The Meld Model: The Holy Grail of Indian Corporate Jurisprudence

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Is a model of a theory of Indian corporate jurisprudence effable? This paper posits that jurisprudence of Indian corporate law is desirable and possible.

Given the relative nascence of the Companies Act 2013, Insolvency & Bankruptcy Code 2016 and the Competition Act 2002, this paper undergirds the possibility of jurisprudence through modelling– the meld model – which is, jurisprudentially speaking, a synthesis between 'exclusive legal positivism' and 'law and economics'.

The paper instantiates the utility and desirability of the meld model through test suites – i.e. select case laws in the context of company, competition, and insolvency laws. With the help of test suites i.e. precedents from Indian company, insolvency and competition law, this paper iterates a compelling justification for a 'meld model' i.e. a synthesis of exclusive legal positivism and law-and-economics.

It finds that the meld model is a lucidly workable model for Indian corporate jurisprudence.

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I. INTRODUCTION

A popular quip about theory and practice goes on the lines set out below.

Theory: everything is clear, but nothing works;

Practice: everything works, nothing is clear;

And sometimes theory meets practice: nothing works; and nothing is clear.

Regardless of the obvious element of humour above, is it possible to model a theory of Indian corporate jurisprudence which lucidly works? And is such a model effable? This paper answers in the affirmative and posits that jurisprudence of Indian corporate law is desirable, effable and possible.

Interestingly, the triumvirate of Indian corporate laws – company law, competition law and insolvency law – are of relatively recent vintage. Whilst company law stems from the Companies Act of 2013; the insolvency law owes its origin to the Insolvency and Bankruptcy Code of 2016. And although competition law is christened as the Competition Act of 2002, the year of legislation is a misnomer. The conduct-related aspects of the Competition Act are being enforced from 20 May 2009. And merger control provisions were notified (to be enforced) from 1 June 2011.[1] This

[1] Rahul Singh, 'India's Tryst with "the Clayton Act moment" and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics' in D. Daniel Sokol Thomas K. Cheng and Ioannis Lianos, *Competition Law and Development* (Stanford University Press 2013) [250-251].

means that the bulwarks of Indian corporate law are of relatively recent origin in terms of their enforcement jurisprudence.

Given the relative nascence of these enactments, the desirability of jurisprudence can hardly be overemphasized. Even so, this paper undergirds the possibility of jurisprudence through modelling[2] – the meld model. Jurisprudentially, the meld model could be understood as the synthesis of Exclusive Legal Positivism (‘**ELP**’) and Law and Economics. In other words, the meld model ‘melts’ ELP in the context of Indian corporate law and ‘welds’ law-and-economics into it. The paper has a modest aim to establish the utility and desirability of the meld model through test suites – i.e. case laws in the context of company, competition, and insolvency laws.

The remainder of the paper is organized as follows. Section II of the paper lays down the analytical jurisprudential framework proposed to be utilized to assess Indian ‘corporate’ law. Section III applies this analytical toolkit to analyze different aspects of corporate law. Section III (A) applies the analytical framework to a couple of company law decisions and highlights how a more efficient solution would have been arrived at if the court kept the framework in mind in arriving at its decision. Section III (B) applies the analytical framework to leading precedents in competition law and insolvency law. Finally, Section IV concludes the paper.

II. Analytical Framework

Before discussing the manner in which the proposed framework can be utilized to assess corporate disputes in India, it is essential to give a brief overview of its constituents. Accordingly, this section summarizes the key features of ELP and law-and-economics. And then, explains its utility for Indian corporate law.

A. Exclusive Legal Positivism (ELP)

The ELP theory is based upon the sources thesis: legal validity is exhausted by reference to the conventional sources of law i.e. all law is source-based, and anything which is not source-based is not law.[3] Raz further claims that nothing is part of a legal system unless either it is a rule of recognition of the system, or the courts ought to recognize and apply it. To be a rule of recognition is sufficient to be counted as a law of the system, but to be a law that the courts are obliged to apply is not. When courts apply laws of other countries these do not become part of the legal system.[4]

For Exclusive Legal Positivists, the law on a question is settled when legally binding sources provide its solution. According to Raz, in such situations, judges are merely supposed to apply the

[2] Thomas J Miceli, ‘Economic Models of Law’, in Francesco Parisi (ed) *The Oxford Handbook of Law and Economics Volume 1: Methodology and Concepts* (Oxford University Press, 2018).
[3] Andrei Marmor, ‘Exclusive Legal Positivism’ in JL Coleman, KE Himma, and SE Shapiro (eds), The Oxford Handbook of Jurisprudence and Philosophy of Law (Oxford University Press, 2004) 11.
[4] Joseph Raz, ‘The Identity of Legal Systems’ (1971) 59 California Law Review 795, 811.

law, and since it is source-based, its application involves technical, and legal skills in reasoning from those sources and does not call for moral acumen.[5] This conception of legal authority entails the sources thesis (or provenance), since it requires that the law, *qua* an authoritative resolution, be identifiable on its own terms, that is, without having to rely on those same considerations which the law is there to settle.[6] Therefore, a norm is legally valid/ authoritative only if its validity does not derive from moral or other evaluative considerations about what it is there to settle.[7]

B. Law-and-economics

The paper considers two primary law and economics theories. First, Ronald Coase's theory on transaction costs. And second, Richard Posner's focus on wealth maximization using Kaldor-Hicks efficiency. Both are discussed below.

Ronald Coase asserts that regardless of how resources were initially allocated, they would always end up being allocated efficiently in a Pareto optimal outcome, if there were insignificant/no transaction costs involved.[8] Different economists have defined the term 'transaction cost' itself in varied ways, and legal scholars and debate continue how broadly or narrowly the term must be defined. It is often seen as costs which a bargainer would have to incur in order to identify a trading partner, negotiate an agreement, exclude free loaders,[9] and enforce an agreement.[10] In the context of strategizing a plan of action for a company, transaction costs would include the cost of planning, deciding, changing plans, resolving disputes, and after-sales, etc. In the context of a legal system, transaction costs would entail the cost of resources of the judiciary, the cost of investments in terms of time and effort for various actors in the legal system such as lawmakers, judges, or lawyers.

Given that there are barely any allocations without transaction costs, the primary resource allocation aim is to reach a situation as close as possible, and as cheaply as possible, to the allocation which would exist if bargaining in the market was actually costless.[11] In any legal system, this allocation can be achieved either by letting the market function freely, or through intervention of the Government. Calabresi identifies another form of costs to be considered while making this decision by stating:

> "It is precisely the province of good government to make guesses as to what laws are likely to be worth their costs. Hopefully it will use what empirical information is available and seek to

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[5] Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 49.
[6] Joseph Raz, *Ethics in Public Domain* (Oxford University Press, 1994).
[7] Andrei Marmor (n 4) 10.
[8] Ronald Coase, 'The Problem of Social Cost' (1960) 3 J. Law. & Econ 1.
[9] Guido Calabresi, 'Transaction Costs, Resource Allocation, and Liability Rules-A Comment', (1968) 11 J.L. & Econ. 67, 68.
[10] Pierre Schlag, 'The Problem of Transaction Costs' (1989) 62 S. CAL. L. REV. 1661, 1673-75.
[11] Guido Calabresi (n 10) 67, 69.

> develop empirical information which is not currently available (how much information is worth its costs is also a question, however)."[12]

Richard Posner, on the other hand, theorizes that resources must lie in the hands of those who value them the most to achieve wealth maximization. He relies on the Kaldor Hicks efficiency criterion which states that a reallocation of resources would be an improvement and can be justified if the winners in the same could potentially compensate the losers.[13] The question of whether the Kaldor Hicks efficiency criterion must be used in a specific situation, as per Posner, must be a pragmatic decision based on whether using the criterion would serve the goals we have.[14]

C. Baedeker to the Meld Model's Analytical Toolkit/Framework

The analytical toolkit of the meld model has both positive (descriptive) and normative (ie prescriptive) limbs.

The summary of the law and economics approach in section II(B) above does not supplant statutes. Instead, it underpins the importance of statutory enactments. Such enactments are theorized to constitute government intervention to address market inefficiencies and arrive at an efficient outcome. As per this understanding, it becomes essential for a court of law to adopt an ELP perspective while interpreting such an instrument. This is because when a court does not rely on ELP in its judgments, that represents a reallocation of resources different from what the statute envisaged. If the assessment by the government while enacting any statutory instrument is assumed to be correct, this would imply that at the stage of interpretation, the court has arrived at an inefficient outcome, and thereby not only rendering the costs incurred by the government in enacting the instrument as futile but also introducing additional costs for entities governed by such instrument. Law-and-economics provides an interesting vantage point to analyze the consequences of such a departure from the source thesis.

The steps set out below presage the discussion in section III (test suites) of the paper. (Note that the steps are in lexical priority. This means that in those contexts where step 3 conflicts with step 1 (or 2), step # 1 will trump).

Step # 1: Taking the text of the statutes seriously[15] (As delineated through case laws in test suites and explained in step #2 below, this does not necessarily mean being confined to only 'words' of the statute.)

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[12] ibid 67, 70.

[13] Richard Posner, 'Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers', (2000) 29 The Journal of Legal Studies 1153, 1154.

[14] ibid 1153, 1156.

[15] Wouldn't all schools of jurisprudence take the text of the statute seriously? Wouldn't this be a basic minimum, a common ground? Whilst attractive, two polar opposites of the schools are easy instances to negate this notion: (a) natural law theory (which doesn't necessarily rely upon statutes but 'morality') and critical legal studies (which questions the very idea of a 'rule of law'). Note that Ronald Dworkin's idea of 'principles' as instantiated in *Riggs v Parmer* stems *a priori* from the text of the statute. Further, an inclusive legal positivist such as HLA Hart finds a role

Step # 2: To amplify, this means two things:

(a) rule in *Taylor v Taylor* case[16] ought to be taken seriously; and

(b) Lon Fuller's advice ought to be taken seriously ('Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, paragraph, or a whole page or more text.'[17])

Step # 3: Taking law-and-economics based consequences (such as Kaldor-Hicks efficiency, transaction costs) seriously.

An analysis of corporate disputes ought to involve the steps mentioned above. While (descriptively or positively speaking), the court must adopt an ELP lens to the facts of the case and apply the law as is on the facts of the case, any consequence of the application of the ELP lens ought to undergo a law-and-economics assessment. The law-and-economics limb of the assessment will undergird a (prescriptive or normative) reading to underscore efficiency-based outcomes in light of goals (e.g. Kaldor-Hicks efficiency, transaction cost analysis) envisioned by the statute.

The utility of the meld model's analytical toolkit or framework is highlighted with the help of test suites in section III below.

III. TEST SUITES

This section establishes the utility and desirability of the meld model through test suites – i.e. case laws in the context of company, competition, and insolvency laws. Section III (A) applies the meld model to a couple of company law decisions and highlights how a more efficient solution would have been arrived at if the court kept the framework in mind in arriving at its decision. Section III (B) uses the analytical framework to leading precedents in competition law and insolvency law.

A. The Companies Act 2013

At first glance, the following case involving a typical *respondeat superior* based interpretation of a standard template on corporate directors and officials' liability may appear mundane. Yet this Supreme Court of India's precedent may be considered 'leading': the author Justice Ashok

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for the judges to 'rule' albeit only 'at the fringe'. ('The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation look tidier than it really is. Here, at the fringe of these fundamental things, we should welcome the rule-sceptic, as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law') HLA Hart, *The Concept of Law* (OUP 1961) [154].

[16] Where a statute states that a particular act is to be done in a particular manner it must be done in that manner or not at all.

[17] Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 71 Harvard Law Review (1958) 630 [663].

Bhushan has retired from the Supreme Court of India and been appointed as a chair of the National Company Law Appellate Tribunal (NCLAT) – the appeal tribunal responsible for hearing appeals from the Competition Act 2002, Companies Act 2013 and the IBC 2016. He will serve a five-year, non-renewable term in this office. This precedent captioned as '*ignorantia juris excusat'* due to its ignorance of a clause in the statute probably foreshadows what NCLAT jurisprudence has in store for next half-a-decade.

1. *Ignorantia juris excusat:* Shailender Swarup v Deputy Director, Enforcement Directorate[18]

Shailender Swarup, the appellant, was one of the directors of Modi Xerox Ltd. The company had allegedly not submitted the requisite evidence pertaining to the import of goods into India. Pursuant to this, the company and its directors had received a show cause notice from the Enforcement Directorate ('**ED**') as contemplated under section 51 of the Foreign Exchange Regulation Act ('**FERA**'), as to why adjudication proceedings should not be commenced against them. The ED decided to hold the proceedings pursuant to its perusal of the company's reply. The proceedings concluded in holding the company and the directors, including the appellant, in contravention of S. 8(3) and 8(4) of the FERA, which imposes various restrictions on dealing with foreign exchange, r/w Section 68 of the Companies Act, which deals with offences against companies.

The appellant pleaded that he was only a part-time non-executive director of the company, and therefore would not fall under the definition of a person responsible for the affairs of the company under S. 68 of the FERA. The appellant's argument essentially draws from the fact that a part-time director of a non-executive nature could not be involved in the regular functioning of the company, which is why, he ought not be considered responsible for the company's actions. The Adjudicating Authority, the Appellate Tribunal for Foreign Exchange, as well as the Delhi High Court rejected this plea; hence the matter was appealed before the SC.

(a) Analysis

The case revolved around an alleged infringement of section 68 of FERA, which reads as follows:

> "68. (1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.
>
> (2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by

[18] Criminal Appeal No. 2463 of 2014 Supreme Court of India 27 July 2020 ["***Shailendra Swarup***"].

> a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.
>
> Explanation. – For the purposes of this section –
>
> (i) "company" means anybody corporate and includes a firm or other association of individuals; and
>
> (ii) "director", in relation to a firm, means a partner in the firm."

A bare reading of the provision shows that it has two parts. The first 'inculpatory responsibility' clause holds a person liable for the offence if that person was "*in charge of and was responsible to*" the company for the conduct of business at the time of the contravention. The *proviso* has an 'exculpatory *scienter* test', which would allow for a person to escape liability if he proves that the contravention took place without his knowledge, or that he exercised all due diligence to prevent such contravention.

The second clause, which starts with a non-obstante phrase, deems it an offence on part of the director, manager, secretary, or other officer of the company if "*it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect*" on the part of that person.

Surprisingly, the Supreme Court has restricted its analysis to only the first clause.[19] The Court held that since the appellant was a non-executive part-time director, he was not 'in charge of' and 'responsible to' the company for the conduct of business. The Court agreed with the appellant's argument that a part-time non-executive director cannot be expected to know about the day-to-day business of the company, and thus might not have been aware of the contravention. Consequently, the Court allowed the appeal, and the appellant was acquitted.

While the reasoning on the first clause of the provision may seem sound, the Court completely ignored the second clause of Sec. 68 of FERA in this case. This is in spite of the fact that the second clause begins with a non-obstante phrase, which means that nothing contained in the first clause should matter for analysis under the second clause. The second clause provides for a different threshold of analysis, and it is quite possible that a particular instance may fulfill the prerequisites under clause two without fulfilling those of clause one. In light of this, it becomes an interesting case of acquittal aided by the Court's ambivalence towards a complete reading of the charging section.

Viewed from an ELP standpoint, there is no scope to ignore a relevant provision when the Court pronounces judgment of an issue raised before it. Here the court failed to appreciate the black letter of the law. Therefore, without regard for the final conclusion of the court, an analysis

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[19] ibid [38].

using ELP would require the court to also consider the matter under the second clause of S. 68 of FERA. Additionally, since an entire provision has been ignored, from the vantage point of Law and Economics, this would cause transaction costs in society. Particularly, due to this judgment, there are two kinds of transaction costs that would be incurred, as explained below.

First, future litigation will have to be carried out on the same subject due to uncertainty about the legal position which takes away the court, lawyers', and parties' resources to focus on an issue which has already been agitated in a forum.

Second, ignoring a provision renders the legal position of a particular question ambiguous. This manifests itself in two types of costs:

(i) A reasonably clear statute would have to be re-interpreted again through more judgments on this issue. For example, the Supreme Court needs to once again constitute a bench and take away its limited resources to focus on the issue of whether S. 68(2) of the FERA or other similar provisions would apply, and what would be the standard of conduct required to fasten liability on a director or officer of the company.

(ii) On a macro level, this may lead to uncertainty about the conduct expected of a director or an employee of a company when dealing with the company's affairs. The statute provides that negligence or consent or connivance would be sufficient and even goes so far as to make employees liable, however, the Supreme Court has routinely ignored this in the past. Therefore, for an employee entering into transactions on behalf of the company, this creates uncertainty about his potential liability and may create transaction costs.

(b) Key Takeaways

To be sure, the analysis above should not be understood to instantiate any outcome-based preference. In other words, the analysis is not meant to suggest that the second clause would not have allowed for such acquittal. On the contrary, the reasoning is methodology-based.

ELP provides us with a methodology that requires us to apply law as per the source. This means that there is no scope for ignoring a particular provision. The synthesis of Law and Economics to ELP, provides us with another vantage point, which is to not only analyze the law, but also its potential consequences.

Ultimately, when law is viewed as a regulator of human conduct, Law and Economics helps provide an invaluable perspective to understanding the transactions that occur on a daily basis and to minimize the costs incurred to create these transactions and make them more efficient. An application of the vantage points of ELP and Law and Economics in *Shailender Swarup* provides for both a descriptive and normative limb of an analytical framework.

2. ***Messiah complex:*** **Union of India v Delhi Gymkhana Club**[20]

The Companies Act, 2013 brought with it a specialized body – the National Company Law Tribunal ('**NCLT**') – to adjudicate on matters relating to company laws in India. Notably, the NCLT comprises of judicial members from a judicial background and technical members with more general commercial background. While analyzing corporate law framework from a synthesis of law & economics and ELP, it is imperative to examine the nature of decision-making at the forum where company law cases commence. In light of this objective, it would be apt to analyze the order in the *Delhi Gymkhana* case to assess whether the NCLT's decisions are in compliance with this theoretical framework. In particular, this NCLT precedent highlights a misplaced sense of redistribution which guides the judgment. This misplaced sense of redistribution doesn't have statutory basis. And is animated by 'messiah complex' ('saviour complex).

In June, 2020, the acting president B.S.V. Prakash Kumar of the principal bench of the NCLT, passed an interim order in the *Delhi Gymkhana* case. The order was passed under section 241(2) of the Companies Act in a case dealing with the oppression provisions of the Companies Act, 2013. The Union of India, through the Ministry of Corporate Affairs, initiated the company petition against Delhi Gymkhana Club Limited, alleging that the affairs of the club are being conducted in a manner prejudicial to public interest. The government sought to remove the incumbent directors of the club and sought the permission for the Central Government to nominate 15 persons as directors of the club to manage its affairs.

Delhi Gymkhana Club is a hundred-year-old body corporate registered under the then Companies Act in 1913. The contention in the petition filed against the club was that the club is not granting memberships in accordance with its Articles and Memorandum of Association, and is restricting its membership to 'privileged people'. Because the club is situated on a land leased to it by the colonial government at a nominal charge, the petition claimed that the granting of memberships a matter concerning the public at large. It was alleged that the memberships were granted to certain individuals, dependents of green card holders, and others at the expense of other waitlisted applicants who had paid the relevant fees and were kept waiting for the membership. This became the underlying basis for the allegations of mismanagement and that the club's affairs being conducted prejudicial to the public interest. The NCLT held that the affairs of the club were against public interest and found a *prima facie* case of oppression and mismanagement.

(a) Analysis

There are two levels on which this judgment has to be looked at. First is the application of constitutional law principles to a private law matter, and second is the reasoning of the NCLT to give an interim holding against the Delhi Gymkhana Club.

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[20] CP No. 71/2020 (National Company Law Tribunal, Principal Bench, New Delhi) of 26 June 2020 ["**Delhi Gymkhana**"].

On the first issue, the order considered the issue from a public interest perspective in a purely commercial law matter. It invoked Article 14 of the Constitution of India in a company law matter to hold that as the club is operating from a land leased by the government, the constitutional provisions of equality must be extended to the Delhi Gymkhana club. The order reeked of similar basis of reasoning to make a case of prejudice to public interest.

On a preliminary analysis, it is unclear, unwarranted, and unreasonable for the NCLT to rely upon the constitutional provision of Article 14 in a company law case (not concerning the state). This is because of two reasons. First, the NCLT is not conferred the powers under the Companies Act, 2013 to apply or interpret the Constitution in any manner. Second, in any event, the fundamental rights provisions of the Constitution of India only apply to 'state' as defined under Article 12 and not to limited companies. Thus, the NCLT is not merely disregarding a legislation but indirectly and to a certain extent, the Constitution of India itself.

With this we turn to the second issue of the process of reasoning employed by the NCLT. The order decides the issue in absolute disregard of the statute, specifically section 241 of the Companies Act 2013, as well as the precedents on oppression and mismanagement. Precedents mentioned in the order only get a superficial analysis, if any. The order has failed to provide or build on to previous interpretations of the statute, in any manner. Admittedly, there is no Supreme Court precedent interpreting 'public interest' under section 241, however, the order does not deal with other cases on section 241 either, and fails to assess the correct objective of section 241 petitions. In doing so, the order militates against the the doctrine of *stare decisis*.

Additionally, it is discernible that the NCLT's underlying concern was to ensure that memberships are granted in a fair manner and without prejudice to certain individuals. By using section 241 as a means to resolve the problem of distribution, not only does the NCLT disregard the accepted principle of common law that a company has the permission to function autonomously within the bounds of the law, but it also disregards the objective of section 241.

When analyzing the order, in light of the above issues, from the perspective of ELP, it is clear that the basis of the NCLT's reasoning is not grounded in any source of law. Rather, the order explicitly moves away from the statute (referred to as 'lawbook' in ¶32 of the order) and provides an absurd and untenably wide interpretation to section 241. The case is a prime example of where the legislation has passed a statute, however, the adjudicators comply with neither the text of the statute, nor the past decisions on the issue. The holy grail of 'public interest' under section 241 and the absurd interpretation provided to it by the NCLT is bound to increase transactional costs. This is because the uncertainty of the application of law creates confusion and doubt in the minds of the subjects of the law as the actors in the corporate world become unsure of how the NCLT will deal with similar cases in the future. Orders such as these lead to uncertain situations where commercial parties are confused about the way they should conduct themselves. The transaction costs resulting from the order cannot be compensated from a single victory for the government in the present case.

(b) *Key Takeaways*

It is essential for a legal system to ensure that the forums of first instance, where the highest number of cases is adjudicated, are equally, if not more than the higher courts, aligned with the theories of ELP and law & economics to adjudicate in a reasoned, and predictable manner. Although not prescriptive, the analysis of the NCLT's adjudication in *Delhi Gymkhana* showcases the utter disregard of the statute and precedents (sources of law). The result is undoubtedly an undesirable increase in transaction costs for those subjected to the law.

B. (The Competition Act 2002) *Settled versus right dichotomy* in Excel Crop Care v. Competition Commission of India[21]

The Supreme Court of India in *Excel Crop Care* upheld the Competition Appellate Tribunal's ('**COMPAT**') decision of awarding penalty based on 'relevant turnover'. In the instant case, the Competition Commission imposed a penalty of 9% on the average turnover of the companies found to be operating in contravention of section 3 of the Competition Act. On appeal, COMPAT deemed it fit to introduce the concept of relevant turnover and limited the penalty to 9% of the relevant turnover. This means that for a company engaged in different areas of production, relevant turnover refers to the turnover from the product that forms the subject matter of the contravention. While coming to this decision, the court emphasized that a tribunal ought to be governed by the doctrine of proportionality in imposing penalties and that penalizing statutory violators on their entire turnover would not be a penalty proportional to the contravention.[22] It felt that adopting the criterion of 'relevant turnover' for the purposes of imposition of penalty would be more in tune with the ethos of the Act and legal principles which surround the matters pertaining to imposition of penalties.[23]

(a) *Analysis*

The Supreme Court's interpretation has little textual basis. Instead, it goes against the letter of law. To understand whether the scheme of the Act provides any basis for relevant turnover, we need to look at Section 27(b) which authorizes the Competition Commission to impose penalties when there is a contravention of Section 3 or 4 of the Act.[24] The statute itself states in clear terms that the penalty is to be calculated in relation to the 'turnover' of the company. The Act does not mention that the proportionality of penalty is a relevant consideration for imposing penalty. A plain reading of the section makes it obvious that the provision imposes penalty on the entire turnover rather than a part of it. Notably, the Court makes a passing reference that the usage of the term relevant market may point towards a penal provision that is catered towards the consumer welfare taken away by the goods that form the subject matter of that relevant market.[25] However,

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[21] (2017) 8 SCC 47 ["**Excel Crop Care**"].
[22] ibid [92].
[23] ibid [83].
[24] The Competition Act 2002, s 27.
[25] Excel Corp Care (SC) (n 22) [21].

this argument does not hold much merit in a situation where section 27(b) specifically refers to the entire turnover of the offending company.

To justify their decision of taking into consideration only relevant turnover, the COMPAT referred to the European Union (‘**EU**’) and Office of Fair Trading (‘**OFT**’) guidelines, holding that the guidelines were ‘undoubtedly relevant’.[26] The court also relied on a judgment of the Appeal Court of South Africa, which made a similar insertion.[27] However, as highlighted earlier, from an ELP perspective, application of laws of other jurisdictions by courts does not make such laws a part of the domestic legal system.[28] According to this understanding, the sources which have been relied upon by the SC are not sources of ‘law’ in India. This shows that instead of basing their decision in the law, they have taken into account extra-legal considerations to come to this conclusion.

Moreover, the Supreme Court’s reasoning is not in line with Raz’s sources thesis and prevents the statute from being an ‘identifiable authoritative directive’. This is because while deciding, the Court seems to derive the validity of the rule from the evaluative considerations it is there to settle in the first place. The statute, i.e. the Competition Act here, exists to decide what must be the competition rules in India including the rules on penalty. Therefore, as per Raz’s thesis, the Competition Act itself cannot be interpreted using reasoning based on what is logical and what is absurd since it exists to do that very thing. By using other evaluative considerations like ‘proportionality’ in penalty, the court has tried to supplement their logic over that of the lawmakers, who have used these penalties as a deterrent for future behavior. Doing this will prevent the Competition Act from claiming the legitimate authority it needs to ensure compliance. If the Court is to prescribe the reasons outside the statute on subject matters the statute is present to cover, it is a violation of ELP.

Undoubtedly, proportional penalty as contemplated by the Court might be considered as a just and equitable punishment by many. However, going against the letter of the law in achieving this end by providing inadequate reasoning and not observing the implications of such a decision is of such a decision goes against the principles of ELP. This brings us to the second limb of our framework to look at law and economics to assess the effect of such a deviation from ELP.

In the present case, the Competition Act 2002 can be seen as the legislature’s conclusion that the creation of legal rules in the anti-trust domain was the best route to the ideal resource allocation. Furthermore, Section 27(b) of the Competition Act 2002 is a liability rule[29] which represented the formula adopted by the Parliament to determine the penalty. Such formula would have been determined through research, debate and consultation before it was finally written into law.

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[26] Excel Crop Care Limited v. Competition Commission of India, 2013 SCC OnLine Comp AT 149 [62].
[27] ibid [83].
[28] Joseph Raz (n 5)795, 811.
[29] Guido Calaresi and Alexander Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’, (1985) 85 Harvard L. Rev., 1089, 1092.

In other words, the Government incurred two kinds of transaction costs while determining the formula under Section 27(b).

First, in *Excel Crop Care*, by reading the word 'relevant' into Section 27(b), the Supreme Court changes this formula entirely, thus, rendering the Government's past efforts futile while also jeopardizing its future prospects of amending the provision based on new information on its allocative outcomes. This would lead to future litigation on the same subject due to uncertainty on the legal position created by the Court. By basing its reasoning on 'proportionality' the Court also ignores policy goals other than allocative efficiency which the Government based the provision on, for instance, a deterrent effect on bargainers of such transactions.

Secondly, ignoring the statute results in making jurisprudence on a particular law ambiguous. This manifests itself in two types of costs.

(i) A reasonably clear statute will have to be reimagined again in such a scenario through more judgments on that statute. The ignorance of the statute creates a need to clarify and 'create' the law in that area. This is because the new concept of 'relevant turnover' will lead to questions about what method to use to determine what forms the 'relevant' portion of the total turnover. These answers may differ in different sectors and will often be subject to facts and circumstances. This leads to additional burden on the court to make an assessment it would not have had to if the statute had been read as is. Thus, the court now will have to incur costs to gather empirical information, parts of which had already perhaps been used by the legislature to create the law in the first place. Additionally, any concrete clarification of the concept of relevant turnover may take several years as it will need a certain volume of cases for the Supreme Court to completely land on the suitable position of law. Thus, the overall development of jurisprudence will be slowed down, uncertain, and will need a degree of creation of law by the judges which may not be in line with their constitutional role.

(ii) This ambiguity further leads to another form of transaction cost, i.e., costs to the parties to the suit, the lawyer, and other individuals who may have to approach the courts in this regard. The ambiguity in jurisprudence will lead to uncertainty about what the law actually is and how statutes or precedents will be used. For example, precedents on purposive interpretation were used in *Excel Crop Care* to justify the addition of 'relevant' as being more in line with the ethos of the act. Thus, a lawyer will incur higher informational costs in an attempt to predict the leanings of the court towards certain precedents in order to decide which arguments to make. The parties to the suits will also have to incur additional valuation and negotiation costs for their transactions which may be affected by Section 27(b).

Hence, it can be concluded that deviating from the sources thesis under ELP leads to myriad transaction costs along with the risk of misallocation, and of not achieving the desired policy goals which would not have arisen in the counterfactual scenario. Particularly, qualifying the penalty to be restricted only to the relevant turnover may reduce the amount paid by the party, especially

when it is a conglomerate involved in diverse sectors. It may also reduce the deterrent effect that a penalty on the total turnover may have had. Both of these consequences are a move away from the text of Section 27(b) and represent a reallocation of resources. If here, the court were to use the Kaldor-Hicks criterion, it can be seen that the ruling reduces the cost incurred by a party which violated Section 3 of the Competition Act and entered into an agreement which caused appreciable adverse effect on competition within India – such a party is thus a 'winner' in Posner's language. Yet, there does not seem to be any kind of compensation to the losers from this action, including the consumers, enterprises at different levels of the supply chain who may have been impacted, employees etc. Perhaps, this can enable us to conclude that stakeholders who were considered while enacting the Competition Act have not received the benefit that the act aimed to provide them. Thus, despite the Supreme Court's justification of this move from the statute as being more just and equitable, there is no certainty as to whether it leads to wealth maximization in the sense that it was actually desired by the statute.

(b) Key Takeaways

It must again be emphasized that the above analysis is not to state that the introduction of the term 'relevant' has no merit at all. It is theoretically possible that a more efficient allocation of resources might be arrived at after adopting this approach. This, however, is not proven to be the case by the decision in *Excel Crop Care*, which it must have done while deviating from the clear statutory language. The critique here is more structural in nature in that the court has an obligation to merely interpret the law that the legislature has enacted subsequent to various measures such as consultations and balancing of interests. In the absence of such compliance with the language of the law, the burden to be placed on the court in demonstrating the necessity of the deviation is required to be high. This procedural certainty will possibly aid in ensuring both the confidence of the stakeholders in the legitimacy of the application of the intervention by a court of law, as well as the desired certainty and predictability,

C. (The Insolvency and Bankruptcy Code 2016) *Manifest arbitrariness* in Essar Steel India Limited v Satish Kumar Gupta[30]

The *Essar Steel* case decided a number of questions that arose in the context of the Corporate Insolvency Resolution Process ('**CIRP**') under the Insolvency and Bankruptcy Code, 2016 ('IBC'). The appeal before the Supreme Court was against the decision of the NCLAT in the matter of the CIRP of Essar Steel, and encompassed questions of the scope of judicial review over the decision of the Committee of Creditors ('**CoC**'), as well as the constitutionality of the amendments passed by the legislature to invalidate some portions of the NCLAT order.

On the question of the determination of the amount to be paid to the different classes of creditors in the CIRP, the Supreme Court deferred to the commercial wisdom of the CoC in

[30] 2020 8 SCC 531 ["**Essar Steel**"].

deciding these matters.[31] In order to arrive at this conclusion, it relied on 'sources' of law such as the IBC (statute), the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (statutory instrument/ delegated legislation) and, to an extent, judicial decisions. As per the court, in the IBC itself, section 31 read with 30(2) [NCLT], and section 32 read with section 61(3) [NCLAT], provide limited grounds for judicial review of the decision of the CoC.[32] If these conditions are met, the adjudicating/ appellate authority must approve the resolution plan. Although Regulation 38, which fleshes out section 30(4), mentions that operational creditors must be given priority over financial creditors, the court held that this does not mean that operational creditors must be paid in proportion to or on par with financial creditors.[33] It is sufficient if the CoC demonstrates that it has accounted for the interests of all stakeholders in light of the aim of maximizing the value of the assets of the corporate debtor. Thus, relying on these posited sources of law, the court held that the commercial wisdom of the CoC must be deferred to.

Similarly, in deciding questions such as the role of the resolution professional,[34] the constitution of sub-committees,[35] etc., the court relied on the scheme of the IBC, the IBBI Regulations, and judicial precedent. Therefore, here too, there was a reliance on the statute, statutory instruments, and judicial precedents. The court, however, deviated from the statute in its interpretation of the time limit of 330 days for the completion of the CIRP under section 12,[36] holding it to be merely directory in nature despite the statute using the term 'mandatorily'. It noted that if sufficient reason is shown to the satisfaction of the court that it is in the interest of all stakeholders that the entity remains a going concern, and that the delay (which is not the fault of the applicants) does not exceed 330 days by a significant period, the court may relax the time limit and provide an extension. Noting that striking down the entire provision would be an extreme step, the court arrived at a compromise, in that the provision would be directory. Therefore, while *ordinarily* the time limit must be followed (in light of past experiences with delay in the context of Sick Industrial Companies Act, 1985), the court would have the discretion to relax the same in "exceptional cases" so as not to force liquidation.

(a) Analysis

In order to strike down the word 'mandatorily', the court primarily relied on the doctrine of 'manifest arbitrariness'.[37] Neither the meaning of the doctrine nor its source has been adequately elucidated in the judgment. The court merely held that a mandatory time limit would excessively interfere with the litigant's "fundamental right to non-arbitrary treatment under article 14", as delays in legal proceedings are not the litigant's fault. It also reasoned that the fundamental right

[31] ibid [52].
[32] ibid [62].
[33] ibid [88].
[34] ibid [39].
[35] ibid [99].
[36] Insolvency and Bankruptcy Code 2016, s 12.
[37] Essar Steel (n 31) [127].

to carry on business under article 19(1)(g) would also be restricted unreasonably by the mandatory time limit.

In respect of such an employment of the doctrine of manifest arbitrariness to strike down as unconstitutional the word 'mandatorily' in the statute, ELP, especially the version embodied by Joseph Raz's 'sources thesis',[38] raises important questions. The doctrine of manifest arbitrariness is not posited in any conventionally identified 'source' of law. It is not part of the IBC or any of the delegated legislations under the IBC. It also does not find express mention in the text of the Constitution, neither in terms of fundamental rights nor in respect of legislative competence. An argument could be made that *Essar Steel*'s reading of the manifest arbitrariness doctrine into Article 14 is rooted in precedent. Indeed, it had been employed in *Shayara Bano* v *UoI* ('**Shayara Bano**'),[39] which had subsequently been cited for the same by judgments such as *Navtej Singh Johar* v *UoI*.[40] However, in a judgment with multiple opinions, the ratio, as per the 'narrowest grounds' doctrine, is the implicit consensus/ lowest common denominator between the various opinions addressing the facts of the instant case, rather than broader generalizations.[41] This would also ensure predictability. Thus, as per this doctrine, the manifest arbitrariness test in *Shayara Bano* was not its ratio. Therefore, subsequent cases which have relied on *Shayara Bano* for this point would also be infirm in this regard. Therefore, there is not much support by way of judicial precedents serving as sources declaring this doctrine as law.

If the doctrine had been prescribed by a conventionally identified source of law, it would have been a 'power-conferring' legal norm which is valid in the eyes of ELP.[42] This would mean that the law is directing the court, and giving it the 'directed' power, to use moral considerations in its decision-making.[43] However, in this case, the court is making the moral standard of 'manifest arbitrariness' a *part* of the law itself.

Therefore, as per ELP, in light of this doctrine not originating in posited sources of law, it is not 'law'. This in turn implies that *Essar Steel* was perhaps not decided by the Supreme Court in accordance with existing law. Instead of interpreting law, the court here has created law. It has, despite the clear wording of the statute, imported extraneous (moral/ political) considerations to decide what the statutory provision *should* be. It has also thus derived the validity of the law from those moral considerations or questions which the statute exists to settle in the first place, when, instead, the law is something which possesses independent, *de facto* authority. A direct consequence of this is that the public may well attempt to excuse their non-compliance with the law by challenging the moral considerations which the court has made part of, and used to justify,

[38] Joseph Raz (n 7) 211.
[39] (2017) 9 SCC 1 [101].
[40] (2018) 10 SCC [253].
[41] R Cross and JW Harris, 'Precedent in English Law' (4th edn, 1992) 40; MA Thurmon, 'When the Court Divides: Reconsidering the Value of Supreme Court Plurality Decisions' (1992) 42 Duke Law Journal 419, 428.
[42] Andrei Marmor (n 4)10.
[43] ibid 11.

the law. Hence, it becomes important to turn to law and economics theory to analyze the implications of this departure from ELP.

The three costs similar to that highlighted for the *Excel Crop Care* case arise over here.

First of all, the use of the term 'mandatory' in Section 12 of the IBC 2016 was a deliberate resource allocation model adopted by the government after research and consultation. The costs incurred in arriving at this model are rendered futile by reading the provision down to only a directory provision. It also sidesteps the possible policy goals such as the speedy completion of the CIRP process, and raises costs of future possibilities of reaffirming this position due to the uncertainty created on the legal position by the Court.

Secondly, the growth and development of jurisprudence is impinged due to the ambiguity introduced by making the 330 days requirement as directory. This ambiguity manifests itself in two kinds of transaction costs.

(i) This would now require several clarifications in its application as against the earlier clear model proposed in the legislation. Instead of plainly applying the 330 days timeline, the Court would now often have to determine whether the timeline could be deviated from in a given situation. Based on its own ruling,[44] the Court would have to clarify two factors. First, it will need to elucidate the meaning of the term 'short period' up to which a delay would be admissible. Second, in each case, the court will need to assess whether it is in the interests of all stakeholders to keep the corporate debtor functioning or whether it was a circumstance where not following the timeline could lead to any form of negative impact. This will not only lead to a lag of several years before any sense of certainty is attained, but also impart a role of creating the law to judges, a role they are not constitutionally envisioned to perform.

(ii) The transaction costs for all stakeholders in a CIRP process increases significantly due to this newly introduced ambiguity. For example, the established precedents on purposive interpretation were arguably ignored in *Essar Steel* by reading down the mandatory timeline which had been added as a lesson learnt from the former SICA regime on insolvency. This leads to a scenario where stakeholders can never be sure of how the courts will interpret and adjudicate their disputes. This raises the informational costs for a lawyer in determining how courts will treat precedents. In CIRP cases, the parties may now have to incur higher legal fees due to the possibility of the process stretching for longer than 330-days and then a possible subsequent challenge to the same in Court where it decides whether such delay was justified. Further, the valuation and negotiation costs will also increase for transactions affected by the ruling in *Essar Steel*.

The decision in *Essar Steel* militates against Kaldor-Hicks efficiency. The move from a 'mandatory' timeline to a directory timeline is justified by using the principle that a procedural delay must not cause an individual any harm. However, the court does not assess whether moving

[44] Essar Steel (n 31) [79].

to a directory timeline by ignoring the explicit intention of the legislature which was borne out of the experience under the SICA regime[45] may actually lead to a worse efficiency outcome and might go against the goals of the statute. It does not analyze whether the gains of the potential winners – corporate debtors who do not have to liquidate even when the CIRP extends beyond 330 days[46] – can compensate for the losers including corporate debtors who may be faced with a delayed CIRP when time is of the essence, and other stakeholders such as creditors for whom the best value may have been realized through liquidation itself. An analysis based on Kaldor-Hicks efficiency here could be useful as it would allow us to see that the losses of the creditors in a delayed proceeding could be far greater due to the corporate debtor being a going concern and its value further diminishing. Compared to this loss, the only gain a corporate debtor could see is that it is allowed to have a delayed process when this is caused by factors beyond its control. The identification of this imbalance in gains and losses could enable a court to decide in a manner which may fulfill the desired goals more effectively.

(b) Key Takeaways

The above analysis indicates the importance for courts to adopt an ELP perspective as otherwise it might lead to inefficient outcomes as indicated by Law and Economics. This is particularly problematic with the tendency of the Indian courts, the Supreme Court in particular given its vast complete justice powers, to go beyond the clear statutory provisions enacted by the legislature.

An introduction of a new and vague concept such as manifest arbitrariness to corporate law jurisprudence merely creates an uncertainty in the market without sufficient guidance for stakeholders to conduct themselves.[47] In doing so, the court adopts a role of lawmaking that it is both not allotted to as well as not suited to. This is important to consider since the process of enactment of legislation is carried out after a long-drawn assessment of the interests of varied stakeholders.

Courts are ill-placed to interject in the *modus vivendi* instantiated via statutes. This is due to what Fuller and Winston have reminded us about the 'polycentric' nature of adjudication of disputes[48]:

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[45] Kristin Van Zweiten, 'Corporate Rescue in India: The Influence of the Courts' (2015) 1 Journal of Corporate Law Studies 1.

[46] In theory, it might be plausible to argue that had the Supreme Court interpreted 330-days timeline as mandatory, such an interpretation *could* increase transaction costs in those where the courts will need to disallow creditors' committee approved resolution plan merely because of lapse of 330-days. Note, however, that the reasoning adopted in this article is agnostic towards outcome. And failure of a resolution plan isn't a financial Armageddon. The IBC 2016, in terms of an ELP-based statute envisions dissolution of a corporate debtor.

[47] Vasu Agarwal, 'Manifesting the Consistency in the Application of Manifest Arbitrariness Doctrine', 20 Statute Law Review (2021).

[48] Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication', 92 Harvard Law Review 353, 395 (1978).

> 'We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" – each crossing of strands is a distinct center for distributing tensions.'

Undoubtedly, the court's maladroitness stems from the varied interests while adjudicating a dispute containing limited parties based on the specific arguments raised in the specific hearings before them. Courts are unlikely to be privy to the nature of considerations behind the enactment of the legislation which traverse much beyond the limited set of facts a court deals with in a case. Accordingly, if a similar long-term effects-based approach would have been adopted by the court in *Essar Steel*, irrespective of impact on the final decision arrived at by the court, the nature of its reasoning and caution adopted by the court would have been vastly different.

IV. CONCLUSION

The so-called Eisenhower Principle states: 'what is important is seldom urgent, and what is urgent is seldom important'. Even so, given the nascence of the triad of Indian company, insolvency and competition law, a jurisprudence-based model for Indian corporate law is both urgent and important.

Such a model of Indian corporate law doesn't suffer from *je ne sais quoi*. With the help of test suites i.e. precedents from Indian company, insolvency and competition law, this paper iterates a compelling case for a 'meld model' i.e. a synthesis of exclusive legal positivism and law-and-economics.

A brief summary of the sample set of test suites is set out below.

Test suites	**ELP** **(positive/descriptive)**	**Law-and-economics (normative/prescriptive)**
Swarup (*Ignorantia juris excusat*)	*Non obstante* limb of the statute	Incentives? TC?
Delhi Gymkhana (messiah complex)	The 'oppression' provision doesn't have an Article 14 limb	TC
Excel Crop (settled v right dichotomy)	'relevant'	Kaldor Hicks efficiency

Essar Steel (manifest arbitrariness)	Timelines?	Kaldor Hicks efficiency

In sum, the meld model i.e., a synthesis of exclusive legal positivism and law-and-economics is a lucidly workable model for Indian corporate jurisprudence.