day-in-day-out.[528]

In doing so, the SC relied on sound arguments, case laws, and principles laid down in literature on *'Law and Economics'*.

Continue reading to know the what, why, and how.

Background

With the passage of the Industries (Development and Regulation) Act in 1951, the sugar industry was brought under the control of the Government of India (GoI) which prescribed licensing requirements for the industry. Since sugar is also an essential commodity under the Essential Commodities Act, of 1955, the GoI published the Sugarcane (Control) Order, 1966, which provided for a fixed minimum price of sugarcane, regulated its distribution and movement, and set out terms and conditions for issuing licenses to cane crushers, amongst other things.

Also, the GoI regularly issued guidelines for the sugar industry through press notes which were amended from time to time. The amendments typically took into account the availability and growth of sugarcane and consequently changed the requirements of licenses for new sugar factories. They also provided for minimum distance requirements between two sugar factories to ensure equitable availability of sugar cane to the sugar mill.

As a consequence of liberalisation, the GoI relaxed control over various types of industries. Accordingly, by Press Note No. 12 (Press Note) issued on August 31, 1998, the condition to apply for a license to set up a sugar factory was done away with. The GoI called it as 'De-licensing of the Sugar Industry'.[529] However, the requirement

528. Bloomberg, 'Supreme Court's sugar factory verdict may bring economic interest into play in court battles', Financial Express, 5 June 2017, https://www.financialexpress.com/industry/supreme-courts-sugar-factory-verdict-may-bring-economic-interest-into-play-in-court-battles/702176/.

529. Press Note No. 12, 'Subject: De-licensing of Sugar Industry', 1998, https://dipp.gov.in/sites/default/files/press12.pdf.

to maintain at least a 15 km distance between two sugar factories remained. In the Press Note, the government clarified that to avoid unhealthy competition among sugar factories to procure sugarcane a minimum distance of 15 km has to be observed between an existing sugar mill and a new mill (factory).[530] The government also stated that sans the 15 km distance rule, sugar mills will be starved of sugarcane and become sick, leading to closures. This will adversely affect the farmers and render the investments futile, thus, inevitably resulting in uneconomic sugar prices.[531]

In a separate matter, the validity of the Press Note was challenged before the Allahabad High Court in *Kisan Shakari Chini Mills Ltd. v. Union of India & Ors.,*[532] (2006) where it was held that the minimum distance criteria of 15 km as mentioned in the Press Note was to be interpreted as administrative guidelines without any statutory character.[533] Similarly, the Delhi High Court in *Oudh Sugar Mills Ltd. v. Union of India & Ors.*,[534] in their judgment dated December 22, 2015, clarified that the minimum distance of 15 km as mentioned in the Press Note is to be observed between an existing mill and a new sugar mill and not between two proposed sugar mills.[535] In the same matter and in view of these developments, expert advice of the Department of Legal Affairs, Ministry of Law was sought.

While the Ministry of Law initiated the process to amend the Sugarcane (Control) Order, 1966, the SC in its judgment in *Balrampur Chini Mills Ltd. v. Ojas Industries Pvt. Ltd. & Ors.,*[536] dated September 05, 2006, directed the GoI to iron out the difficulties regarding

530. *Ibid.*

531. Ram Sahgal, 'Centre doesn't want new sugar mills within 15 km of another', The Economic Times, 25 October 2006, https://economictimes.indiatimes.com/markets/commodities/centre-doesnt-want-new-sugar-mills-within-15-km-of-another/articleshow/130349.cms.

532. Civil Writ Petition No. 31199/2005.

533. *Shree Renuka Sugars Ltd. v. Union of India, Ministry of Consumer Affairs Food and Public Distribution & Ors.*, MANU/KA/0879/2011.

534. Civil Writ Petition No. 12078/2005.

535. *Shree Renuka Sugars Ltd. v. Union of India,Ministry of Consumer Affairs Food and Public Distribution & Ors.*, MANU/KA/0879/2011.

536. Transfer Petition [Civil] No. 421 of 2006.

the minimum distance requirement and industrial entrepreneurs memorandum (IEM)[537] within eight weeks.

To correct the anomaly, the GoI after consultations with the State Governments and other stakeholders amended the Sugarcane (Control) Amendment Order, 2006[538] on November 10, 2006, according to which clauses 6A to 6E were inserted in the Order. Clause 6A stipulated a mandatory requirement of a minimum distance of 15 km between two sugar factories. The provision now had statutory backing as well.

Be that as it may, under the new process, the main requirement for new entrepreneurs was IEM which was required to be filed by entrepreneurs along with a certificate from the Cane Development Commissioner stating that there is no sugar factory within a 15 km radius of the proposed site of the new sugar factory.[539] In the case of sugar mills, a similar condition also prevailed in Kenya but the distance was more than 15 km. It was 40 km. Like in Maharashtra (see below), farmers protested and achieved some relaxation.

> *"The proposed relaxation in distance between the two sugar factories will spur competition and also promote the entry of the private sector in the sugar industry. Further, this will enable sugar factories to become professional and thereby pay the fair and remunerative price (FRP), which is mandatory, to sugarcane growers."*
>
> –Maharashtra government in 2014, when contemplating removing the minimum distance requirement.

Interestingly, a new entrant also had to obtain a no-objection certificate (NOC) from an existing sugar factory in the area, which was an unusual requirement, as it would require a competitor to

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537. Industrial undertakings exempted from the requirements of Industrial Licensing under I (D&R) Act, 1951 are required to file information relating to setting up of industries, https://services.dipp.gov.in/lms/iemServices.

538. The amendment was a result of the Supreme Court order in *Balrampur Chini Mills Ltd. v. Ojas Industries Pvt. Ltd. & Ors.,* Transfer Petition [Civil] No. 421 of 2006.

539. 'Industrial Entrepreneur Memorandum Services', Department for Promotion of Industry and Internal Trade, https://services.dipp.gov.in/lms/iemServices.

cooperate with another. This factor needs to be studied but it is not a part of this book. I have come across such conditions in other developing countries as well, which are quite an anomaly. It does not recognise the fact that it is anticompetitive, and also forecloses innovation.

For example, in Vietnam, a proposal to establish a new cement plant at one time needed a NOC from the state-owned Vietnam Cement Corporation. One can imagine how this can be a bottleneck to establishing a new plant.

In Maharashtra, the condition was worse due to the political economy. The government had fixed the distance between two sugar mills at 25 km. Swabhimani Shetkari Sanghatana (SSS[540]), a farmers' association, has sought the removal of the aerial distance between two factories to increase competition among the millers and enable farmers to get better rates. The Sanghatana has called for an open market to increase competitiveness in the sector.[541]

Yogesh Pande, the spokesperson of SSS stated that the aerial distance between factories needs to be removed to encourage competition. He pointed out that, *"Let open market conditions prevail and let the fittest survive. The mandatory 25 kms distance means that there is monopoly over cane. This leads to discrepancy in the Harvesting and Transportation (H&T) costs."*[542]

A government committee, headed by Dr. C. Rangarajan, Chairman, Prime Minister's Economic Advisory Council and former Governor of Reserve Bank of India, etc., also recommended complete decontrol of the sugar industry, in line with the industry's demand for easing controls. The Report by the Rangarajan Committee stated that the export and import policy should not be guided by domestic availability. Thus, the concept of a minimum distance of

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540. Proud Farmers Asscn..

541. Nanda Kasabe, 'Farmers' body seeks removal of distance norms between sugar mills in Maharashtra', Financial Express, 14 May 2019, https://www.financialexpress.com/industry/farmers-body-seeks-removal-of-distance-norms-between-sugar-mills-in-maharashtra/1577287/.

542. *Ibid.*

15 km between any two sugar mills should be done away with. This minimum distance requirement obligates a mill to buy cane only from growers within the reservation area. This means that the virtual monopoly over a large area can give the mills power over farmers, thus restricting competition, and inhibiting entry and further investments.[543] Doing away with such a requirement will enable mills to enter into contracts with farmers, thus ensuring better prices for farmers and forcing existing mills to pay the cane purchase amount on time.

While certain recommendations by the Rangarajan Committee were accepted and implemented by the government, the concept of a minimum distance between sugar mills is still not done away with. In 2014, the Maharashtra government was contemplating removing the 25 km minimum distance requirement, in a bid to bring competition and thus efficiency in the sugar sector. However, the same did not translate into implementation.[544]

A section of progressive farmers welcomed this also. But they could not succeed. This happened due to strong pressures from the sugar lobby who came up with several arguments to not drop the 25 km distance requirement and even rejected one recommendation of lowering it to 15 km as prescribed by the GOI and followed by many states.

Reverting to the case, after obtaining the NOC, a new entrant is also required to furnish a distance certification from the Survey of India.

Only after these formalities are completed, final approval is sought from the State Government, after which actual purchase of land, plant, and machinery could be undertaken. At this stage, the

543. Sakshi Balani, 'Report Summary – Report of the Committee on the Regulation of Sugar Sector in India: The Way Forward', PRS Legislative Research, 1 November 2012, https://www.prsindia.org/administrator/uploads/general/1351831763~~Summary%20--%20Deregulation%20of%20sugar%20sector%20-%20final.pdf.

544. Sanjay Jog, 'Maharashtra likely to abolish 25-km limit between two sugar units', Business Standard, 25 November 2014, https://www.business-standard.com/article/economy-policy/maharashtra-likely-to-abolish-25-km-limit-between-two-sugar-units-114112300348_1.html.

entrepreneur also commissions civil works and raises necessary finance, and submits a performance guarantee to the GoI along with a commitment to submit periodic progress reports.

Background to Litigation

The litigation, in this case, happened at two levels – first, before the Karnataka HC and thereafter, before the SC. To put it succinctly, the dispute was about two key aspects: firstly, with regards to compliance with the minimum distance requirement and secondly with regard to what constitutes an 'existing' factory. Both these aspects are closely interrelated as the minimum distance requirement is *vis-à-vis* an existing factory.

To understand this in detail, one will have to traverse through the timeline of the case which effectively starts from 1995 i.e. when Shivshakti Sugars first sought the NOC from one Raibag Shahakari Shakar Kharkhane (hereinafter referred to as Raibag Factory). Interestingly, Raibag Factory, set up in 1978, had already been struggling to keep up with their operations due to financial problems. Accordingly, an order of liquidation in respect of Raibag Factory was passed by the Government of Karnataka in 1995 and final liquidation proceedings started in 2004 i.e. two years after operations of Raibag Factory had come to a halt completely.

Pertinent to note here is the fact that Raibag Factory was not the only sugar factory sustaining and accumulating losses in the state. There were many others as well. The difficulty for sugar factories meant losses for the State Government on two counts: loss of revenue as locally produced sugar cane was being sent to other states for processing and losing crores of rupees in trying to keep loss-making enterprises alive by pumping in funds

Thus, while the government announced the liquidation of the Raibag Factory, the ideal situation was to find a new bidder to lease the factory to ensure its revival and sustenance. Therefore, the Government of Karnataka decided to revive the Raibag Factory on a lease model, as was done with another sugar factory by the name Pandavapura Sahakari Sakkare Karkhane in Mandya, Karnataka.

As discussed earlier, the requirements for new entrepreneurs who wished to set up a new factory from scratch had also been relaxed in 1998. Under the new process, an IEM was filed by Shivshakti Sugars in August 2006. Fulfilling other necessary conditions took another 13 months and by November 2007, Shivshakti Sugars had acquired final approval from the government to start constructing the facility.

Amongst other things, these conditions included getting an NOC from another sugar factory in the area by the name of Doodhganga Krishna Sahakari (hereinafter referred to as Doodhganga) and approval from Survey of India stating that the requirement of minimum distance from both Doodhganga and Raibag Factory was being complied with.

The Regional Cane Commissioner also supported Shivshakti's case. He had highlighted in his letter to the State Government that the total production of sugarcane in the Raibag Taluk was more than 23 lakh tonnes i.e. way above than can be effectively utilised by the existing factories. For instance, Shivshakti Sugars required merely five lakh tonnes a year. Similarly, the total crushing capacity of the defunct Raibag Factory was only four lakh tonnes a year.

On the other hand, the State Government had invited tenders for giving the Raibag Factory on lease. This move of the State Government was challenged by certain persons in the form of a writ petition filed in the Karnataka HC, but the HC dismissed them. This subsequently resulted in Renuka Sugar winning the tender and a lease deed was executed in its favour in October 2008 to operate the Raibag Factory.

Even this grant of the lease was challenged in a bunch of writ petitions which too were subsequently dismissed by the Karnataka HC in February 2010. While dismissing the writ petitions, the HC stated that restarting the factory was in the public interest as that would lead to optimal utilisation of the farm produce resulting in concurrent welfare for farmers. One could sense, that between the lines, the HC also considered the economic costs and benefits of re-starting the factory.

The Turnaround

During June-November 2010, four different writ petitions were filed in quick succession against Shivshakti Sugars in Karnataka HC. The first writ petition was filed by Renukaat Dharwad to declare IEM of Shivshakti Sugars dated June 08, 2006, has lapsed.[545] The second writ petition was filed by some members of Raibag Factory.[546] The third writ petition was filed by some members of the Doodhganga factory,[547] and the fourth writ petition was a PIL.[548]

The key contention of the petitioners was that Shivshakti Sugars violated the minimum distance requirement as provided under clause 6A of the Order. This turnaround was premised on the fact that the Survey of India had notified new rules for measuring distance in September 2007. The measurement of distance, as per the new rules, showed that the distance between the two factories was less than 15 km. The petitioners contended that even though these rules were to come in force from January 01, 2008, they should have a retrospective effect and therefore Survey of India should have recalled its certificate given to Shivshakti Sugars in July 2007. If this had happened, Shivshakti Sugars would not have been able to procure other permissions.

On behalf of Shivshakti Sugars, it was argued that as per Explanation-1 under clause 6A of the Order,[549] Raibag Factory was not an existing factory at the relevant time[550] and thus clause 6A was not violated, and the distance requirement was met under the prevailing rules – a fact also substantiated by Survey of India's affidavit to the Karnataka HC. Moreover, it argued that clause 6A

545. W.P. No 64254 of 2010.

546. W.P. Nos. 66903-907/2010 and W.P. Nos. 66926-35/2010.

547. W.P. Nos. 66920/2010 and W.P. Nos. 66972-990/2010.

548. W.P. No. 37143 of 2010.

549. Explanation-1, clause 6A of the Order: An existing sugar factory shall mean a sugar factory in operation and shall also include a sugar factory that has taken all effective steps as specified in Explanation 4 to set up a sugar factory but excludes a sugar factory that has not carried out its crushing operations for last five sugar seasons.

550. Shivshakti had ceased operations from 2002-03 and between 2003-08 it ran for only one year as opposed to minimum five years for it to be recognised as an existing factory.

cannot have retrospective application and thus was not applicable as Shivshakti Sugars had filed IEM before the clause came into effect.

It was also pointed out that both the factories, Shivshakti Sugars and Raibag Factory being operated by Renuka Sugars, could co-exist in the region. The same is more than clear from the statement of the Regional Cane Commissioner to the State Government which highlighted that cane production in the region is abundant and surplus.

It may be noted that Shivshakti Sugars had sought two extensions from GoI to start operations which were granted. However, these extensions were also challenged by the petitioners. The GoI submitted to the HC that the extension of time to set up its factory was granted to Shivshakti Sugars based on the opinion sought by the government from the Additional Solicitor General of India and on acceptance of bank guarantee under the Sugarcane (Control) Order, within a stipulated period. Further, the certificate submitted by Survey of India was on record and valid.

On March 29, 2011, the HC held that the clause 6A of the Order was mandatory and retrospective in operation in view of the SC judgment in Ojas Industries Ltd. v. Oudh Sugar Mills Ltd.,[551] wherein the apex court held that:

> "Suffice it to state, that the Sugarcane (Control) (Amendment) Order, 2006 shall apply retrospectively to all cases, including the present cases in which IEMs are pending. In this connection, the question which arises for determination is: firstly, whether the Sugarcane (Control) (Amendment) Order, 2006 operates retrospectively and if so whether the effective steps enumerated in Explanation 4 to Clause 6A are adequate. In this connection, we have to keep in mind the conceptual difference between the distance certificate, the concept of effective steps to be taken by an IEM Holder and the question of bona fides. Sugarcane (Control) (Amendment) Order, 2006 inserts Clauses 6A to 6E in Clause 6 of the Sugarcane (Control) Order, 1966. It retains the concept of "Distance". This concept of "Distance" has got to be retained for economic reasons. This concept is based on

551. (2007) 4 SCC 723.

> demand and supply. This concept has to be retained because the resource, namely, sugarcane, is limited. (emphasis added)....In our view, therefore, the Sugarcane (Control) (Amendment) Order, 2006 is retrospective. In all pending cases the Central Government now seeks to put a bar for setting up new sugar factory (mill) for a limited period during which the Former or Earlier IEM Holder is required to take effective steps. The said Order of 2006 is not banning on setting up of new units. It is only giving priority in the matter of setting up of new units. Therefore, the said 2006 Order operates retrospectively. It will not apply to mills which are already functioning. The said 2006 Order will apply only to cases where IEMs are pending in disputes in various courts. The said 2006 Order will also apply after our judgment to those cases which are under dispute and where milling has not commenced or permitted to commence."[552]

The HC further held that Raibag Factory was an existing factory under clause 6A and thus the distance between Shivshakti Sugars and Raibag Factory, and also between Shivshakti Sugars and Doodhganga was less than 15 km.[553] The court clarified that the Central Government incorporated clauses 6A to 6E in the Order to make the provisions mandatory and not directive and thus, the distance requirement of 15 km was mandatory. The concept of distance is an economic concept that pertains to demand and supply and to check unhealthy competition as sugarcane is limited.[554]

The HC highlighted that consent by parties or an agreement in the form of a NOC cannot become the basis for nullifying the legal requirement of a statutory provision, and thus such a NOC has no value in the eye of law.

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552. *Ojas Industries (P) Ltd. v. Oudh Sugar Mills Ltd. & Ors.,* MANU/SC/1606/2007.

553. Survey of India being the National Survey and Mapping Organisation of India submitted an affidavit before the HC that they issued a certificate to Shivshakti Sugars based on the prevailing procedure in effect until 31 December 2006. However, new rules for measurement were notified on 2 September 2007. As per the new rules, the distance between the two factories was less than 15 kms. Interestingly, the Survey of India did not nullify the distance certificate granted to Shivshakti Sugars and opposed the writ petitions.

554. *Shree Renuka Sugars Ltd. v. Union of India, Ministry of Consumer Affairs Food and Public Distribution & Ors.*, MANU/KA/0879/2011.

The HC also stated rather illogically, that, given the fact that Raibag Factory was in operation for one season out of the last five seasons (2003-08), it could be considered as an "existing sugar factory" even in 2006. On this issue, the HC noted that Raibag Factory submitted the final manufacturing report for the season 2003-04, whereas Shivshakti Sugars had filed its IEM on 8 June 2006, and thus Raibag Factory was an existing sugar factory. This was quite incorrect.

The court held that Shivshakti Sugars did not take effective steps for compliance as per Explanation-4 of clause 6A of the Order within the stipulated period of two years from the date of acknowledgment of IEM. The HC also noted that while the law permits extension of time, the Government did not follow due process of law while approving the time extension request by Shivshakti Sugars. Thus, the authority acted beyond their jurisdiction to grant the extension. The HC, therefore, ordered that the IEM of Shivshakti Sugars should be cancelled and held that the extensions given by GoI were without jurisdiction.

Despite being highlighted by the State Government, the HC did not consider the economic implications of its judgment, nor the fact that both factories could have co-existed peacefully in the region. This would have also helped the farmers.

Proceedings in the Supreme Court

Issues

Against the HC's judgment, Shivshakti Sugars filed a Special Leave Petition (SLP) before the SC. The SC identified the following seven issues for adjudication:

Issue 1	Whether clause 6A of the Sugarcane (Control) Order, 1966 (as amended in 2006) is applicable to IEM before the amendment on November 10, 2006?
Issue 2	Was Raibag Sahakari Sakkare Karkhane Niyamit not an existing sugar factory (within the meaning of Explanation 1 to clause 6A)?
Issue 3	Did Shivshakti Sugars take effective steps (as per Explanation-4 to clause 6A), within the time frame specified under clause 6C of the Sugarcane (Control) Order, 1966?

Issue 5	Whether the extensions for commencing commercial production to Shivshakti Sugars were incorrectly granted by the Union of India?
Issue 6	Whether the petitioners in the four writ petitions could be considered persons aggrieved and had locus to maintain the writ petitions?
Issue 7	Whether even if the HC is correct in law, in view of the subsequent events, i.e. the establishment of the sugar mill by Shivshakti Sugars and it continuing to crush sugarcane since the year 2011, Shivshakti Sugars' factory may be permitted to continue, in the interest of justice, in the facts and circumstances of the present case?

Arguments

The arguments put forth by *Shree Renuka Sugar Limited & Raibagh Sahakari Sakkare Karkhane* were largely reliant on the reasoning of the HC judgment, with specific reference to HC's interpretation of Explanation-1 to clause 6A of the Order.

On the other hand, *Shivshakti Sugars Limited* submitted that in August 2006 i.e., the time when the IEM application was made and acknowledged, Raibag Factory was not in operation, and thus the instant requirement of distance was not applicable. Moreover, Raibag Factory did not crush sugarcane for five crushing seasons before 2008 and thus it cannot qualify as an 'existing sugar factory'.

Shivshakti Sugars further argued that it did not adversely affect the utilisation of the crushing capacity of Raibag Factory. Shivshakti Sugars further mentioned that even though there was no shortage, the sugarcane from the 14 villages originally assigned to Raibag Factory, and which was subsequently allotted to Shivshakti Sugars, could also be reverted to Raibag Factory.

SC Judgment

The SC found that the provision of distance requirement between Raibag Factory and Shivshakti Sugars as contained in clause 6A of the Sugarcane (Control) (Amendment) Order was not applicable in the present matter. It also found no adverse impact on Raibag Factory in terms of cane availability due to Shivshakti Sugars' operations. Thus, considering the benefits to the sugarcane farmers, people at large and

economic factors, Shivshakti Sugars was allowed to remain open and function. The Apex Court also ordered that the 14 villages that were re-allocated to Shivshakti Sugars, be reverted to Raibag Factory.

> *"We have to keep in mind that the requirement of distance mentioned in the Amendment Order was inserted keeping in mind the benefit of the existing sugar factories. In a situation like this, when such a factory itself gave 'no objection' certificate, thereby waived the requirement, the bonafides of the appellant cannot be doubted."*

Rationale

The SC did not agree with the HC's interpretation of Explanation-1 of clause 6A of the Order. The explanation defining the existing sugar factory had three parts:

> "The first part provides that a factory shall be considered as an existing sugar factory to be a sugar factory 'in operation'. The second part provides that, it shall also include a sugar factory that has taken all effective steps as specified in explanation-4 of Clause 6A but excludes the factory that had not carried out its crushing operations. In explanation-4, five steps have been specified which should be considered by the party setting up the sugar factory while implementing the IEM. The third part provides that a sugar factory shall not be considered as an existing sugar factory if a sugar factory that has not carried out its crushing operations for the last five sugar seasons."

The court observed that Raibag Factory was in the process of liquidation when the Karnataka Government launched the revival process. The IEM of Shivshakti Sugars was acknowledged when Raibag Factory was not operational. Hence, at the time of IEM acknowledgment, no sugar factory existed within the meaning of clause 6A of the Order. The requirement of distance as prescribed in clause 6A, thus, would become redundant. In so far as Doodhganga Factory is concerned, the SC held that as per the Survey of India certificate, the distance between Shivshakti Sugars and Doodhganga

was 15 km, hence it was proper. Moreover, Doodhganga had already provided its NOC to a new sugar factory by Shivshakti Sugars.[555]

The SC further noted that Shivshakti Sugars did not affect the crushing capacity utilisation of either Raibag or Doodhganga Factory.

The Apex Court noted that Shivshakti Sugars incurred an expenditure of approximately ₹300 crores to establish the factory (including the expenditure on land and building of ₹142.26 crores) with an additional ₹150 crores in the operations. Moreover, Shivshakti Sugars also raised loans of ₹237 crores. The sugar factory generated regular employment for 377 persons and indirect employment for more than 7000 persons. The factory also set up a 37 MW electricity cogeneration plant. Thus, having cumulatively considered all the points, the SC held that it did not see that any purpose would be served if the factory were to be shut down. Moreover, it noted that the factory served a public purpose and the economic impact could not be ignored.

> *"Law is an interdisciplinary subject where an interface between law and social science come into play and thus the impact of other disciplines of law is to be kept in mind."*

The SC held that there is no reason to not let Shivshakti Sugar's factory function, merely because there might be a technical violation(s) of law. In saying so, it placed reliance on Har Shankar & Ors. v. The Dy. Excise and Taxation Commr. & Ors,.[556] wherein it was held:

> "While examining complaints of violation of statutory rules and conditions, it must be remembered that violation of each and every provision does not furnish a ground for the court to interfere. The provision may be a directory one or a mandatory one. In the case of directory provisions, substantial compliance would be enough. Unless it is established that violation of a directory provision has resulted in loss and/or prejudice to the party, no interference is warranted. Even in the case of violation of a mandatory provision, interference does

555. *Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd.,* (2017) 7 SCC 729.

556. (1975) 1 SCC 737.

> not follow as a matter of course. A mandatory provision conceived in the interest of a party can be waived by that party, whereas a mandatory provision conceived in the interest of the public cannot be waived by him. In other words, wherever a complaint of violation of a mandatory provision is made, the court should enquire in whose interest is the provision conceived. If it is not conceived in the interest of the public, question of waiver and/or acquiescence may arise--subject, of course, to the pleadings of the parties."[557]

Balancing Law and Economics

The SC, after citing statistics to highlight the importance of economic factors, turned to acknowledge the importance of economic impact analysis and the interface between law and economics. However, the SC also put forth the rider that such economic analysis must be done within the parameters of legal provisions.

The court cited Richard A. Posner's book *'Frontiers of Legal Theory'* to call for an 'economic analysis of law' approach. However, the court noted that the scope of their discussion was limited to the "economic impact of a judicial decision" while the jurisprudence of the economic approach of law has different theories including normative and positive theory.

It also noted that the interface between law and economics is much more relevant in today's time when the country has ushered in the era of economic liberalisation. India is now cruising at a high rate of economic growth. It has been a developing economy for several decades and all efforts are being made, at all levels, to ensure that it becomes a fully developed economy. Various measures are being taken on this behalf by policymakers. The judicial wing, while undertaking the task of performing its judicial function, is also required to perform its role in this direction.

The Apex Court noted that the scope of economic analysis of law has significantly expanded. The range of its subject-matter has become wide, indeed all-encompassing. Exploiting advances in the economics of non-market behaviour, it noted that economic analysis

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557. *Ibid.*

of law has expanded far beyond its original focus on antitrust (competition law), taxation, public utility regulation, corporate finance, and other areas of explicit economic regulation (and within that domain, it has expanded to include such fields as property and contract law). The "new" economic analysis of law embraces such non-market, or quasi-non-market fields of law as tort law, family law, criminal law, free speech, procedure, legislation, public international law, the law of intellectual property, the rules governing the trial and appellate process, environmental law, the administrative process, the regulation of health and safety, the laws forbidding discrimination in employment, and social norms viewed as a source of, an obstacle to, and a substitute for formal law.

> *"It noted that the economic impact of judicial decisions is important in deciding cases, especially in India, which is a developing economy and is pitted on the road to economic growth. Such economic growth and development is not independent of the judiciary, thus it becomes imperative for courts to conduct an economic impact analysis of their decisions."*

The court pointed out that economic evidence plays a big role even while deciding on environmental issues.

The court however also cautioned that the application of statutory provisions to the case was foremost. However, during the interpretation of a particular provision, economic impact or its effect should be considered. In doing so, if in a case, there is a scope and possibility of two approaches or the law permits discretion to the court, then the court shall lean on a position that promotes the "economic interest of the nation."

Similarly, the court should avoid an outcome that can adversely affect employment, growth of infrastructure, economy, or revenue of the State. Citing the instant case, the court mentioned that in competing interests within a case, when economic interests compete with the right of other persons, a balanced approach is a must.

The SC also recounted its judgment in *Raunaq International Limited v. I.V.R. Construction Ltd. & Ors.*,[558] wherein it had cautioned the HC against granting interim stay easily when the awards of government tenders are challenged. This is in respect to a tender floated by the Maharashtra State Electricity Board, inviting a bidder for the installation of pipes and tanks at one of the thermal power stations in Maharashtra.

In response to the invitation, there were 11 bidders, two of them being I.V.R and Raunaq International. The bid was won by Raunaq International, as it offered the lowest price and also fulfilled other requirements, including the experience criteria, as stipulated by the Maharashtra State Electricity Board. This was subsequently challenged by I.V.R in the form of a writ petition before the High Court of Bombay. The ground of challenge was that Raunaq International did not fulfill the qualifying criterion of the bid. But the challenger also did not qualify for the terms mentioned. Hence, the SC stated that the interim stay would not be in the public interest as it would delay the approach and escalate costs.

The SC further cited *CCE v. Dunlop India Ltd.*,[559] highlighting that interim stay should factor considerations such as the balance of convenience, public interest, and financial impact of the stay. The balance of convenience ought to be considered before granting or withholding an injunction or interim stay, thus ensuring that public interest is not prejudiced.

Dunlop India is a manufacturer of tyres, tubes, and various other rubber products. By a notification dated April 06, 1984, issued by the GoI, manufacturers were exempted from a certain percentage of excise duty to the extent that the manufacturers had not availed themselves of the exemption granted under certain other earlier notifications. Department of Revenue was of the view that Dunlop India was not entitled to the exemption as it had cleared the goods earlier without paying central excise duty, but on furnishing Bank Guarantees under various interim orders of courts. Dunlop India

558. *Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors.,* (1999) 1 SCC 492.

559. *CCE v. Dunlop India Ltd.,* (1985) 1 SCC 260.

claimed the benefit of the exemption to the tune of ₹6.05 crores and filed a writ petition in the Calcutta High Court and sought an interim order restraining the central excise authorities from the levy and collection of excise duty.[560] The judge was of the view that a prima facie case had been made out in favour of Dunlop India and by an interim order allowed the benefit of the exemption and the amount the company was exempted was directed to furnish a Bank Guarantee. The justification given by the Calcutta HC on the interim order was not sufficient.[561]

> *"There is a growing role of economics in contract, labour, tax, corporate, and other laws. Courts are increasingly receptive to economic arguments while deciding these issues. In such an environment it becomes the bounden duty of the Apex Court to undertake economic analysis and assess the economic impact of its decisions."*

In concluding the Shivshakti Sugars case, the SC observed that even if the court finds a technical violation, the economic and equitable considerations within a case demand that the court exercises the power granted to it under Article 142(1)[562] of the Indian Constitution and find a balance.

Increasing Importance of Marrying 'Law and Economics'

"To me, the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should

560. *Ibid.*

561. *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260.

562. Article 142(1): The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully."[563]

The economic analysis of law concerns itself with the application of macroeconomic theory to the analysis of legal rules and institutions.[564] As an analytical framework, law and economics have had a significant influence on scholarly writing for a long time now. It was in 1947 that Judge Learned Hand formulated a new approach to judicial decision making by using an algebraic cost-benefit[565] test for determining negligence.[566] However, it was only in the early 1960s that economic analysis began to be applied rigorously to broad non-economic legal problems.[567]

Although 'law and economics' have often been promoted as a tool to be used by policymakers, several scholars have argued that judges either are or should be guided by economic principles when deciding cases. For instance, Judge Richard Posner argued that judges should consider wealth maximisation as a guiding value in deciding common law cases.[568] To the extent that economic analysis helps identify which rules maximise wealth, the use of such analysis would be an important tool for judges. Judge Guido Calabresi has also argued that efficiency is a component of justice and therefore, judges should concern themselves with efficiency as they decide cases.[569] Similarly,

563. Judge Richard A. Posner in Michael Faure & Roger Van Den Bergh, Eds., 'Essays in Law and Economics', 1989.

564. Lewis Kornhauser, 'The Economic Analysis of Law', Stanford Encyclopedia of Philosophy, 17 July 2017, https://plato.stanford.edu/entries/legal-econanalysis/

565. The Learned Hand formula is an algebraic formula used to ascertain liability in negligence cases. According to the formula, when the probability (P) and magnitude (L) of harm resulting from the accident exceeds the investment in precaution (B), the defendant should be held liable. However, if B equals or exceeds PL, the defendant should not be held liable.

566. *Untied States v. United Shoe Mach. Corp.,* 110 F. Supp 295.

567. Guido Calabresi, About Law and Economics: A letter to Ronald Dworkin, 8 Hofstra Law Review 553 (1980).

568. Richar Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Studies 103 (1979).

569. Peter Yorio, Federal Income Tax Rulemaking, An Economic Perspective, 51 Fordham L. Rev. 1, 48-9 (1982).

Edward Yorio has also argued that judges deciding tax cases should adopt efficiency rules whenever possible.[570]

Over the past few decades, several of the most vocal advocates of 'law and economics' have ascended to the bench, including Richard Posner, Frank Easterbrook, and Guido Calabresi. Not surprisingly, they have to a lesser extent or greater degree used economic analysis to help them decide the issues they confront as jurists.

The importance and the need for economic impact analysis in judicial decision making were highlighted in India in a televised roundtable discussion on the 'Economic Impact of Court Judgment'.[571] The panellists included Justices A. K. Sikri, and M. M. Kumar, and eminent lawyers Abhishek Manu Singhvi and Pinki Anand. The discussion resonated with the core message of this book and raised several interesting points. Some of the key points of the discussion are as follows:

- The courts lack a holistic approach in understanding and analysing the stakeholders that may get impacted due to their decision making. These become even more relevant in cases of economic impact.
- The courts while focusing on the immediate parties of the cases do not assess the multiplier effect on the economic structure and the multitude of stakeholders that may also get impacted.
- The approach of the courts is primarily binary, where they are adjudicating cases in favour of or against something, and thus have the negative power to strike down something, but not create something positive. This causes a vacuum as a result of their decision making. Courts are not designed to fill up the vacuums created by them and the government usually takes a substantial time to respond to the vacuum that is created by the court.

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570. Edward Yorio, Federal Income Tax Rulemaking, An Economic Perspective, 51 Fordham L. Rev. 1, 48-9 (1982).

571. https://youtu.be/jCpFaO24KgI.

- The main reason that impairs the courts to assess is limited to the shortcomings of an institutional system. 90 percent of the cases with economic impact generally arise in PIL cases. In PIL, the respondents are almost left without any remedy as to a result of successive and frequent mandamus orders by the courts. In that regard, Senior Advocate Pinky Anand said that expecting the courts to look above and beyond all aspects, including social, political, economic, among others, will open the flood gates for the courts to enjoy unfettered discretion to make interesting orders. At the same time, as has been noted, courts more often than not, do not have the expertise to undertake such extensive analysis.

To overcome this, some of the key suggestions offered by the eminent panellists were:

- The court should strive to balance 'law and economics' and in doing so must go by scientific evidence and not general notions. This is particularly important where PILs are concerned as in the majority of the PIL cases the judge applies the law without factual or scientific basis.
- There is a need to build a post-judgment audit system in the judiciary whereby the court will assess their judgments after a few years of implementing its directions. This would create a corrective mechanism within the judiciary in future cases while undertaking judicial decision making on highly sensitive economic and antitrust matters.
- The SC has the power of substantive justice under Article 142 of the Constitution of India. The court can resort to this power especially in cases where the interface between 'law and economics' is concerned.
- The courts should examine alternatives thus avoiding the vacuum that can be created due to its narrow approach.

The discussion as laid out above exemplifies the importance and need for economic impact analysis in judicial decision making, to ensure holistic and equitable justice for all direct and indirect

stakeholders. The judgment of the Apex Court in the present case has hopefully marked the beginning of many such extensive analyses, which will also further the larger economic interest of the nation.

Epilogue

What to Expect in this Chapter?

In the introduction to this book, some of the historical reasons have been highlighted that have had an impact on the current day working of the SC on the Indian economy. The main body of the book presented six different cases where the SC has had a significant role to play in determining the economic trajectory of the country and specific sectors.

In this last chapter – the epilogue – the attempt is to spell out a way forward for a more responsive and integrated judicial response in the country. The focus will be predominantly on the SC and its role in the economy but it may need to be said here that the SC and the entire judicial apparatus are only a reflection of the larger environment it operates in.

To drive home this point coherently, the epilogue is divided into three parts. In the first part, each case will be revisited in combination with other cases displaying commonalities. The idea is to construct a commentary on common judicial principles and identify an approach through which the SC needs to see cases involving substantive economic impact.

The second part will focus on some general issues that can help the SC evolve a more effective judicial response with regard to the economy and society.

Lastly, the third part will synthesise the first two parts and present crisp pointers for the consideration of the judiciary and policymakers.

Part I

Each case discussed in the book is unique and has elicited a specific response from the SC, yet there are some similarities. Based on how one looks at them, they can be grouped in different ways. For instance, if the criteria are based on the 'robustness of enforceability', then Liquor Ban and Emission Standard cases can be grouped.

If we take 'foundational reasons' behind the dispute as the criteria of bundling, then Coalgate and 2G can be paired together as they both have their genesis in government policies that followed a distorted administrative route in the allocation of natural resources.

If a 'common approach to alternate remedy' has to be the criteria then cases pertaining to Emission Standards, 2G, and Coalgate can be put together. If we take 'sector' as the basis of grouping, then 2G and AGR can be paired together to tell the impact of court decisions on the now beleaguered telecom sector.

Finally, the most obvious way is to single out the last case where the SC takes a refreshingly different approach to settle a dispute where the tension between law and economics is evident. It should be the lodestar for the judiciary to follow in adjudicating cases involving law and economics.

Similarly, there can be other logical ways of grouping the cases. The main purpose of grouping, however, is to cull out common lessons, judicial principles, and even solutions through alternative ways. This is particularly important, as today the SC has come to display 'polyvocality' on similar matters – a fact also noted in the introductory chapter. Common sense tells us that for so long as this may continue, both justice and policy formulation may suffer.

What does the Grouping Reveal?

To begin with, let's focus on the question of 'enforceability'. In the Liquor Ban Case, the gaping hole was with regard to enforceability. The judgment was pronounced to rein in road accidents due to drunken driving. In most cases, questioning the SC on enforcement would be out of place. This is because enforcement is the duty of the executive and hence outside the purview of the court. However,

there may be certain exceptions where it may be prudent for the court to consider certain aspects for effective enforcement. Liquor Ban case is a perfect example where the court could have considered the enforcement dimension in advance. This is due to the following reasons:

- Enforcing the ban meant loss of excise revenue to the state governments. In other words, state governments were not only the affected party but were also asked to inflict the injury upon themselves. Therefore, there was an inherent and conspicuous conflict of interest. This is particularly important because alcohol is amongst the highest revenue earner for most state governments.
- The judgment also brought out ambiguities which required subsequent clarifications by the court. This essentially meant spelling out the specifics. For instance, the kind of establishments under the purview, relaxation on minimum distance, exemption for hilly states, so on and so forth. The important point to note here is that cases of this nature where frequent clarifications are needed should alert the court about the implementation challenges. Not considering such challenges in advance can lead to an unnecessary burden on the court and increased corruption. All efforts may eventually be futile at the cost to the economy and society – something that has been witnessed as a result of this judgment. For instance, state governments reclassified the highways to jump the ban while sellers and vendors found ingenious ways of subverting the same.
- Another fact that was blatantly overlooked from the implementation perspective is that alcohol is not the only intoxicant threatening road safety and even if it were, it is addictive much like other drugs, though they are mentioned in government's advisories and the Radhakrishnan Committee's recommendation on driving under intoxication due to alcohol or drugs. Therefore, there was little that one

could do merely by shutting down the sale of alcohol near the highways.

The reasons mentioned above are just some of the reasons that stand out as glaring examples of facts that should have been considered by the court ex-ante. After all, the purpose of the judgment was to enforce the will of the court.

Furthermore, what was surprising about this case was the lack of coherence within the judicial system. A SC committee headed by retired Justice S. Radhakrishnan comprising of two experts, one of which was S. Sundar, former Road Transport Secretary, had recommended quite some time ago to the Apex Court to take action on drunken driving as the government was not responsive.[572]

This advice or even the existence of such a committee was not mentioned in the order of the SC. Not only that, the court could have consulted the Committee on enforceability and then passed an implementable order. After all, the Committee was established by the Government on court orders and it cost the exchequer substantially. The government must conduct performance or cost-benefit analyses of such bodies as well as organisations established by various ministries.

Similarly, in the Emission Standard case if the court's decision intended to stop more polluting vehicles from plying on the road in the interest of public health, then the court achieved little by banning those vehicles. This is because the banned vehicles were eventually sold at discounted rates before the cut-off date set by the court, resulting in significant losses to the auto industry. This not only defeated the purpose of the ban but also caused a great deal of financial agony to the auto sector which is known to have one of the highest multiplier effects on the economy.

Second, the court seemed to have gone by the intent of the Auto Fuel Policy which meant to ensure induction of lesser polluting vehicles in a phased manner. While this policy laid out clear timelines for new standards to become applicable, a precedent existed where

572. (2014) 6 SCC 36 and S. Rajaseekaran (II) vs. Union of India (UOI) and Ors. (30.11.2017 - SC) : MANU/SC/1504/2017

the auto industry on an earlier occasion was allowed to clear old inventories with some relaxations to enable the transition to new emission norms in a smooth manner. Therefore, the benefit of doubt could have been given to the auto sector by allowing them reasonable time to dispose off the old inventory of vehicles. This could have been done with a warning to both government and the industry that in the future such exemptions cannot be expected. This would not have hampered justice particularly because the availability of compliant/suitable fuel was not uniform all across the country. There were other factors too which lead to automobile pollution; fuel is not the only one

Interestingly, the SC also appeared over occupied on just two of the four parameters that determine emissions from vehicles, namely Vehicular Technology and Fuel Quality. The other two parameters which include Inspection & Maintenance of In-Use Vehicles, and Road and Traffic Management were not looked at by the SC in equal measure.

In reality, there is usually an undue focus on the first two parameters perhaps because the last two parameters require a substantive effort towards on-the-ground implementation. If SC intended to consider the public health dimension in all its seriousness, it should ideally have been concerned about other vehicular factors affecting air quality as well. A piecemeal approach by the SC focusing on selective goals of auto fuel policy raises questions on its capacity to consider issues holistically.

Speaking of the government policy, one should be reminded that the 2G and Coalgate cases too were rooted in government policy, except for this time the policy concerned itself with the allocation of natural resources. In both these cases, a bigger question that is often lost in semantics is what should be the right way of allocating public property?

In the fine print of these cases, the message is clear. The administrative route to allocating public property may be justified when the market is not developed or there are too few players in the market. But, when the market matures, allocation and price discovery must be left to market forces. But that is not to say that

transparency can be compromised in non-market allocations. It must be the yardstick regardless of whether the allocation process is market-related or non-market.

In the Coalgate case, the market-related process of allocation should have been adopted since 2004, i.e. from the time concept of open bidding was made public and a bill to put the bidding process on sound legal footing was drafted. In the 2G case, the "First Come First Served" policy was a no go from the very beginning. In this regard, even the SC noted that there is a fundamental flaw in the policy as it involves an element of pure chance in matters involving the award of public property to private actors. In saying so, the court also noted that it can have inherently dangerous implications besides being violative of Article 14 of the Indian Constitution.

This is evident from the way the then Communications Minister further tweaked the policy to make it more suitable for certain players and exclusionary for others. As a result, it stood to benefit many firms that had no experience in the sector. Consequently, their valuation went up overnight by virtue of having a licence and access to the spectrum.

In short, two policy principles can be culled from this. First, instead of administrative control, auctions should have been a preferred method as the market had a fairly good number of bidders. Second, even the administrative route should have followed the tenets of transparency wherever possible. For instance, in the 2G case, the DoT should have taken the opinion of the Finance Ministry as per the requirement of the Government of India (Transaction of Business) Rules, 1961.

These principles should not be lost on policymakers and the judiciary. Prospectively, both of them would do well if they are guided by the 2011 Report of the Committee on Allocation of Natural Resources prepared by the Cabinet Secretariat under the Chairmanship of Ashok Chawla. The report was never formally released but is available in the public domain.[573]

573. http://www.cuts-ccier.org/pdf/Report_of_the_Committee_on_Allocation_of_Natural_Resources.pdf

The report lays down sound principles of allocation of natural resources. Amongst other things, the report focusses on necessary processes in non-market allocations and has detailed commentary on various forms of competitive market allocation processes such as auctions.

One political economy dimension in both these cases was that junior partners in a coalition government demanded their pound of flesh to support the lead party to rule the country. Only when pushed to the wall would the lead party surrender the support and go their own way. For example, when the Left parties opposed a Peaceful Nuclear Deal with the US, the then Prime Minister, Manmohan Singh went all the way to strike the deal. The Left Front withdrew its external support to the UPA government but the government survived by drawing in new partners. All this cost the nation by way of pork-barrel politics.

When I write this, the party in power, in the current government,BJP, runs a coalition, but yet it has a majority of its own in the lower house of the national parliament or Lok Sabha[574] and can afford to carry out bold reforms which are guided by votes rather than illegal gratification. For example, the Akali Dal withdrew its support from the union government on the farm sector reforms because its vested interests were affected adversely, but the government did not fall. Things may have been different if the Akalis were in power in Punjab with BJP as its coalition partner, as they were before the present Congress government came to power. In many such situations, we do need a strong judiciary to be a countering force to pork-barrel politics, but which would look holistically at the issues in the wide public interest rather than approach the same with a drastic remedy of cutting off the head to cure a headache.

That said, another way of viewing the cases is through the prism of an alternate remedy. In this regard, Emission Standards, 2G and Coalgate cases make for apt examples where alternative remedies

574. For long the BJP and its allies did not have a majority in the upper house i.e. Rajya Sabha and thus had to rely on external support from non-NDA parties to vote along with the government because all laws have to be passed by both houses. Since money bills need not go to Rajya Sabha, the government also cloaked some bills as money bills and got them adopted as laws.

could have been thought of by the SC. Lessons for devising such an approach can be sought from the ideation and process behind creating a Consumer Welfare Fund (CWF).

The CWF was created through an amendment in 1991 to the Central Excise and Salt Act, 1944, where the refund claim on customs and excise duty that is not-refundable to the manufacturers, etc. was to be credited into the CWF. The fund is used to provide financial assistance to promote consumer welfare and strengthen the consumer movement in India.

Before the Central Excise and Salt Act, 1944 was amended in 1991, excise duty with an all-inclusive price was paid on excisable goods by customers. Manufacturers were eligible for a refund, if any such goods were non-excisable or if duties were erroneously paid due to wrong classification or valuation of excisable goods. However, the refund that was allowed to the manufacturers was retained by them instead of returning it to its customers (including consumers) from whom the duties were collected through the price at the time of sale. This led to the unjust enrichment of manufacturers.

The controversy sparked off when the Central Board of Excise and Customs sent out instructions on March 21, 1990, directing the Collectors to sanction refund claim in supersession to Departmental instructions dated November 18, 1998, and November 10, 1989.

Few public-spirited citizens informed some Members of Parliament about this matter. The MPs highlighted this issue before the then Minister of Finance in the parliament, who requested a comprehensive inquiry on all aspects relating to refund of central excise duties. As a result, the then Speaker of the Lok Sabha referred the issue to the Public Accounts Committee (PAC), which deliberated on the issue, which was reported in their 22nd Report (Ninth Lok Sabha) on Refunds of Central Excise Duties.

The PAC heard the matter and pulled up the government on assurances made by successive governments in bringing suitable provisions to deny refunds in cases of unjust enrichment. This had been pending necessary amendments since 1969. In pursuance of the recommendations made by the PAC, the Central Excise and Customs

Laws (Amendment) Bill, 1991 was introduced by Manmohan Singh, then Finance Minister, on August 12, 1991, and was finally passed by the Parliament on September 18, 1991.

The manufacturers challenged this amendment before the Supreme Court in *Mafatlal Industries Ltd. and Others vs. Union of India* ((1997) 5 SCC 536) case, stating that it violates Article 265 of the Constitution of India and Section 72 of the Indian Contract Act, 1872. The apex court, on the Government retaining the unrefundable excise and customs duties for a public purpose under the CWF, noted that *"the Preamble and the aforesaid articles do demand that where duty cannot be refunded to real person who have borne the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good."*[575].

The money that is credited to the CWF is managed by the Department of Consumer Affairs, Government of India to provide financial assistance for promoting and protecting the welfare of consumers, generating consumer awareness and strengthening the consumer movement in the country particularly in the rural areas, with special emphasis on women's participation.

Not stopping at the refund of excess excise levies into the CWF, the Government also passed an order directing that all fines and penalties levied by the National Consumer Disputes Redressal Commission under the Consumer Protection Act, 1986 will also be credited to the CWF. The principle was the same: if any compensation awarded by the NCDRC against a business cannot be passed on to consumers, who are large in number and cannot be identified as such, it should be credited to the CWF. The same spirit was also followed by State Commissions and District Fora to ask the punished party to deposit the sum in the CWF.[576]

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575. (1997) 5 SCC 536.

576. Interestingly a similar approach was taken by the Department of Corporate Affairs and Securities and Exchange Board of India to establish their own Investor Protection & Education Fund by collecting all unclaimed shares and dividends into these funds for being used for public good, as their rightful claimants could not be identified. Similarly, the Reserve Bank of India has created the Depositor Education and Awareness Fund for being credited with unclaimed deposits and balances to be used for awareness activities for banking consumers.

The genesis of CWF and other similar funds and their contribution to the public good is a model example of a remedy that can be appropriately institutionalised by the Supreme Court. The Government can also do so in cases where instead of disrupting the industries by invalidating their activities, it can demand penalty or levy from the said industries and direct the monies to rectify the wrong and promote the public good. An enabling framework legislation can be the way forward while at the same time allowing the industries to continue with their operations unless the same was barred due to any other statute in force.

For example, in the case of 2G spectrum licences, rather than cancelling the same and upsetting the sector and the economy, each of the licensees could have been asked to pay a penalty to the exchequer which would have compensated the government for the loss of revenue due to malevolent grant of licences. Surely, the total sum need not have been ₹1,76,000 crores as that was a heroic sum assumed to be the loss by the CAG and termed notionally.

One of the issues raised by the court is that few firms were allotted spectrum without having any track record in the telecom field. What the court should have done is to evaluate the capability of such firms to operate a telecom business rather than outright reject their capability. After all, the telecom sector is in dire need of deep pockets. If the firms could show their financial and management capability then they could qualify. After all, talent and skills can be and are hired from the market. The example of Reliance Jio makes sense here. The mother company is a humongous oil refinery business, yet it has ventured into many new businesses without having any experience in the sector. They hire the best available talents to run their businesses if they can't find a suitable person in the house.

On the other hand, in cases like the coal allocation matter, instead of cancelling the allocations made over two decades, the court could have instituted an experts committee, comprising of lawyers, economists and chartered accountants, to examine the merits of each allocation. Those involved in corruption or favouritism could have been asked to compensate for the losses incurred by the exchequer

by way of penalty. In the case of national highways, when trees are to be destroyed by the developer or the builder, they are required to either replant them or plant a higher number of new trees elsewhere to compensate for the deforestation. The road works are not stopped.

An innovative approach is used in the United States, where settlement money is distributed for welfare and educational activities through a special fund, if the parties cannot be identified for compensation or when after all identified parties have been compensated, the settlement amount still has uncollected residual funds. This is governed by the principle called cy pres, which means next best use. Cy pres is recognised as an equitable remedy.[577]

Another way of looking at alternate remedies is to limit the liability to erring parties rather than hurting the whole sector or the economy. In this regard and as discussed in this book, Mohan Guruswamy, economist and former advisor to the Finance Minister, while referring to the 2G case has pointed out that the Supreme Court should have restricted itself to singling out corrupt officers (and Ministers), rather than quashing the licences and allocations altogether. He notes that the court should just restrain itself as it is not qualified to make economic policy decisions.

In the 2G case, as we know, the notional loss calculated by the CAG was to the tune of ₹1,76,000 crores. This was of course on the higher side and captured the popular imagination, which perhaps even influenced the decision of the Supreme Court. The figure remains contested even today just as is the case with AGR dues. Both cases are different. In the 2G case government allegedly incurred a deliberate loss in dealings with the private sector while in the AGR case it went for maximum extraction.

Yet there are similarities on at least three counts. They both pertain to a certain loss to the exchequer, since in both of them government parted with the exclusive privilege that it held. In both cases, the government through DoT played a role that nearly wiped out the telecom sector. The Supreme Court did not help either. On the contrary, it went a step further.

577. https://thewire.in/economy/supreme-court-judicial-intervention-economic-development

Like 2G, the AGR case too has drawn severe criticism from several experts. After nearly two decades of litigation, the SC has finally allowed a 10-year window for the payment of AGR dues. These dues were calculated on the definition that the DoT provided. However, DoT did not follow a fully transparent and participatory process, as was assured by it to the telcos at the time of the shift to the new revenue sharing regime.

Even as it appears to be the SC's final take, many questions have emerged for the apex court in this entire saga.

- First, why did the SC not hold DoT accountable for not following a proper consultative and participatory process in the AGR case to determine the definition of revenue? Could that have contained the damage?
- Second, why was the benefit of the doubt not be extended to telcos, especially when TRAI and TDSAT were not in favour of the inclusion of non-telecom revenue for calculation of dues? For example, even in airport PPP contracts, only aeronautical revenue is shared between the operators and the government. Non-aeronautical revenue, such as shop rents or automobile parking fees, is the exclusive income of the operator.
- Third, on more than one occasion SC came down heavily on telcos for immediate payment of dues but later changed its stance and allowed 10 years for staggered payments. How does one reconcile these differing stances of the apex court? One can argue that a plea was made to the SC to consider a larger impact on the economy; the question remains what stopped the SC from taking such a view on its own accord right from day one of litigation?
- Fourth, what scientific argument did the SC base its decision on granting 10 years and not 20 years for staggered payments?
- Fifth, what stopped the SC from finding an alternative solution to prevent similar future disturbances? For instance, a radical solution has been provided on AGR regulation[578] by

578. https://www.linkedin.com/pulse/improving-agr-regulation-parag-kar

a well-known Telecom expert Parag Kar. Such ideas along with others need more debate.

- Sixth, the TDSAT is a specialised tribunal to deal with telecom and broadcasting matters headed by a retired Supreme Court judge accompanied by two experts. Despite the legalese surrounding the law and constitution of the tribunal, could the SC not have deferred the matter to it for resolution. It would have thus saved much time and taxpayers' and telcos' money.
- Seventh, like the SC Committee on Road Safety, could the SC not have constituted a standing Committee of Experts, headed by a retired SC judge, to provide inputs for the future course? This assumes even more significance in light of the fact that while the cost of road accidents is about 3 percent of our GDP, the telecom sector contributes 6.5 percent to our GDP, a figure which is likely to rise to 8.2 percent when 5G services are in operation soon?
- Finally, could the SC not evolve a suitable penalty for disgorging the illegal profits of the licensees in the 2G case to the government. If the apex court can hold Subrata Roy Sahara in jail for more than eight years for not refunding low and middle-class depositors' monies, why can the SC not follow similar precedence while announcing such orders that disrupt industries, livelihoods, and the economy at large?

In one view, the SC judgment in the AGR case has considerably reduced the DoT's ability to unwind the damage, as any such attempt was seen as causing loss to the exchequer, leading to political ramifications. The current mess is more severe than the 2G scam, as it will damage the telecom industry (also drive ISPs out of business) and hamper the DoT's attempt to drive policy reforms under the umbrella of the existing licensing framework.[579]

579. https://www.linkedin.com/pulse/scs-interpretation-agr-real-intent-DoT-parag-kar/?trackingId=VXjTecwsZHQ2%2B1FGM%2Bom5Q%3D%3D https://www.linkedin.com/pulse/scs-interpretation-agr-real-intent-dot-parag-kar/

A clear message that emerges from both these cases is best described in the words of Parag Kar. He says that *the telecom sector, like other sectors, is a victim of vague policies and a lack of foresight by the players - to act quickly to mitigate risks. Vague policies are embedded with statements like "unconditional acceptance", "govt has the right to reject without assigning any reasons" etc. These phrases are mainly driven by a strong urge of the government to keep cards close to their chest to drive maximum flexibility. But the price for it is hefty - lack of trust, prolonged litigation, increased transaction cost and loss of dignity of individuals, and exploitation by vested interests (on both sides).*

These words are sure to resonate with the reader of this book as the malaise described above cuts across all the sectors. The question is – what should the apex court, which far too often presides over matters of vague policies, do in such a situation? Should it take a broader view of economy and society, and make that as a premise of justice or should it take a narrow view enmeshed in legalese and technicalities, and limit its remit to the parties involved?

Dealing with this question in detail is the last case in the book pertaining to a dispute between two sugar mills. Like other cases, this case too dealt with an interface between law and economics even though the quantum of economic impact was much smaller compared to other cases and that this was mainly an adversarial case. That said, what the bench of Justices Sikri and Sapre say in this case is an important judicial principle worth recalling and reiterating.

Establishing the importance of law as an interdisciplinary subject where the interface between law and other sciences come into play, they emphasise the need to understand the impact of other disciplines. Their judgment exhorts the judiciary to appreciate the fact that economic development is a result of decades of effort and therefore judiciary too has a role to play towards this endeavour.

In short, the call to the judiciary is to adopt an approach that balances economics and law. In doing so, they say that the economic analysis of law has expanded beyond its original focus on explicit economic dimensions such as in tax, competition, or finance to nonmarket or quasi-nonmarket fields of law. Amongst other things, these may include tort law, family law, criminal law, free speech,

procedure, legislation, public international law, the law of intellectual property, the rules governing the trial and appellate process, environmental law, the administrative process, the regulation of health and safety, the laws forbidding discrimination in employment, and social norms.

Speaking from a practical standpoint, they highlight that the first duty of the court is to decide the case by applying the statutory provisions. However, on the application of law and while interpreting a particular provision, the economic impact/effect of a decision, wherever warranted, has to be kept in mind.

Likewise, in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of the view which subserves the economic interest of the nation, or the larger good. Conversely, the Court needs to avoid that particular outcome that has the potential to create an adverse effect on employment, growth of infrastructure, or economy, or the revenue of the State. It is in this context that economic analysis of the impact of the decision becomes imperative.

The judges also remarked that the Indian judiciary has resorted to the economic analysis of the law on an ad hoc basis but the time has come that even if we find some technical violation but there is a greater good to be attained, the court must lean in favour of that greater good and for such purposes exercise of power under Article 142[580] of the Constitution of India will be justified.

Part II

This part is further divided into two important discussions. The first discussion is on PIL and the second discussion is on other areas that can enhance the effectiveness of Supreme Court decision making in general.

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580. *"Article 142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc.- (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe".*

Are PILs Good or Bad for the Economy?

The discussion on PIL is not only an important one but also quite complex. For instance, if the Sugar Mills case is anything to go by then Justices Sikri and Sapre are of the view that PILs should be dealt with in a much more conservative way. They say that the court can examine the previous record of public service rendered by the organisation filing the public interest litigation. They also add that even when public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening.

These remarks of judges were particularly in the context of larger economic interests. They were concerned that if strict oversight is not maintained on PILs, then it can delay economic progress in a number of ways and can lead to cost escalations, say, in commissioning of projects.

The judges' observation is worthy of serious consideration, though it does not come without a formidable challenge from the civil society and other legal experts. For instance, legal scholar Lavanya Rajamani says the *"power of PIL in India lies in its freedom from the constraints of traditional judicial proceedings. PILs in India have come to be characterised by a collaborative approach, procedural flexibility, judicially supervised interim orders and forward-looking relief. Judges in their activist avatar reach out to numerous parties and stake-holders, form fact-finding, monitoring or policy-evaluation committees, and arrive at constructive solutions to the problems flagged for their attention by public-spirited citizens. Judges have tremendous power, in particular in PILs, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials and enforce orders. And, they are not hesitant to exercise this power in what they perceive as the public interest…"*.

In many ways, what she says is the ethos upon which the concept of PIL is premised. It will not be wrong to say that the persona of the Indian judiciary, particularly the Supreme Court and the High Court, where the right to hear PILs is reserved, is largely made possible due to PILs.

The problem is that these avenues have come to be relied upon to tackle every conceivable ill in society. The other issue, as noted in

the introductory chapter of this book, is that courts too seemed to succumb to the populist ideas of the day when dealing with PILs. This is evident from the fact that in the early phase directions and orders passed by the SC primarily focused on protecting fundamental rights under Article 21 of the Indian Constitution, of the marginalised groups and sections of the society who because of extreme poverty, illiteracy and ignorance could not approach the SC or the High Courts. In later stages, it mainly focused on environmental and historical issues like protection and preservation of ecology, forests, marine life, wildlife, mountains, rivers, and monuments, amongst others. Thereafter, the focus changed to dealing with issues around standards of probity, transparency, and integrity in governance.

Be that as it may, the higher judiciary is often viewed as the panacea for the various endemic social and political problems that plague India while the lower judiciary is perceived as purely pathological – inefficient, corrupt and overly embedded in the Indian social milieu. Making matters worse is the attitude from the members of the higher judiciary who distance themselves from the lower judiciary and express despair at its condition while not taking any responsibility for the same. This is particularly important because in a strict sense they have direct vertical oversight over the lower courts.[581]

One may recall that in the introductory chapter, we had discussed this issue in brief while highlighting that the admission cases today demand disproportionate time from the SC compared to regular hearings. In doing so we had referred to an insightful essay on the SC by Madhav Khosla and Ananth Padmanabhan.

Once again, the same essay can be referred to understand the role of the SC in festering the pathology that has come to inflict not just the lower courts but also the larger environment in which all institutions work. In this regard, the authors note that while the SC did well in recognising several socio-economic rights, it did too little in awarding strong remedies. This shortcoming, the authors say, can

581. Khosla, M., & Padmanabhan, A. (2018). The Supreme Court. *In Rethinking Public Institutions in India*. Oxford University Press.

be witnessed across the spectrum; for instance, the SC has done little on corruption to ruffle political feathers and challenge the state. Backing this point in the same essay is a noted scholar Pratap Bhanu Mehta who says *judicialisation of politics and politicisation of judiciary have turned out to be two sides of the same coin*.

On the strength of these arguments, one can express disagreement with Justices Sikri and Sapre on PILs. In other words, tightening the noose around the PIL procedure is not likely to yield much unless systemic changes are introduced to the reform of the entire judicial apparatus. That is the only thing that is likely to increase the capacity and competency of our courts in dealing with complex economic matters. If anything, today we need far more effective institutions and instruments to represent people in policy and practice. Instruments like PIL can be made more effective by ensuring that they are backed by a body of evidence. The parties affected by PILs should also be given a fair chance at representing themselves so that courts can take a holistic view.

Introduce Systemic Solutions for Better Judicial Response on Economic Matters

When we think of systemic solutions, we need to think holistically. The SC is not an island disconnected from the rest of the country or the ecosystem. What comes to the SC for adjudication and how the court deals with that, speaks volumes about the nation, its economy, its society and the ecosystem. Therefore, if it has to function well, it will have to play its part in continuously improving the state of the economy, society and the ecosystem.

There can be several ways of doing it. In some of them, the SC can be an active participant while in others the changes will have to be done from the outside. To begin with, there is a need to acknowledge that there is a universe of dysfunctional public institutions around SC.[582] This has come about incrementally and is evident from the fact

582. Khosla, M., & Padmanabhan, A. (2018). The Supreme Court. *In Rethinking Public Institutions in India*. Oxford University Press.

that the higher judiciary today deals with a large number of cases that reflect governance failure in several areas.

In such a scenario, the court is seen as a last resort of justice and quite often it engages with such cases. However, since liberalisation the variety of unconventional cases has also increased but the competency and expertise of Indian courts, it appears, has not improved commensurately. This can be ubiquitously observed even in the quasi-judicial regulatory bodies as well. The late Finance Minister, Arun Jaitley, a leading lawyer himself, once said in the parliament that since liberalisation and economic reforms the demand for good lawyers to help business clients has gone up so much that they do not consider a place on the bench. Thus, the quality of judges has fallen.

With regards to regulatory action, the courts are usually hesitant in intervening. Sector specific quasi-judicial regulatory bodies with an appellate tribunal are supposed to have the requisite expertise and are expected to work independently for undertaking regulatory actions. This was the very logic and intention for their creation in a market economy. But just like courts, they too have been increasingly wading through unchartered and unconventional territories without the necessary expertise. In the new economic context, where sheer speed and scale of change is overwhelming, these institutions are often caught guessing the meaning of public interest. Matters are often made worse due to political interference in the conduct of such bodies. This is not always proven explicitly but is well known.

Complicating the landscape is also a new trend – something that has caught on speed after the 2008 Transatlantic financial crisis. Some of the biggest companies since then have emerged in the tech space and most of them are consumer-facing. In other words, cash business. Yet the consumer and citizen of today is perhaps more challenged and marginalised than it has ever been in the past. Many of these companies operate in a regulatory vacuum and speak in a language not easily decipherable by non-technical people.

Governments try to play catch up and often end up catching their tail. Who do the citizen and consumers then turn to?

Of course, institutions![583] More particularly, institutions that can uphold justice.

The institution of the judiciary, therefore, has much on its shoulders. Ironically, by the time a case lands up in a courtroom, having traversed through the 'stations' discussed above, it has already acquired a great deal of complexity and generated significant cost for the economy.

The higher judiciary, and in particular the SC, therefore, has to be prepared at all times for speedy and effective disposal of cases. To do so, it might want to begin by first impressing upon the government the need to infuse the lower judiciary with competent judges and officials and simultaneously weeding out incompetent and/or corrupt judges and officials. At the same time, it must also emphasise the importance of high courts and lower judiciary. Experts note that by hearing cases that should ordinarily be not reserved for the SC, the incentive to reform the high court and the lower judiciary has diminished. In other words, SC has contributed to the decreasing significance of high courts and lower courts.[584]

Observers point out that the SC is also guilty of failing the fast track court initiative in India. This initiative had shown exemplary success with a clearance rate of 84 percent of the cases referred to them. The scheme worked for five years but starved of funds by the central government. Moreover, the SC permitted the scheme to continue, without undertaking any substantial engagement using data analytics and reform proposals.[585]

Another injury that SC seems to have inflicted upon the judicial system is the dilution of the three adjournment policy,[586] i.e. no

583. One must distinguish between institutions and organisations which is often thought of as synonyms by many. Institutions are the whole regime i.e. the organisation, its stakeholders and its culture or practices.

584. Khosla, M., & Padmanabhan, A. (2018). The Supreme Court. *In Rethinking Public Institutions in India*. Oxford University Press.

585. *Ibid*.

586. Getting adjournments after adjournments for no rhyme or reason is one of the major causes of delays in our courts. Lawyers have opposed any discipline on the same and the sitting judicial officers do not quarrel with the lawyers. In many laws, time period is prescribed but with an escape clause: "as far as possible", which then becomes the rule rather than the exception.

granting of more than three adjournments in a case hearing. This policy is said to have affected the learning curve of the court, causing an adverse impact on the entire legal profession as well. Along with prolonging the life of the case, this policy also reduces the effectiveness of the court in adjudicating matters, as any prolonging of time affects the analysis in a case.

Related to this point is the need to introduce a Case Management Policy for the timely disposal of cases. A consultation paper on this aspect exists on the website of the Law Commission. Incidentally, it was drafted as a consequence of the judgment of the SC in Salem Bar Association vs. Union of India. The paper contains model case flow management rules for the trial courts, subordinate appellate courts and High Courts. Strangely enough, the SC was kept outside its purview.[587]

Important to note here is that the consultation paper was not produced by the Law Commission, but by a committee constituted by the SC. In the context of this discussion, what indeed came out of the Law Commission was a unique proposal that may never see the light of the day due to opposition from the SC bar. The very sensible proposal was to spilt up constitutional and appellate work of the SC by creating a constitution bench in Delhi and four regional cassation benches in different regions of the country to handle appellate work arising in these regions.[588]

At CUTS, we too have published a discussion paper[589] to curb delays in courts asserting our rights as consumers of the judicial system. The paper has looked into anecdotes of experiences in India and the best practices abroad to advance reforms in the legal system and cut down on delays. Of course, much of the problems lie in the mindset. For example, the proposal to cut our court vacations has been opposed by the bar vehemently. If all offices can work around

587. http://lawcommissionofindia.nic.in/adr_conf/casemgmt%20draft%20rules.pdf

588. Khosla, M., & Padmanabhan, A. (2018). The Supreme Court. *In Rethinking Public Institutions in India*. Oxford University Press.

589. Judiciary - A crumbling Pillar of Indian Democracy? Speeding up delivery of Justice in India, CUTS International, 2013. https://bit.ly/3hSnmaj

the year, why cannot our courts also work around the year? Judges or staff of the courts are entitled to their vacations as others working in the government or public or private sector are. A positive step is taken in this regard given the COVID-19 situation, where the Indian Supreme Court has decided to cut short their summer vacation.[590]

A similar decision has been taken by the Bangladesh Supreme Court, where they have decided to cancel their annual vacations given the pendency of cases because of the coronavirus pandemic.[591] But both these are temporary measures and may not be regularised as very desirable permanent features. One hopes it happens otherwise when the judiciary realises the value and public support that it would gain.

There is a need to debate such proposals in greater detail.[592] The practice in India and other developing countries is a hangover from the Colonial times when judges had to take rest from either the gruelling heat of the summers or hardships of winter. It has been argued many times that considering the pendency of the backlog of cases before our courts the system of court holidays should be discontinued. However, judges and the court staff would be entitled to their annual leaves like any other service people, but the courts will not close.

Responsiveness of the judicial system can also be made better by learning from the wisdom of senior advocates and legal luminaries even if their views are expressed outside the courtroom. Senior advocates are designated by the Chief Justice and other judges based on their special knowledge and experience.[593] Therefore, they carry

590. https://www.ndtv.com/india-news/coronavirus-lockdown-supreme-court-postpones-summer-vacation-to-function-till-june-19-2229545.

591. https://southasiamonitor.org/index.php/bangladesh/bangladesh-supreme-court-cancels-annual-vacations.

592. https://www.bloombergquint.com/opinion/court-vacations-are-they-justified#:~:text=Courts%20are%20closed%20for%20considerable,state%20they%20are%20located%20in).

593. Khosla, M., & Padmanabhan, A. (2018). The Supreme Court. In Rethinking Public Institutions in India. Oxford University Press.

a tag of recognition from the very institution of the court besides expertise.

One may have also seen the courts appointing several commissions and committees from time to time for various purposes, but more popularly for fact-finding and to ensure probity and proper implementation. However, the time has come for courts to appoint expert commissions and committees to carry out a cost-benefit analysis of the cases where a substantive economic question is involved. This needs to be embedded as a regular practice in addition to empowering commercial courts[594] with the necessary expertise and fast track mandate. Doing so is well within the powers of the Court.

The Code of Civil Procedure gives discretionary powers to Courts to summon any person as a witness, whom the parties to the suit have not brought forward. Additionally, a recent amendment to the Specific Relief Act empowers courts to get expert opinion and secure their attendance for providing evidence. There are similar provisions in the Indian Evidence Act and the Arbitration and Conciliation Act.

It may also be highlighted that the Commercial Courts Act, 2015 was passed to expedite the redressal of commercial disputes in India. The Act emphasised the need to speed up the disposal of high stakes commercial disputes, and thereby enhance investor confidence. The Act defined 'commercial dispute' to include a wide variety of disputes including ordinary transactions of merchants, bankers, financers and traders, to the exploitation of oil and natural gas reserves and even electromagnetic spectrums, amongst others. The Act allows state governments and high courts to designate courts as commercial courts to hear commercial disputes above a certain pecuniary value. Initially, it was determined at ₹1 crore, however with an Amendment in 2018, the value was reduced to ₹3 lakh thus bringing a wide gamut of disputes under the purview.

Furthermore, we have revised all our Bilateral Investment and Promotion Agreements (BIPAs) also known as Bilateral Investment

594. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. https://www.prsindia.org/sites/default/files/Commercial%20courts%20Act%2C%202015.pdf

Treaties (BITs) to remove international arbitration. Instead, commercial courts will have exclusive jurisdiction to deal with commercial disputes. Therefore, foreign investors will have the right to redressal only through such exclusive and limited channels.

But the reality is far from what the Act envisages. A research study by Vidhi Centre for Legal Policy[595] finds that the objective of the Act and the Amendment in 2018 was primarily aimed at improving India's image in the Ease of Doing Business Index and making India a favourable investment destination. However, the procedural reforms as introduced through this Act have not supplemented long-term reforms for improving litigation culture in India.

For instance, section 17 of the Act mandates disclosures of judicial statistics and related data by High Courts to be able to assess the efficiency of courts in disposing off cases. However, the majority of High Courts disregarded this mandatory requirement under the Act. Not only have the courts failed to publish the data, but they have also even failed to collate the data.[596]

Further, not all high courts in the country have designated commercial courts in their respective jurisdictions since the language in the Act does not make it mandatory. Ideally, this should depend on an assessment of prevailing commercial disputes or the likelihood of such disputes occurring in the state.

High Courts have the authority to notify as many commercial courts as deemed necessary for the expeditious disposal of the cases. However, the Vidhi study finds that there is hardly any correlation between the number of courts that have been designated and the number of pending cases in that state.[597]

Moreover, despite the reduction in the pecuniary value of a commercial dispute, there is no notable increase in the number of commercial cases filed. As for the disposal rate at the Commercial Courts across all states, it stood at a low of 10 percent.

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595. https://vidhilegalpolicy.in/research/commercial-courts-act-2015-an-empirical-impact-evaluation/

596. *Ibid.*

597. *Ibid.*

In a nutshell, the report observes that commercial courts have failed to take off. On the contrary pendency rates across most states have increased while resulting in case overload on existing judges. This is somewhat like the implementation of the Consumer Protection Act, 1986 under which the redressal fora took time of about three years for various reasons to be fully implemented throughout the country. Only by 1990 or so did every district have a prescribed district forum and so on.

Part III

In this chapter, we have discussed a range of issues, lessons, judicial principles and solutions for a better and more responsive justice delivery system, particularly focusing on the SC and reflecting on the interface between Law and Economics. We have also suggested that the overall capacity of the system needs to improve for better disposal of cases with a substantive economic dimension. In the last part of this chapter, the attempt is to summarise the discussion in crisp bullet points.

These are discussed below:

Conclusion

- In cases where it is apparent that strict adherence to legal provisions will lead to substantive economic loss, the SC must be guided by the larger public good. Similarly, where the SC feels that it is constrained in doing a well thought out analysis, it must appoint a committee of experts to carry out a cost-benefit analysis, or engage experts who can provide evidence about the possible economic impact of their decisions. In all such matters, it must also consider alternate remedies and a multitude of stakeholders directly and indirectly involved, rather than hurting the larger economy.

  On similar lines, in an op-ed, Mr. Amitabh Kant pointed out that applying an economic impact/cost-benefit analysis must become a fundamental process for judges to arrive at responsible and sustainable judgments. He posits that

institutionalisation of dispute assessment through an independent committee of experts from diverse subject backgrounds assisting the court can help balance its final assessment by offering quantifiable analysis.[598]

- Rather than tightening the noose around the PIL procedure, the SC must seek to become the champion of systemic changes. The systemic changes must include the following, but not limited to them.
- The SC can set an example for the entire judicial system by undertaking ex-ante assessments of enforcement challenges of their decisions, particularly in cases where there is an explicit conflict of interest.
- The SC should not only deliver judgments but may also highlight the key judicial principles that it seeks to uphold. In doing so it should endeavour to maintain consistency in jurisprudence.
- In disputes related to matters of allocation of public property or where the state parts away with the exclusive privilege, the SC must endeavour to highlight the importance of following due processes of transparency and accountability. Such processes must also include giving due weightage to the recommendation of expert bodies.
- The SC must also set unprecedented fines and penalties on officers and politicians involved in outright corruption. This can act as a strong disincentive to the executive not to indulge in theft, malfeasance, or even pork-barrel politics.
- Increase the number of judges and their competencies in the lower judiciary. For a better quality of judges, the law on the National Judicial Appointments Commission with some tweaking should be revived. One fails to understand how it affects the independence of the judiciary.

598. https://timesofindia.indiatimes.com/blogs/toi-edit-page/gdp-and-our-judges-courts-are-intervening-in-economic-policy-matters-in-a-way-thats-costing-india-big/

- End the system of vacations in the courts so that more time is available for adjudication when the number of pending cases continues to rise every year. After all, the taxpayer is paying for full time round the year service i.e. their salaries and perquisites, hence why should s/he be short-changed. All the other branches of the government work round the year subject to listed holidays and personal leaves.
- Split the SC into two: Constitutional Court and Appellate Court, so that better justice is done to all types of cases. The Appellate Court can have dedicated regional and central chambers on commercial and financial matters as in many other countries.
- Consider appointment of economists and finance experts on the appellate side to hear cases involving law and economics, such as competition law, sectoral regulatory laws, contracts, auctions, PPP contracts and the like. Alternatively, such experts should be engaged without hesitation by the Courts, invoking explicit and discretionary powers given under the Specific Relief Act and the Code of Civil Procedure, respectively. This should be over and above the appointment of *amicus curiae* which courts do appoint to help them in adjudicating the case.
- Institutionalise accountability in the judicial system to ensure high standards of legal and jurisprudential analysis and decision making and weed out incompetent and corrupt judges and staff.
- Acknowledge that regulatory expertise is not always a given. It should abolish the practice of post-retirement appointments for both judges and bureaucrats, which breeds corruption and conflict of interest.
- Take steps in recasting the importance and significance of High Courts.
- Adopt case management policy for itself and the subordinate judiciary as a mandatory direction for the timely disposal of cases.

- Do what it must to revive fast-track courts and ensure that commercial courts are also functioning on the fast-track model.
- Furthermore, since commercial courts and commercial benches in High Courts will be dealing with cases straddling law and economics, judges must undergo mandatory basic orientation on microeconomic issues.
- Another way to reduce the burden on the lower courts,[599] is to empower the current executive magistracy (District Magistrates (DM), Additional DMs, Sub-divisional DMs, almost 5,000 in strength) as a second line of defence to expedite the process of judicial disposal of cases. Executive magistrates even today approve preventive detention, impose prohibitory orders and order injunctions in land disputes under CrPC and the Land Revenue Codes. They also exercise quasi-judicial powers under laws such as the Arms Act, Cinematography Act and Disaster Management Act. Clearly, their services can be utilised for disposal of cases under the MV Act and the Negotiable Instruments Act, for example.
- Set up a national research unit, manned with professionals from law, economics, finance and political science fields, tasked with developing an integrated analytical unit in the SC or the Law Commission, which monitors and evaluates cases of SC, HC, Lower Judiciary, Tribunals and even Regulatory Bodies.
- The research unit should publish regular reports highlighting the effectiveness of different judgments on the wider economy and society. In doing so it may highlight key trends, judicial principles, solutions and alternative remedies. Artificial intelligence tools can be appropriately used for this purpose.

599. https://timesofindia.indiatimes.com/blogs/toi-edit-page/the-logjam-need-not-be-a-list-of-administrative-means-for-reducing-indias-painful-judicial-pendency/?source=app&frmapp=yes

- To hold public servants to account, invoke the doctrine of 'public accountability' and 'equal fault'. It is based on the premise that the power in the hands of administrative authorities is a public trust which must be exercised in the best interest of the people.[600] However, it needs to be balanced with reasoned decisions taken by civil servants in good faith.
- To deal with such matters involving corruption, a law similar to the False Claims Act (FCA) in the US could be enacted in India. The FCA provides that any person who knowingly submits false claims to the government is liable for treble the government's damages plus a penalty that is linked to inflation. In addition to allowing the government to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called "qui tam" suits) against those who have defrauded the government. Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery. While India has Whistle Blowers Protection Act, 2014, it is yet to witness effective enforcement.[601] Though there have been attempts to amend and operationalise it, these have not been successful as yet.[602] There is a need to strengthen and immediately operationalise the legislation to protect whistle blowers in India.

The central idea behind putting out these thoughts is to initiate a greater discussion on the justice delivery mechanism in general and the role of the Apex Court in particular. The author feels that improving on one dimension of the court will have a positive and multiplier effect on other dimensions as well.

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600. https://www.researchgate.net/publication/228250952_Doctrine_of_Public_Accountability_in_Light_of_DDA_vs_Skipper_Construction_Co

601. https://www.mondaq.com/india/whistleblowing/1118060/whistle-blowers-protection-act-2014-a-cracked-foundation and https://thewire.in/rights/despite-20-rti-activists-killed-in-bihar-no-expedited-probes-rights-groups-point-to-disturbing-trend

602. https://prsindia.org/billtrack/the-whistle-blowers-protection-amendment-bill-2015 and https://ethicontrol.com/en/blog/whistleblower-law-India-en

In the new economy, where economic matters are not only more complex but also far more frequently placed for adjudication, the courts in India will have to get their act together, sooner than later. This will inspire, motivate, and even push other institutions to play their part.

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