

RAPE AND COMPENSATION: AN ECONOMIC ANALYSIS OF THE CRIMINAL LAW ON RAPE IN INDIA

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Introduction:

Criminal law is the backbone of any civilized nation. It aims to maintain law and order in the society. The criminal law specifies various wrongs as 'crimes' and penalises them. By and large the criminal law works on the principle of 'deterrence' and thus it punishes the wrongdoers to set an example for others. However, with the span of time the criminal law has also engulfed the idea of 'reformatory justice' apart from the 'retributive justice'. It aims to reform the wrongdoers by subjecting them to various rehabilitative programmes. Criminal law differs from various other laws because other laws deal with 'private wrongs', but the offences under the criminal law are regarded as the 'public offences' and thus need harsher punishments. Crimes are wrongs against the State and thus, the State is the prosecutor in criminal law.

Economics is the study of the problem of choice, where resources are limited and the aim of society is the 'maximization of benefit welfare'. There is growing trend of the economic analysis of law and legal problems because an economic analysis is being used to choose the most effective punishment. A crime is not only a wrong against the victim, but it carries certain costs too. When a crime is committed the society suffers from the loss of certain resources, or if physical harm is inflicted, certain cost is incurred on the treatment, or when a man is killed his family suffers from the loss of his earnings. So, somewhere down the line all crimes affect the economics of the society. Criminal law aims at the welfare of society by minimising the occurrence of crimes and economics aims at the social welfare maximization. In the following paper we shall try to do an economic analysis of criminal law with special reference to the offence of rape.

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Why an economic analysis?

A question which arises as to why we need to do an economic analysis of any law? A law is one of the most stringent of the social sciences where everything is chalked out in black and white. Economists like Posner, Robert Cooter, Thomas Ulen, Steven Shavell, G.S.Becker etc. are some of the stalwarts in the field of economic analysis of law and legal problems. The economic approach to criminal law is based on the proposition that economic efficiency is useful for examining and designing rules and institutions. Economic efficiency means that there is no way to make a change that benefits someone without harming someone else. A given change is efficient if those winning from that change compensate those losing so that no one is worse off after the change. This is the well known “**Pareto Efficiency.**” Most of our analysis is based on a less restrictive concept of efficiency, social welfare maximization or “Kaldor Hicks Efficiency”. Under this less restrictive concept, a given change is efficient if an individual could in principle compensate those who lose and remain better off but with no requirement placed on the beneficiary to actually hand over compensation. Understanding efficiency is fundamental to the economic analysis of criminal law in two ways:

1. In a positive sense, to evaluate the efficiency of current institutions.
2. In the normative side, to propose more efficient institutional arrangements.¹

Economics and the criminal:

One of the main differences between a civil wrongdoer and the criminal is this that the later do all the wrongs intentionally, whereas the former might have done it by accident. Professional criminals are economically rational. They compare the profit from committing a crime with the expected cost, including the risk of punishment, the possibility of social stigma and eventual psychological costs. A criminal is an individual for whom the gain from committing a crime more than compensates the expected cost. Now, the question which arises is whether the criminal should be allowed to move freely if he adequately compensates the victim as is done in civil wrongs? Cooter and Ulen

1 Nuno Garoupa, “An Economic Analysis of Criminal Law”, www.estig.ipbeja.pt/~ac_direito/Garoupa_criminalaw01.pdf

define the '*perfect compensation*', which is a sum of money that leaves the victim indifferent between the injury with compensation and no injury.² If a criminal proposes to compensate the victim perfectly then can he be acquitted? No is the answer, because he interferes with the liberty of the victim which are to be protected by the State. If this is allowed then the liberties and rights of the citizens shall be exposed to continuous violation. The main aim of the criminal law is 'deterrence' which cannot be undone only by way of compensation. Thus even if we try to analyse the activities of a criminal economically we cannot justify them. However, we cannot deny the fact that his activities are economically effective.

Crime and the cost:

If we try to study the costs related to the crime and criminal law then we need to look into the theory of "transaction cost" by Ronald H.Coase. *Transaction cost means the cost incurred in the maintenance and protection of the rights.* Criminal law aims at protecting and maintaining the liberties and rights of the civilians and thus the cost incurred by the State on the maintenance of Police, Jails, and Compensations etc are all included in the transaction cost. Now Coase also gave a theorem known as the "Coase Theorem" which says that "*the goal of the legal system should be to establish a pattern of rights such that economic efficiency is attained.*"³ As discussed earlier, economic efficiency is useful for designing compensation etc. But in criminal law we cannot allow mere compensation to undo the wrong done. However, the punishments can be so designed that the economic efficiency is attained. The State incurs heavy cost in punishing criminals. Jails are to be maintained and all food and lodging costs of the criminals are incurred by the State. Thus according to the Coase theorem the legal system should be such that the occurrence of crime is minimised so that the economic efficiency is maintained. If the crime rate is high then the state shall not be able to maintain the economic efficiency. Moreover, it also means that the punishments must be sufficient enough to deter future wrongdoers. If the punishments are not harsh enough then the "deterrence aim" of the criminal law shall lose its meaning and the crime not be controlled.

2 Coote, Robert r & Thomas Ulen; "Law and Economics";Addison-Wesley Longman, Inc; 1999;p.432

3 Medem, Steven G. & Richard O.Zerbe, Jr.; " The Coase Theorem", *encyclo.findlaw.com/0730book.pdf*

Punishment and economics:

The theory of criminal law aims to answer two basic questions:

1. What acts should be punished?
2. To what extent?⁴

Those acts should be punished which fulfil the essentials of 'crime' i.e. *actus reus* + *mens rea* + *motive*. Any act coupled with wrongful intention and a motive which causes harm either to an individual or to society as a whole is a crime and thus should be liable to be punished.

The method should be to formulate a measure of the social loss from offenses and find those expenditures of resources and punishments that minimize loss. We have already discussed the 'perfect compensation'. Now there is '*perfect disgorgement*', which is a sum of money that leaves the injurer indifferent between the injury with disgorgement and no injury.⁵ The general theory of punishment is the "*theory of reasonableness*" i.e. the punishment should be in proportion of the harm inflicted or the injury caused. The actual punishment should be such that it exceeds the amount of 'perfect disgorgement'.

Multiplier principle:

When the probability of detection and punishment is one (certain enforcement), any sanction between 80 and 100 deters the criminal act (since the loss from being punished outweighs the illegal gain). Under a rule of strict liability for harm (a criminal pays for the harm a criminal act causes), the fine would be 100. Under a rule of fault based liability for harm (a criminal pays for the harm only if his act is undesirable), the fine would be 100 because the act is undesirable. However, if the harm caused by the act were to be 60, the fine would be 60 under a rule of strict liability and zero under a rule of fault based liability. In this last example, the criminal act is not undesirable because the benefits obtained by the criminal exceed the harm. Due to the fact that it is costly to identify and penalize criminals, the probability of punishment is less than one (enforcement and probability). If the probability of punishment is 50% and the fine is 100, the expected fine is 50. For a risk neutral

4 Supra2, p.427

5 Supra2, p.432

criminal (a criminal with no regard for risk), the relevant cost is the expected sanction. Thus, he will commit a criminal act that benefits him with 80 and has an expected cost of 50. In order to deter this individual, the government should apply a fine of 200. This result is known in the literature as the multiplier principle.⁶ The multiplier principle is not very efficient because the punishment must be decided according to harm caused to the victim and according to the gain of the criminal.

An economic analysis of rape:

Rape is one of the most heinous crimes against mankind. No other crime includes all the costs i.e. transaction cost + social cost + psychological cost in one. A victim of rape suffers social stigma as well as psychological trauma. There has been a growing trend to award compensation to rape victims. A Bangladeshi woman was gang raped by some railway employees. Damages were awarded to her against the *Railway Administration in Chairman, Railway Board* under Art.226.⁷

‘Suppose a rapist derives extra pleasure from the coercive character of his act. Then there would be no market substitute for rape and it could be argued therefore that rape is not a pure coercive transfer and should not be punished criminally. But the argument would be weak: (a) the prevention of rape is essential to protect the marriage market and more generally to secure property rights in women’s persons. (b) Allowing rape would lead to heavy expenditures on overcoming these protections. The expenditure would be largely offsetting and to that extent socially wasted. Given the economist definition of value- the fact that the rapist cannot find a consensual substitute does not mean that he values the rape more than the victim disvalues it.’⁸

Another very important aspect of economic analysis is to try to draft a legal structure under which when rational individuals act the effect is efficient. What do we mean by efficient outcomes? In case of criminal law, efficient outcome would, mean that both the parties are induced to behave in such a way that the social costs are minimized. Now, if we interpret in context of rape then the legal structure should be

6 Supra 1

7 AIR 2000 SC 988: (2000) 2 SCC 465

8 Donohue III, John J & Ian Ayres; “Book Review: Posner’s Symphony No.3 : Thinking About The Unthinkable”; www.jstor.org/stable/1228766

such that the women feel so safe that they don't spend extra on their safety like personalized cabs etc. while travelling. They should feel equally safe in a public transport which is cheaper and efficient. In case of rapist, first of all the law should be very stringent and strict that they don't dare to rape. Another, far reaching change in the legal structure can be to legalise prostitution. This argument assumes that crimes always have a cheaper market substitute, for example purchase instead of theft. So if we legalise prostitution then probably the menace of rape can be efficiently tackled. But, this do not addresses the issue of marital rape and poor people who can't even make two ends meet, to expect that they will pay prostitute, is too much to ask for. It will rather result into the exploitation of prostitutes and a prostitute will always have a right to say no! Thus, the punishment of rape needs to be made very stringent so as to deter the criminals and to induce them to act so as to reach efficient outcomes.

Why rape takes place? There can be innumerable answers to this question. We will try to find an economic answer to it. A person commits a crime when the value of the crime or the gain out of it is more than the cost, which he pays in his punishment, or he wouldn't do it.⁹ Given the lawlessness in India, to rape doesn't costs a penny. If caught then it can cost something, however, due to shockingly low rate of conviction in rape cases, the value of pleasure derived out of rape is much more than the cost incurred by the rapist. Thus, an efficient punishment is the only ray of hope for reducing rapes.

Towards an efficient punishment:

Law in India:

In India, rape is dealt under with Section 375, Indian Penal Code. Section 375 defines rape and Section 376 prescribes punishment. The maximum punishment which can be awarded is life imprisonment. The minimum punishment is fixed at seven years which can be reduced at the discretion of the Court. Thus, the total outcome of the punishment is not efficient. The deterrent effect of punishment is almost zero. There should be no exemption from the minimum punishment. A greater stigma needs to be attached with the crime of rape, not to the victim but to the

9 Friedman, David.D; "Law's Order- What Economics Has To With Law and Why it Matters"; Princeton University Press, Princeton & Oxford (2000); pp.223

accused. In India the case is vice versa. Accused of rape should not be accepted back into the society. He should suffer economic penalties also. His sources of income should shrink after acquittal. Unfortunately, all this happens with the victim in India. Economist John Lott did two empirical studies, one dealing with the white collar criminals and other dealing with the corporations charged with cheating their customers. He reached to the conclusion that “stigma is a very real punishment”.¹⁰ The loss to be suffered by the rapist should be more than the highest fine that would be imposed if the charges turn out to be true.

Optimal punishment:

The expected punishment should at least be equal to the gain to the criminal. Thus, to deter the criminal the punishment should be more than the gain to the criminal. Now, how do we employ this theory in rape cases? It is here the idea of compensation comes into the picture. As far as the other punishment goes that is quite stringent. Compensation should be higher than the gain to the criminal. It should be exemplary and compulsory. The conviction should result in both a sentence and compensation. The idea of compensation should include both the aspects: compensation to the victim and compensation to the State as well. It increases the punishment cost. Punishment cost is defined as the difference between the cost the punishment imposes on the criminal and the benefit it provides to others.¹¹ Punishment cost should be made zero. However, compensation can never equal the damage done to the victim in the rape cases. But, if compensation is also paid to the State then probably State could work efficiently. It is not that the State does not want to prevent rapes, but the State is not ready to pay the cost of doing so. If the State is also compensated by the victim then State would work towards preventing the rape, for example by lighting the stray streets, deploying more police on dark roads etc.

The economic analysis is aimed to document the additional costs to the health sector of improving post rape. The transaction costs of rape are not very high because the State doesn't seem to be taking any care of maintaining and protecting the rights of the citizens. Moreover, the compensation cannot adequately undo the wrong done to the victim, but it should be given along with the punishment to the wrongdoer. Nothing

10 Ibid; pp.231

11 Supra 10, p. 225

like perfect compensation exist in the case of rape. Moreover, the State doesn't seem to be following the Case theorem because no such pattern of rights seems to be emerging in case of rape which is economically efficient. The Pareto Optimal rule also doesn't seem to apply because there is no way a rapist can undo the harm done to the victim.

Conclusion:

The economic analysis of law seems to be a very attractive hypothesis; however, not very practical applications of this approach have been evident. It works best for the ascertainment of the punishment. In rape the costs of the crime are too high to be compensated or to be met by the state. But compensation should be given for making the punishment cost zero. There are no doubts that the economic theory of criminal law constitutes a body of literature which has contributed to the understanding of crime and law. Rape has been made the crime because there is no inexpensive way of protecting women's body. Some societies did this by locking their women in houses. In modern times it would be a very costly solution. Thus, the State has been bestowed upon the duty to protect women's right to their own body. Rape violates this right and thus is a crime.