Uncertain Precedents and the Propensity to Litigate

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Efficiency, being an extremely elusive concept, has been scrutinised time and again by economists and has been applied in various legal circumstances. One such examination may be attributed to Rubin, who, in his paper on common efficiency, has stated that continuous litigation, by default would lead to an efficient legal system, implying that an increase in litigation is a prerequisite to efficiency. This efficiency will continue to evolve till a point is reached wherein courts are no longer required for settling disputes and out of court settlements would be the preferred method. Rubin himself, however, has acknowledgds that this equation would hold true only in an ideal scenario, which would require a world free of absolutely any kind of ignorance. The reality, quite far from it, does not allow Rubin's theory to hold true. In fact, a major contributor to Rubin's concept of efficiency is the uniformity in precedents, and the author has highlighted the fact that the growing body of disharmonious precedents through continued litigation is driving us away from any kind of efficiency. The paper draws heavily from the theoretical framework provided by Rubin to examine the Indian legal system, and points out the hurdles including not simply the lack of efficiency but also the out of control spiralling maze of complexities that call for immediate changes.

I. Introduction

Many scholars have studied the delicate balance between the choice to litigate or to opt for an out of court settlement. This choice is closely related to the 'efficiency' of the precedents that exist in the concerned jurisdiction. However, literature also points out that uncertainty of precedents can take litigation and its outcomes far from efficiency. Continuous litigation, appeals, addition to laws, and judge-made laws come at a heavy social cost.

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Various scholars, including Posner,[1] have argued that common law is in fact efficient; however, his claims will fail to stand if certain assumptions used in his methodology are incorrect. These claims have been analysed in the subsequent sections of the paper. Others, like Tullock,[2] have argued that such an efficiency is evasive at best and that Common Law is not as efficient as Continental Law. Unlike other branches of Economics where a process is modelled and is checked for leading to efficient outcomes, under Law and Economics, a legal principle is selected and it is then verified if the particular principle is efficient; thus, according to Rubin[3], examination of any legal doctrine would potentially form evidence for or against the theories put forth by Priest, who has argued that inefficient precedents would lead to an increase in Litigation.[4]

Efficiency of common law has been a contentious issue and many scholars have found themselves at loggerheads with a number of the hypotheses that have been proposed.

Subsequently Rubin,[5] Priest,[6] and others have written about the continuous movement of law towards efficiency, that is, wealth maximisation without making the other party worse off [following the Kaldor-Hicks principle],[7] the central idea being that litigation stems from the inefficiencies that plague the legal system which are duly addressed through the process of litigation. According to Rubin[8] and Priest[9] this efficiency shall be achieved due to the acts of self-interest by the litigants themselves, also known as the invisible hand theory.[10] They further argue that the litigations will continue till an efficient solution is reached, after which out of court settlements will be the order of the day and court settlements will come to an end.[11]

The purpose of this paper is to appraise the veracity of this hypothesis in general and in particular to assess whether the assumptions hold true vis-a-vis the justice delivery system in India.

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1 Richard A. Posner, The Economic Analysis of Law (1972).
2 Gordon Tullock, The Logic of Law (1971).
3 Paul H. Rubin, Judge Made Law (1999).
4 George L. Priest, *Selective Characteristics of Litigation*, 9(2) J. Legal Studies 399 (1980).
5 Paul H. Rubin, *Why is the Common Law Efficient?*, 6(1) J. Legal Studies 51 (1977).
6 George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Studies 65 (1977).
7 Mitchell Polinsky, An Introduction to Law and Economics (4th ed., 2011).
8 *Supra* note 5.
9 *Supra* note 6.
10 *Supra* note 5; Adam Smith in his book *The Wealth of Nations* has stated that the invisible hand theory suggests that equilibrium between the demand and supply of goods will be automatically achieved in a free market, without any intervention from forces other than the participants.
11 *Supra* note 6.

In India, the District Courts form the lowest rung of the judicial system, followed by the High Courts and finally the Supreme Court as the apex institution, which also acts as the final appellate body. In all cases except those filed under Article 32 (or Article 132), the applicant needs to navigate through the hierarchy of courts and may not possess the ability to file a suit directly in the Supreme Court. The judicial system has been established mainly in order to provide with appropriate fora to those who wish to either enforce their rights or remedy the violation of their right by another party. Therefore, it can be said that the judicial system's major objective is the enforcement of law in different forms for the achievement of ideals included in the Constitution. Furthermore, by carrying out the aforesaid functions, the courts are to be held responsible for clarifying the position of statutory law by giving it meaning and proper application, necessary for the desired enforcement.

In order to perform the various functions, the courts, especially the Supreme Court, have the important role of interpreting the different legislations. However, is it possible that instead of causing a simple elucidation of legal principles, litigation has somehow managed to make the existing body of laws even more complex and convoluted, resulting in an 'litigation explosion' in all the three tiers of the judicial system, thereby leading us to the problems in the hypothesis that greater litigation leads to greater efficiency?

The next part analyses the claims made in the literature surrounding the hypothesis, i.e. the efficiency of precedents and evaluates their validity in India, to test the shortcomings of the hypothesis. In particular, it sets a definition for efficiency used here and critically analyses the links, which various scholars have established between precedents and efficiency.

The third part briefly discusses the theoretical basis of the hypothesis in order to explain the situation in an ideal scenario. The next part sheds light on the data that is available and compares the reality with the ideal situation, as explained in the previous part. Part IV follows from the third and offers a detailed explanation of the different factors that are responsible for the non-realisation of efficient legal principles. The final and concluding part weaves together the various factors to finally comment on the hypothesis being examined and attempts at providing a solution to the pandemonium created by an expanding body of laws.

II. The Convoluted Path To Litigation And Its Economic Aspects

A. Defining efficiency

Much has been said on efficiency; however, paucity of space does not allow us to go into its jurisprudence and the related debates. For the purposes

of this paper it is sufficient to discuss the plethora of definitions offered by the literature, to choose from. Polinsky[12] has defined efficiency as the trade-off between the social costs involved in an activity, and the benefits that the society reaps from it.[13] He has illustrated his definition with the help of a pie. Efficiency of a particular scenario will determine the total size of this supposed pie, implying that the size shall increase with greater efficiency, thus reaping benefits for the society as a whole since the overall size of the pie is increasing.[14] Similarly, Kaldor-Hicks efficiency is reached when the group that is better-off, following a 'move' from one state to another, can share its benefits with the disadvantaged and maintain its better position.[15] Thus, the Kaldor Hicks definition follows the same rationale as Polinsky's, wherein the benefits are spread without disadvantaging another group. At the same time, Polinsky has also distinguished his definition from that offered by Pareto, which is a more 'technical take'[16] The point of distinction between the two is that per Pareto, one cannot put a person in a better position without hurting another; thus instead of the society benefiting as a whole, one individual benefits at the expense of another.[17]

We shall use the definition of efficiency from Polinsky.[18] Thus, throughout the paper an efficient institution would be considered to be the one where the social benefits can justify the social costs. This definiton has been chosen by the author since Polinsky's definition, which he himself calls "intuitive than technical"[19], can be used to explain arguments in the paper better. Further, in this paper, efficiency is explained in the context of precedents and litigations, and thus it has been reasonably assumed that it is desirable if the social cost borne by the society is lesser than the social benefit received, the solution will be efficient and shall be assumed to be desirable by the society. The subsequent sub-parts have deliberated on the link between efficiency and litigation. In order to venture into such a discussion and comment upon its efficiency, it is crucial to first establish the importance of precedents in the process of litigation.

B. Linking precedents to litigation

Precedents are an important means for dispute resolution in the common-law regime. As a consequence, there exists an important link between precedents and the amount of litigation, i.e. number of cases. In this

[12] *Supra* note 7.
[13] *Id.* 7.
[14] *Id.* 8.
[15] Satish Jain, Law and Economics 4 (2010).
[16] *Supra* note 7, at 7.
[17] *Supra* note 15, at 4.
[18] *Supra* note 7, at 7.
[19] *Supra* note 7.

connection it would be worthwhile to mention Rubin's criticism of Posner's approach in *Economic Analysis of Law,* where he has disagreed with the latter's contention that it is the Judges and their wisdom that leads to efficiency. He has argued that it is, in fact, the behaviour of the litigants that leads to efficiency since litigants shall continue to approach the courts till inefficient solutions exist and will stop only when efficiency is reached.[20] Thus, litigation, driven by the behaviour of the litigants, is a process by which evolution from an inefficient state of things to an efficient one is reached. This definition brings out the stark contrast between Posner's and Rubin's definition, wherein the former has held the judge responsible for attaining efficiency and the latter has laid emphasis on the litigants. It is interesting to note that this statement applies, according to these economists, generally in situations where both the parties litigating have a future interest in setting a precedent that favours them; it does not apply uniformly across all situations.[21] When only one party has an interest in setting a precedent, the law evolves in spite of efficiency, in favour of that party[22] and when neither party has an interest in the precedent, there is no incentive for the law to change and it remains as it is.[23] In other words, efficiency can be achieved only when both the parties are interested in setting a precedent which favours them.[24] Rubin explains this concept empirically and concludes that the parties will settle outside the court only if what the losing party pays is more than what the winning party gains (when both parties are interested in the precedent).[25] This can be represented formally by the equation—

$$(1\text{-}R)\ (Ta\text{-}Tb) > 2C^{26} \text{ --- } (1)$$

where R is the probability that party B wins, Ta and Tb are respectively the value of the case going to the court for A and B respectively, Ta-Tb is the loss of inefficient laws (when Tb < Ta and efficiency thus requires B to win) and C is the court costs.

Further, according to Rubin,[27] litigation will continue till the courts one day rule in favour of A (assuming that the current law is inefficient) as A will continue to litigate because of the loss from excess amount he has to pay. From that point on the law will remain efficient since B lacks incentive to go to the court, as Tb < Ta and he suffers no loss in relation to what A suffered.[28]

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20 *Supra* note 5, at 58.
21 *Supra* note 5.
22 *Supra* note 5, at 61.
23 *Supra* note 5, at 63.
24 *Supra* note 5, at 60.
25 *Supra* note 5.
26 *Supra* note 5, at 60.
27 *Supra* note 5, at 61.
28 *Supra* note 5.

Priest[29] has partially disagreed with Rubin; according to him efficiency is reached without being affected by the parties' intentions, the judges' ideologies or any such externalities.[30] He has agreed on the one hand with Rubin on the fact that litigation continues till inefficiencies exist and out-of-court settlements begin when efficiency has been reached.[31] On the other hand, he has disagreed with Rubin's assumption that both the parties will agree on the value of the probability of victory for either side[32] due to errors in calculations and perceptions. Priest[33] has first established that litigation occurs when the law is inefficient and has then proceeded to persuasively establish that even if judges hold biases and have a tendency to turn efficient laws into inefficient ones, there will ultimately be a net addition to the repository of efficient laws. This is based on his premise that only inefficient laws go for litigation, at least a few of which will ultimately become efficient ones thereby adding to the wealth of efficient laws.[34] Thus, for Priest, even though the conclusion is the same as it is for Rubin, that is, there will be a movement from inefficient to efficient laws through litigation, he has not accorded the same sense of righteous judgment to the litigants. He has instead asserted that the law, regardless of the errors in judgement made by litigants, will in the end reach a state of efficiency.

As an explanatory rejoinder, Rubin[35] has discredited Priest's explanation on the grounds that Priest assumes that "transactions in the real world are positive".[36] Further he has defended his claim that it is reasonable to assume that both parties do, in fact, agree on the value of the probability of winning a particular case as disagreement on the probability is ignorance on the part of the party and such ignorance can be used to derive absolutely any aberration.[37]

If we take a step back and try to look at what the two authors have argued, certain aberrations or anomalies can be observed from a 'practical' point of view. For instance, the assumptions held in the literature may not hold true in everyday situations. That apart, it is also important to mention that while Rubin has argued vehemently that provided both parties have a vested interest in the future of litigation, the common law will evolve into an efficient system, Priest seems to have taken a less aggressive approach, making it a more believable one. Where it seems that Rubin has taken a more extremist point of view, Priest seemed to have taken into account certain realities and factored uncertainty in, which makes Priest's approach less prone to criticism in this respect. He has agreed with Rubin's basic premise, but at the

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29 *Supra* note 6.
30 *Id.*
31 *Id* .at 65.
32 *Id*. at 66.
33 *Id*. at 67.
34 *Id*. at 69.
35 *Supra* note 5, at 69.
36 *Supra* note 6, at 65.
37 *Supra* note 5, at 69.

same time has been careful not to indulge in extreme assumptions, stating clearly the possibility of flaws. He has explained that he does not intend to convey that common law will rapidly move towards efficiency but has stated that there are a number of factors that influence the speed with which efficiency will be achieved, including bias of the judges, frequency of litigation and other pressures.[38] In support of his argument he has in fact cited a number of articles by Posner[39] wherein it has been shown that cases with relatively consistent "characteristic debates"[40] are more likely to have efficient laws, since a concrete recurring question of law is involved, increasing the chances of certainty in its settlement. More importantly, for the purpose of this paper it was mentioned that the speed of the efficiency is also dependent on the robustness of the precedents.[41]

Perusal of Rubin's works betrays a feeling that efficiency is something that is simple to achieve and that the sole determinant of achieving this efficiency is the extent of interest that the litigants have in setting a precedent that is in their favour. The use of absolute terms in the paper, without providing for a possibility of uncertainties, as done by Priest by including factors such as judges' bias, the political climate among others, leaves little scope for flexibility and signals a generous usage of assumptions. In contrast, however, Priest has clearly left scope for certain hindrances, to take their course. Having said this, it would be naïve to not acknowledge that Rubin[42] has provided a base for extensions to be built upon and in that respect is invaluable. Priest[43] on the other hand has taken important leads from Rubin and adapted it to more life-like situations. Priest's paper may not answer all questions, however, his approach being more flexible than Rubin's has taken into account several externalities that Rubin's has not. While Priest's paper has rightly imparted an evasive colour to efficiency, Rubin's paper has regarded efficiency to be an inevitable outcome of litigation.

C. Why do people litigate?

Rubin[44] and Priest[45] could leave one with an impression that the reason for which there is so much litigation is the existing inefficiencies in law. While Priest[46] has expounded on the possibilities of a slow progress towards efficiency, with externalities (an effect that is experienced a party not involved

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38 *Supra* note 5, at 69.
39 *Supra* note 1.
40 *Supra* note 6.
41 *Id*. at 75.
42 *Supra* note 5, at 69.
43 *Supra* note 6.
44 *Supra* note 5, at 69.
45 *Supra* note 6.
46 *Supra* note 6, at 72.

in the main transaction),[47] Rubin has not mentioned any such possibilities, intentionally or otherwise, hinting that efficiency is an obvious result of litigation. However, there seems to be a problem with this conclusion. Inefficiency, as propounded by the two authors, may evolve into an efficient legal system, however, the present state of affairs, vis-à-vis Indian judicial system, does not offer much hope for such a utopian state, as the precedents today are resplendent with confusing and contradicting judgements.[48] Not only does this situation of 'chaos' prevailing in the appellate courts but also in the horizontal courts where courts of equal authority have given contradictory judgements on the same issue.[49]

This has resulted in gross uncertainty of precedents, where no longer can the outcome of a case be even remotely predicted.[50] Skewed perceptions of precedents delay the realisation of the efficiency that Rubin and Priest have so eloquently put before us. In fact, Priest[51] has mentioned that consistency with which precedents are followed is a pre-requisite in attaining the said efficiency. Even Posner and Landes[52] have compared the body of precedents to a capital stock which provides important information; the value of such capital stock progressively declines as the conditions for applying the same change, and the capital is then replaced by new capital.[53] D'Amato[54] has argued that in certain situations this uncertainty is desirable, however, this is a different debate altogether and is not within our scope.

What is being argued here follows from the proposition by Rubin[55] that whether litigation will ultimately lead to efficiency depends on the absence of several externalities like uncertainty of precedents, factors that are extra-legal which affect the behaviour of the judges and others. The presence of these factors make the certainty of precedents hazy and we will probably only crawl, instead of rapidly moving towards efficiency. In fact, D'Amato[56] has quite convincingly argued that more decisions, more nuanced statutes and more litigation will result only in chaos and more uncertainty, which is in clear contradiction to the hypothesis put forth by Rubin and Priest to an extent.

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47 Bryan Caplan, "Externalities" The Concise Encyclopedia of Economics (2008).

48 Anthony D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1 (1983).

49 Ram Singh, *Economics of Judicial Decision-Making in Indian Tort Law*, 39(25) Econ. & Pol. W'kly 2613 (2004).

50 *Supra* note 48.

51 *Supra* note 6, at 72.

52 M. William Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis,* 19 J. L. & Econ. 249 (1976).

53 *Id.*

54 *Supra* note 48.

55 *Supra* note 5, at 69.

56 *Supra* note 48.

Singh[57] has also argued that such ambivalence and inconsistencies on the part of the court have reduced the efficiency of the legal system.[58]

D'Amato[59] has given a very detailed account of the reasons why the law is continuously moving towards inefficiency and how they are interlinked with uncertainty. First, law is an evolving process, which means that the governing principles continuously grow into a body of principles, especially under the common law regime.[60] Second, formal procedures like amendments make the law an ever-expanding body with myriad additions on an almost daily basis;[61, 62]. Third, the judges have tools for the interpretation of statutes using which they can construe a law to mean almost anything.[63] Judicial Activism may be seen as a precursor for change by many, but it certainly does not clarify the court's stand on a specific issue.[64] Instead of clearly spelling out the court's stand on an issue, the inconsistency of judgments has given an impression that even if precedents have not favoured a particular party, he may approach the court to get the decision in his favour.[65] Moreover, after judges pronounce the law, everything stated by the judge shall become a part of the law. This further adds to the existing body of legal principles, that is already quite voluminous.[66]

In this connection, Harnay and Marciano's work[67] which has analysed the extra-legal factors which affect the judges, may be mentioned. They have extensively explained how the expectations of the judicial community, conforming to precedents in anticipation of promotion, recognition, and salary have a huge bearing on the decisions that judges pronounce.[68] They have very logically linked together the kind of judges, their personalities and their tendency to behave in a certain manner[69], thereby being in sync with theories of legal positivism. They have shown that judges, after all, are not as efficiency-driven as we often perceive them to be. Molot[70] has explained that there are multiple risks that a party undertakes while opting for litigation; certain factors which are within control of the parties to reduce the risks include

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57 *Supra* note 49.
58 *Id.* at 2615.
59 *Supra* note 48.
60 *Id.*
61 *Id.*
62 Sophie Harnay and Alain Marciano, *Judicial Conformity Versus Dissidence: An Economic Analysis of Judicial Precedent,* 23 Int'l Rev. L. Econ. 405, 406 (2004).
63 *Supra* note 48.
64 *Supra* note 48.
65 *Supra* note 48.
66 *Id.*
67 *Supra* note 62.
68 *Supra* note 48, at 406-408.
69 *Id.* at 407.
70 Jonathan T. Molot, *A Market in Litigation Risk,* 76(1) Univ. Chi. L. Rev. 367 (2009).

checking the judge's personality and choosing one's own lawyer.[71] This also implies that judges' perceived and known behaviour alters litigant behaviour; they may choose to delay the suit and wait for a judge who has the reputation to favour a certain kind of litigant party. Illustrative examples of this would be the reputation that Justice Kuldip Singh holds as a 'green judge'.

Furthermore, with the passage of time, in those cases where some pattern is discernible, people will make use of the loopholes in the legislations to justify their behaviour. In other words, if the statutes do not fit their actions, they will modify their actions so as to fall into the undecided grey-zone of precedents.[72] This further points out to the uncertainties that are contributed by the judges themselves. D'Amato (2010) can be effectively used to question Rubin's[73] assertions. To reiterate, as mentioned earlier, Rubin[74] has assumed that once litigation starts, the probability of a party winning will more or less be a clear number; however, the above proven factors show this can hardly happen in the present circumstances; in other words the value of R will go on becoming uncertain.[75] Thus, Priest[76] hase done more justification to this argument than Rubin[77] by leaving speed of reaching efficiency dependant on certain factors.

D. Litigation will never stop as long as there is uncertainty in the value of R

In the previous section, we have argued that efficiency is quite an elusive concept. Even if we define efficiency, the 'efficient solution' will keep changing due to amendments, modifications and interpretations.[78] Both Rubin and Priest have elaborated upon how inefficient rules lead to litigation.[79] According to the definition of inefficiency followed in this paper, such precedents, categorised as inefficient by Rubin and Priest, would include only those which reach an incorrect conclusion about a particular case. D'Amato[80] has shown that inefficiency in this sense is not the only reason for people to go to the court; uncertainty, as explained in the previous section, plays a major role in this determination. To put it differently, uncertain precedents throw predictability out of the window, leaving litigants unsure of what is in store inside the

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71 *Id.* at 367.
72 *Supra* note 48.
73 *Supra* note 5.
74 *Id.* at 69.
75 *Supra* note 48.
76 *Supra* note 6, at 72.
77 *Supra* note 5.
78 *Supra* note 48.
79 *Supra* note 5, at 60; *supra* note 6, at 65.
80 *Supra* note 48.

court room, while, at the same time, the same uncertainty provides the judges with a wide scope to twist the laws.[81]

To explain this, consider a situation following D'Amato[82] for all cases to begin with, the value of 'R' is close to 0.5. This makes planning by the litigants an impossible task or at least extremely risky; further an uncertain area of law does not bind that judge. With all the possible biases, the decision could really be in any person's favour.[83] To further add to this pandemonium, the appellate courts may just reverse all that the lower courts have decided.[84] Thus, it may be inferred that for predictability there must at least be a clear probability of R - it should be greater or lesser than 0.5; the greater the distance from the mid-point, the better is the predictability of the decision.[85] Thus, by implication, litigation will stop only when there is complete certainty or absolute absence of uncertainty with regards to the decision of the court that is, if R becomes equal to one or zero.

This brings us to the second argument against Rubin's conclusion[86] that movement towards efficiency will stop litigation. Let us assume that efficiency is reached; even then there is some probability that the case may be decided otherwise due to unpredictable parameters explained earlier. Therefore, as long as the parties find it feasible to go the court and feel there is a substantial chance of winning, albeit a small one, because they have a lawyer with an established brand-name or that they can fit it in the "cracks" of the law[87], they will go to the court regardless of the efficiency considerations of the society. In fact, Rubin himself has conceded that the "judges are likely, [but] not certain to decide in the favour of the precedents".[88]

Thus, firstly, efficiency is a distant dream with the current conditions and secondly, even if we do reach the efficient condition, there is hardly any evidence that such efficiency will be sustainable.

In fact, there is evidence that uncertainty leads to increased litigation. Singh[89] has compiled data showing the huge discrepancies that exist in the damages awarded by the courts at different hierarchies. This is one of the many reasons why people spend so much financial resources on legal advice; this certainly leads to inefficiency as it drains the society through unproductive

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81 *Id*.
82 *Id*.
83 *Id*.
84 *Id*.
85 *Id*.
86 *Supra* note 5, at 60.
87 *Supra* note 48.
88 *Supra* note 5, at 59.
89 *Supra* note 49, at 2615.

expenditure.[90] Singh,[91] though restricted to cases of damages under Motor Vehicles Act, has provided very straightforward and simple arguments supporting the fact that uncertainty in fact obstructs efficiency and increases the social cost. Through a compilation of cases of motor accidents, he has shown that huge discrepancies are present in the decision of the courts which has led to economic inefficiency and "avoidable waste of resources".[92]

Through this, a clear link has been established between certainty of precedents and tendency to litigate.[93] It has also been shown that when the courts apply rules uniformly and if there is slight predictability in the criteria of the judges, the litigants will be able to reasonably infer the outcome and will be more likely to settle outside the court leading to efficient use of resources.[94]

As we have seen above, even though it is possible to collate existing data on cases and verify these theories, there still exists no literature in India which checks the validity of these theories against real case data. There is much literature in other jurisdictions that establishes the relation between certainty of precedents and litigation which can be used to unravel the story behind real dynamics of the society and its rationale behind litigation, thus creating a possibility to check for the viability of the explanations economic theories only offer on paper.

The lack of any empirical studies in India, make it difficult to establish whether we are in fact moving towards efficiency. Furthermore, there is negligible literature that evaluates the malpractices that plague the Indian legal system, thus making it even more difficult to undertake any empirical studies to check for the level of efficiency.

III. The Ideal World

This section shall de-construct the 'ideal world' as has been envisaged by Rubin[95] to test the veracity of his theoretical predictions.

To begin, let us take a hypothetical situation with two parties,—A and B—both of whom are interested in the outcome of the case for future disputes. Now, in case of a case of civil liability, let us assume that if A is made liable he has to spend an amount of Rs. 1000 to restore the situation. On the other hand, if the rules place liability on B, then he spends Rs. 700 in this process of restoration of status-quo. If A is made liable the society loses Rs.

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[90] *Id.* at 2616.
[91] *Id.*
[92] *Id.* at 2615.
[93] *Id.*
[94] *Supra* note 49.
[95] *Supra* note 5.

300 for the same result while saves the same amount if B is made liable. Thus, according to the Kaldor-Hicks principle, B should be made liable. If this is not so, and the courts show a tendency to favour B, then A will find it viable to opt for litigation in order to turn precedents to favour him since he will experience direct loss from being made liable.[96] At some point, when the decision turns in favour of A, rules will become efficient and B, himself experiencing no deadweight loss, will not be incentivised to go to the court.[97] This will mean that the precedent will eventually consolidate itself in one place and out of court settlements will be more likely.

This is what the situation should ideally be. Eventually, litigation should come to an altogether stop and courts should no longer exist. Quite evidently, this has not happened in India or for that matter, anywhere else in the world. Courts very much exist today and cases have been piling on continuously.[98]

A. Factors as pre-conditions

Certain conditions emerge as pre-requisites for the above conclusion to follow. Firstly, the two parties must have an interest in the precedent that is set by the case; secondly, the judges must decide cases without too much creativity and follow the precedents set; thirdly, a very small percentage of the cases that go in for appeal should be reversed; and fourthly, the legal principle to be applied in the case must remain stable. There are several other such conditions that are required ideally. It will be noticed that all these condition directly or indirectly converge into a single calculable parameter—a more or less accurate measure of the probability that a party will win, that is a fixed value of R.

The equation to determine the efficiency of principles vis-a-vis precedents was given by Rubin[99] as: [1-R] [Ta—Tb] > 2C.

R= probability that B will win

Ta= total monetary value placed on the case by A

Tb= total monetary value placed on the case by B

According to Rubin, litigation will continue till this condition holds true. This can be reversed following two methods: first, the value of R becomes very high and second, the value of Tb exceeds Ta.[100] Again Ta and

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96 *Id*.

97 *Supra* note 5.

98 Nick Robinson, *Indian Supreme Court by the Numbers*, 1 (Ctr. for Policy Research, Working Paper 2012).

99 *Supra* note 5.

100 *Id*.

Tb depend upon the value of R. Thus, again, the determination of R is crucial in deciding whether to go to the court.

Only by using this value will the parties get an idea of the chances that a decision in their favour will be made. Now, let us imagine a scenario where this value of R is flexible, it has no fixed value and the outcome can be almost anything. In such situation, the parties would fail to accurately put a finger on a single applicable legal principle and would also fail to predict the outcome. This will become like a gamble where random outcomes will engulf parties and the system into a stable game of cases. However, these words hold no meaning unless concrete proof is given to prove this. Therefore, the next section gives four conditions to reveal the misleading labyrinth that has become of our legal system, quite similar to the concerns expressed by D'Amato, as explained under section 2.3 of the paper.

IV. Factors Responsible For The Uncertainty In The Value Of 'R'

It is universal knowledge that going to the court to settle disputes involves heavy costs and resources.[101] One has to engage lawyers, pay court fees, and spend on various things like commutation, paper work, and others.[102] Thus, it is a drain on the parties financially and human resource wise. Logically, before going to the court, any party would check for itself its chance of winning and if it seems unlikely, they would choose not to waste their time and resources and settle the matter out of court. However, the current situation does not offer such simple possibilities. The main culprit for this is the fact that there is hardly a way to safely predict the outcome of any case; and even if there is, many know how to twist arms and get the better of our legal system. Apart from these factors, there may be a plethora of reasons for various parties to litigate such as to cause delays, to draw attention to a cause they believe in, draining the opposite side financially, despite the knowledge that they might lose the case. This section analyses, with the help of evidentiary cases, some of these factors which have made lawyering a risky business and court settlement a game of cards.

A. Bias of the judges

It is a well-known fact that ideologies and the belief systems of the judges affect the judgement they deliver.[103] It can be shown that various judges were popular for the beliefs they held and thus parties strategically planned

[101] *Supra* note 49.
[102] *Id*.
[103] *Supra* note 98.

their cases knowing the perspective through which the judge looked at the cases. For example, Justice Arijit Pasayat is well known for coming down with a heavy hand on offenders who commit rape and murder, often awarding them death penalties; whereas Justice Sinha is known to dislike the punishment of death penalty and considers it to be unnecessarily harsh.[104] It would be interesting to think of the behaviour of the litigants here—wouldn't the defendants prefer to be heard by Justice Sinha and what would the Prosecution do to take the case to Justice Pasayat.

To further illustrate the point, the author would use the example of Justice P.N. Bhagwati, who is known to be a liberal judge. It was Bhagwati, who in *Hussainara Khatoon (4)* v. *State of Bihar*,[105] had introduced the concept of Public Interest Litigation ('PIL'), thereby making the Supreme Court directly available to the common person.[106] He is famous for having taken even postcards as filing of PILs. Furthermore, it was Bhagwati who, along with Justice V.R. Krishna Iyer had introduced the concept of Judicial Activism in India.[107] In fact, throughout his reign a clear pattern in his judgements can be observed. Taking examples of criminal cases, especially of death penalty, this pattern becomes clearer. In *Bachan Singh*[108] in 1982, Justice Bhagwati was unhappy with the frequency with which death penalties were awarded. He had remarked that the Supreme Court awarded death penalties "arbitrarily and freakishly".[109] It is the same Bhagwati who as one of the judges on the Bench had commuted the death sentence given to Kashmira Singh while Jeeta Singh, a part of the same case but heard by a different bench was hanged to death.[110] Accustomed to Bhagwati being a champion of fundamental rights, it was hard for people to digest his judgment in *ADM Jabalpur case*[111], where he had ruled that it was acceptable to disregard the right against *habeas corpus* during the times of emergency. Justice Bhagwati apologised for this judgment 35 years after delivering it claiming to have been "young" and not quite understanding law at that point of time.[112] Furthermore, he himself has confessed that he gave in to the pressures of his colleague proving the pressures that a judge is surrounded by.[113] What is more interesting is that out of the 5 judges in the said case, Justice H.R. Khanna was the only one who had ruled against

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[104] Nick Robinson, *The Indian Supreme Court and its Benches*, Seminar No. 642, Constitutional Challenges: A Symposium on Democracy and Constitutionalism in India, (Feb., 2013), *available at* http://india-seminar.com/2013/642/642_nick_robinson.htm.

[105] (1980) 1 SCC 98: AIR 1979 SC 1369.

[106] Interview by Lekha Rattanani with P.N. Bhagwati, Ex-CJI, Supreme Court of India, Outlook, March 06, 1966.

[107] *Id.*

[108] *Bachan Singh* v. *State of Punjab*, (1982) 3 SCC 24.

[109] *Id.*

[110] *Id.*

[111] *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521.

[112] *Id.*

[113] *Id.*

the majority and was also the only judge who did not get appointed as the Chief Justice of India. The other four judges were all rewarded with the prestigious position. This just leaves the readers to speculate about the conditions that affect judges; despite having a consistent pattern in his judgments, Justice Bhagwati was influenced majorly by the political winds at the time, Justice Khanna on the other hand, had to bear the brunt of delivering a judgment devoid of political allegiance. Political landscape, thus, adds another dimension of uncertainty to the situation.

George Gadbois has found that K. Subba Rao, an anti-government Supreme Court judge, gave dissent forty-eight times. However, when he became the Chief Justice of India, his opinions affected the opinions of other judges because of his position, and during this period between 1966 and 1967, a number of decisions against the government were churned out (as cited in Robinson).[114]

Another judge for whom one could establish a clear pattern over the judgements is, Justice Kuldeep Singh, who was also responsible for "giving teeth to Public Interest Litigation".[115] He also earned the title of "Khalistani Judge" for his deep involvement against "police atrocities" in Punjab.[116] Singh is responsible for giving words to Precautionary Principle and Polluters Pay Principle and making them a part of Article 21. Singh also gave birth to the term Public Trust in the Span Motels case. During his six-year term, Justice Singh, has ordered the industries around Taj Mahal to supply only the non-polluting form of Natural gas and LPG, he has come up with the extended Polluters Responsibility and given compensation against environmental damage worth Rs. 10 lakhs to the victims. Here again, a clear pattern emerges which explains why majority of his cases have ruled in favour of the victims of environmental damage and why have the authorities been hauled up for improper implementations of safer environmental standards. Judges like Kuldip Singh, with predictable patterns are an exception rather than the rule, pointing to the blatant lack of certainty that promote litigation. Moreover, even if certainty is temporarily established, it changes with a change in the judge and the judge's retirement restores the uncertainty.

B. Contradicting judgements

Contradicting judgements are one of the most significant contributors in blurring the consistency of precedents since it works on two levels. Firstly in a vertical manner, where huge discrepancies in the judgments given by the upper

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[114] *Supra* note 98.

[115] M.J. Antony, *Kuldip Singh: A Name that Politicians Dread*, Rediff (Feb. 19, 2008), http://www.rediff.com/money/2008/feb/19kuldip.htm.

[116] *Id.*

and lower courts spur litigation on; secondly, on a horizontal level, where the different High Courts and District Courts give different decisions. The latter discrepancy is worse since the decision of one High Court is not binding on the others, adding to the chaos which again pushes the litigants to go to the Supreme Court. Criminal cases show a clear aberration in the judgments delivered by the courts, especially in cases of death penalty, which is well established. In *Krishna Mochi*[117] and *Bhullar*[118], the Supreme Court awarded the death penalty to the accused despite the judges in the lower courts having acquitted them as the Supreme Court found them within the purview of 'rarest of the rare' (*Bhullar case* was reconsidered and the judgment was reversed yet again).[119] In *Kheraj Ram*[120] the Supreme Court again imposed death penalty on the accused person who had already been acquitted by the High Court. In this case the accused had killed his wife and children accusing the wife of infidelity. In an equally absurd situation, the court commuted the punishment in *Damu,* [121] where the accused killed three of children and awarded the death penalty to the accused in *Sushil Murmu*[122] where he killed one child. In fact, class and colour also play a role in the awarding of death penalties. In *Rajendra Prasad,*[123] Justice Iyer stated "capital sentence perhaps has a class bias and colour bar". Justice Bhagwati agreed with this view in *Bachan Singh*[124] and stated that capital punishment has "class complexion or class bias in as much as it is largely the poor and the downtrodden are the victims of this extreme penalty".[125]

On the matter of civil cases, Singh[126] has quoted judgements from different courts awarding different amounts of compensation in similar case. Further, the discrepancy does not amount to a small one; but by a substantial amount, it was shown. For example, in three similar cases, *M.A. Rahim*[127], *Mohd Muzzafar*[128] and *Nachhan*[129], 12 year old boys were crushed under vehicles; while in the first two cases the court awarded a compensation of 16,000, in the third case a measly amount of 4,000 was awarded.[130] In fact, in *Mala Aggarwal* v. *Jagdish Kumar*[131] the compensation initially given was Rs. 7,500.

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[117] *Krishna Mochi* v. *State of Bihar*, (2002) 6 SCC 81.
[118] *Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195.
[119] *SC Commutes Death Sentence of Bhullar to Life Term,* The Telegraph Calcutta, March 31, 2014, http://www.telegraphindia.com/1140331/jsp/frontpage/story_18138199.jsp#.V2KUoofDHlI.
[120] *State of Rajasthan* v. *Kheraj Ram*, (2003) 8 SCC 224.
[121] *State of Maharashtra* v. *Damu*, (2000) 6 SCC 269.
[122] *Sushil Murmu* v. *State of Jharkhand*, (2004) 2 SCC 338.
[123] *Rajendra Prasad* v. *State of U.P.*, (1979) 3 SCC 646 : AIR 1979 SC 916.
[124] *Supra* note 108.
[125] *Id*.
[126] *Supra* note 49, at 2613.
[127] *M.A. Rahim* v. *Sayari Bai*, 1972 SCC OnLine Mad 83 : AIR 1973 Mad 83.
[128] *Mohd. Muzzafar* v. *Mohd. Sultan Sheikh*, 1979 SCC OnLine J&K 2 : 1980 ACJ 516.
[129] *Nachhan* v. *New India Assurance Co. Ltd.*, 1984 SCC OnLine All 7 : 1985 ACJ 37
[130] *Supra* note 49.
[131] *Mala Aggarwal* v. *Jagdish Kumar*, 1991 SCC OnLine P&H 743 : 1992 ACC 659.

This amount when appealed against was augmented to a huge amount of 75,000![132]

There are several other judgments from which one can show that different courts reach a different conclusion on a single or similar cases. In fact, courts use various means for the calculation of compensation, which means that there is no fixed and unified computing method.[133] Application of different methods would obviously yield different results and thus a different compensation amount. Seeing such drastic augmentation of the compensation, litigants are forced to make a difficult choice—whether to keep the amount they have received or to go in for appeal tempted by a potential increase and risk a possible decrease in the amount.

C. Inaccurate data collection

Predicting the outcome of the case depends on the probability of the cases won by parties in similar cases under similar circumstances. Once this information is there, a pattern of decisions can be traced or even calculated mathematically, if no clear pattern emerges, by dividing the number of cases won by the total number of cases fought. Judging by this probability or a pattern, the litigants can make informed choices as to whether they want to opt for litigation or settling out of court, as determined by economic viability of the case. However, this argument presupposes the existence of a comprehensive and complete database of the cases heard and judged by the courts as well as a clear and consistent pattern. Without this information, the results yielded will be an arrow in the dark.

Robinson has offered some startling numbers on this issue. He has written that during the years 2005 to 2010, while the case disposal rate of the High Court has increased to 25%, the Supreme Court's burden of appeals increased by a stark 52%.[134] Robinson has also marked an increase of about 97% in the cases filed in the SC from the year 2000 to 2010.[135] It has been increasingly difficult for the courts to keep a track of the latest judgements thereby even confusing the already confused lower courts. The annual report that the Supreme Court publishes to keep a track of the developments in the court is also now "two years' overdue".[136] In his study, Robinson has also commented upon the difficulty with which he acquired the data needed for the study. The difficulty is posed by the selective data available publicly while other data has to be extracted from the officials and what is obtained can only be hoped to be complete. After one accomplishes the task of finally laying hands

[132] *Supra* note 49.
[133] *Id.*
[134] *Supra* note 98.
[135] *Id.*
[136] *Id.*

on the data needed, one has to wonder whether the data is even correct. As Robinson[137] has pointed out there are several discrepancies in the data recorded which provide further scope for speculation on the accuracy.

The condition of incomplete data is further aggravated by the cases pending in the courts. According to Robinson[138] if the Supreme Court stops accepting cases at present, it will still take three years to dispose the cases that are pending before it. This results in aggravated forms of wastage of resources since a litigant might file a case under the assumption that no case for this issue has been filed since there is no decision pertaining to it[139]. The individual, however, might be unaware of a similar case pending before the court.

Robinson[140] has pointed out to two difficulties: the incomplete nature of data and the inaccuracy of data. Without such data, one can only imagine what a confusing maze the system would appear to be to parties who wish to decide whether to litigate. If this is the condition then how can the parties even remotely predict the outcome of any case? In such a scenario, when high risk is involved, a lack of information would only drive people to go to the court with individual cases burdening the overloaded system further.

D. Selective option of going to the court

A consideration of the factors as discussed in this paper, would clearly imply that litigation is quite challenging to the individual opting for litigation as well as in terms of the resources employed for such hearing. The author wonders if some people are just better off not having the means to enter the mesh itself. While it is true that PILs and other judicial provisions have brought the facilities of a Supreme Court to the doorstep of the common man, it is apparent that only the wealthy can afford to enter what seems to be a battleground and emerge unscathed.[141] Where lawyers with big names are used to tip the balance in one's favour, not many can afford even a simple defence lawyer.[142, 143] Not just financial but geographical constraints are other considerations that hinder many from approaching the highest court of authority.[144] People living in and around Delhi have easier access to the Supreme Court than people who live in the South.[145]

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137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 The State Level Legal Authorities are supposed to assist prospective litigants who fail to access the legal system due to financial constraints. However, the questionable quality of services that are made available under such a system is a different issue altogether.
144 *Supra* note 98.
145 *Id.*

What these invisible barriers are doing is that they are restricting the application of justice only to those who can reach it. In fact various studies and facts go on to reinforce the adverse effect caste, class, power and poltics have on the duration that is spent in jails.[146]

V. Summary And Conclusions

After analysing the different components of our judicial system, it would be prudent to collate the data and trim the edges off our arguments, if we were to avoid a mess similar to the one created by the courts. Rubin has given us the equation to check for efficiency, when litigation would come to a stop and courts would no longer exist. From his readings, we deduced the ideal conditions and used those to measure the digression from our path to efficient laws. We examined just four of the many such hurdles: judicial bias, contradicting judgments, inaccurate data collection and selective opportunity to file/appeal to the court. The efficiency criteria proposed the abolition of Supreme Court someday; at this moment however, it is impossible to imagine our lives without the courts. Instead of stopping ourselves from throwing everything on the courts in expectation of a solution, our dependence on the courts has only progressively grown.

Some qualifications, however, must be added at this point. The arguments above do not imply in any way that the judicial system should be turned into a concrete block of codes and rules which leaves no scope for human variation; at the same time it should not come to a point where every situation with even the slightest of distinction or no distinction at all, starts to be considered as an individual situation of their own. To put it differently, the objective of the courts while pronouncing judgments should be achieving certainty without leading to excessive rigidity of laws. This would render the system of precedents completely useless. It would be unanimously agreed upon that judges cannot and should not be replaced by machines or parrots who blindly apply the same law in the same manner to every situation; however, some sort of uniformity is desirable not only for the sake of the litigants but also to reduce the burden on the courts. The judges cannot stop admitting cases into the court, but the system of records and lending certainty to precedents should be attempted.[147] With a country like India, where there are

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[146] Biswajeet Banerjee, *Man Freed, but Spent 12 Years in Jail for Lack of Surety*, The Pioneer, September 05, 2015.

[147] A significant step that has been taken towards maintenance of records is the e-courts mission mode project, under which efforts are being made to put in place a system that helps the lower courts in their daily functions and would help in the maintenance of records of judgments online, apart from other things. Gujarat, Mumbai, Punjab & Haryana, Allahabad, Odisha and Delhi are some of the High Courts that have started the process of shifting to an e-courts base and digitisation of records; E-courts, last viewed February 11th 2016 http://ecourts.gov.in.

unemployed youth in abundance, employment can be generated in the form of accurate data compilation and records in the lower courts, so that new laws and judgments can be continuously supplied to all the courts. This would help the entire system in a lot of ways. The lower courts and the higher courts would at least begin to come at par with regards to application of legal principles. The litigants will also be in a better position to make more informed choices as to the predictability of the outcome of the case. This would reduce the pressure on the courts which would in turn mean that the courts will start giving less credence to lawyers and more to their arguments.