

## THE ECONOMICS OF COMPENSATION: REDRESSING THE RAPED

Konina Mandal, Kaishori Raut

KIIT School of Law  
KIIT University  
Bhubhaneshwar  
Odisha  
India

### ABSTRACT

*Going by the statistics of the National Crime Records Bureau for the year 2014, everyday around 93 women are being raped in India. There is an outrageous rise in the number of rapes reported from 33,707 in 2013 to an appalling 37,681 in 2014. However, the number of reliefs granted being paltry creates a major hindrance in achieving the objective of victim compensation and denotes a failure in governance. There is a correlation between the increasing incidents of rape since "Nirbhaya" and a periodic fluctuation in the economic growth of the country which safely concludes that the social equity of the country, which is the root of effective compensation, is controversial. 'Social Equity' while being considered as one of the social indicators of sustaining economic growth, an appreciation of the value of the social equity would buttress the development of the country. The distance between the spirit and letters of law makes governance problematic in the present context which seems to be a challenging task for the state. Therefore, the compensation and rehabilitation schemes for the rape victims appear to be more debatable and a cost effective approach towards achieving the same is essential. In the present dispensation, an attempt is made to introspect and highlight the fallacies in the existing legal framework from an economic perspective, supplemented by a cost benefit analysis.*

Keywords : Economics, Rape, Compensation, Cost-Benefit Analysis.

## 1.INTRODUCTION

India's fastest growing crime, rape, requires much more introspection than meets the eye. Given the enormity of rape, compensation for it, is not a new idea. Delving into the fundamental question of why rapes occur, an economic answer would be novel and thought-provoking.<sup>i</sup> Economics is the study of the problem of choice, where resources are limited and the aim of society is the maximization of benefit welfare.<sup>ii</sup> A growing trend of the economic analysis of law and legal problems has stimulated effective methods of punishment. A crime is not without its costs. 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. Therefore, somewhere down the road, all crimes affect the economics of the society.<sup>iii</sup>

While criminal law minimizes the occurrence of crimes to foster societal welfare, economics endeavours to achieve social welfare maximization, a target which even Bentham, the advocate of utilitarianism desired to achieve. According to him, individuals are rational and attempt to increase pleasure, even illicit desire, until anticipated pain appears to outweigh the expected enjoyment.<sup>iv</sup> When the value of the crime committed by a person or the gain derived out of it outweighs the cost of punishment, he is emboldened to commit it. Owing to shockingly low rates 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. The current situation in India is a dismal reminder of the prevalent lawlessness.<sup>v</sup>

## 2.ECONOMIC ANALYSIS AND ECONOMIC EFFICIENCY

## 2.1. Need for economic analysis

Some of the stalwarts in the field of economic analysis of law and legal problems, like Gary Becker, Posner, Robert Cooter, Steven Shavell, Thomas Ulen take the view that economic efficiency is useful for examining and designing rules and institutions. Economic efficiency states that a change that benefits someone cannot be made without harming someone else. A given change is efficient if those gaining from it compensate those losing so that no one is worse off after the change. This is the well known "Pareto Efficiency."<sup>vi</sup>

Our analysis is based on a less restrictive concept of efficiency, social welfare maximization or Kaldor Hicks Efficiency. Kaldor Hicks Efficiency, an improvement in Pareto Efficiency is a principle which deduces that one person is made better off without making anyone worse off.<sup>vii</sup> In practice however, it is difficult to employ without putting at least one person in a detrimental position but not entirely impossible. Kaldor-Hicks states a decision can be more efficient as long as in theory everyone can be compensated to off-set any potential costs.

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.

Professional criminals are those who are economically rational and can compare the profit from committing a crime with the expected cost, including the possibility of social stigma, risk of punishment, and the eventual psychological costs.<sup>viii</sup>

## 2.2. Towards economic efficiency

As defined by Cooter and Ulen, a sum of money that leaves the victim indifferent between the injury with compensation and no injury is Perfect Compensation<sup>ix</sup>. Though the activities of a criminal can be economically analysed, it is inappropriate to justify them. However, it is undeniable that his activities are economically effective. The theory of transaction cost propounded by Ronald H. Coase helps us determine the costs associated with crime and criminal law. Transaction cost means the cost incurred in the maintenance and protection of the rights.<sup>x</sup> From the perspective of criminal law, safeguarding the rights and liberties of civilians requires the maintenance of police, jails, and compensations through expenditure which are all included in the transaction cost.

Coase theorem, another theorem given by Coase enunciates that the goal of the "legal system should be to establish a pattern of rights such that economic efficiency is attained."<sup>xi</sup> The State

pays a hefty amount in punishing criminals through maintenance of prisons, food quality and lodging facilities.<sup>xii</sup> So, the Coase theorem suggests the minimisation of occurrence of crimes to attain economic efficiency. Higher crime rates negate economic efficiency. Insufficiency and leniency of punishments fails to meet the objective of deterrence in criminal law.<sup>xiii</sup>

### **3. DO INCREASES IN PROBABILITY OF PUNISHMENT DETER MORE THAN SEVERITY OF PUNISHMENT ?**

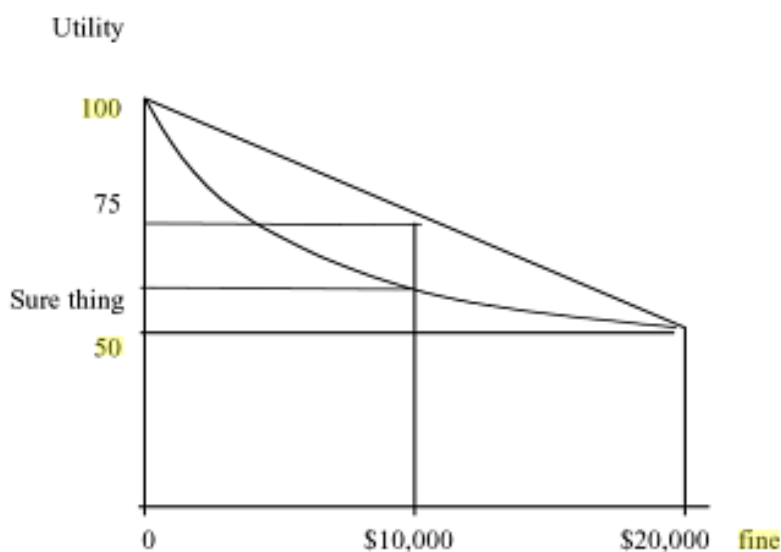
The decision of law enforcement to produce expected penalty that achieves optimal deterrence is only taken after careful consideration of the optimal level of deterrence.<sup>xiv</sup> In the decision of a criminal to commit a crime, he calculates his expected penalty as a product of probability of punishment and severity of punishment as both these aspects are the responsibility of the law enforcement to ensure the achievement of the desired expected penalty.<sup>xv</sup> The question which requires introspection is whether probability and severity can be set independently. If potential offenders are risk neutral and have no wealth constraints all of the combinations of probability and severity should produce identical level of deterrence.<sup>xvi</sup> It is relatively economical for society to intensify the severity of sanctions. Inflation of a monetary fine imposes hardly any additional cost, rather it escalates the revenue for the society.<sup>xvii</sup> Therefore, a low probability/ high fine combination still achieves the same deterrence as high probability/ low fine combination, but at a much lower cost to society. A high fine low probability combination is the optimal and feasible since it reduces enforcement costs.<sup>xviii</sup>

As opposed to fines, expanding the severity of imprisonment imposes extra enforcement costs on society. Nevertheless it may still be relatively cheaper to increase the severity of the imprisonments than to increase the probability of sanctions. As in case of fines, combination of probability and severity is a long prison sentence and low probability. Although longer prison sentences increase enforcement costs, fewer individuals are imprisoned which decreases enforcement costs and off sets the increase from longer sentences. Thus, regardless of the form of sanction, high severity and low probability is, in general, the optimal combination because it achieves deterrence at the lowest possible cost.<sup>xix</sup> With effective deterrence comes the effective reduction in rape which automatically does away with the need for compensation and directs the revenue for more productive government projects.

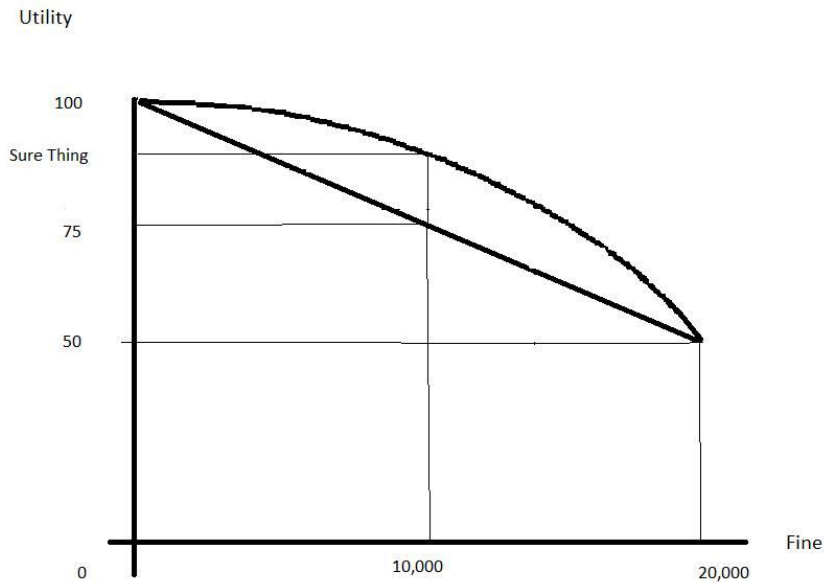
"Suppose that society has a choice of either doubling the probability of being convicted (say, from 50% to 100%) or doubling the level of punishment if convicted (say, from 10,000\$ to 20,000\$) which method will reduce the crime rate the most? Students almost always answer

that increasing the probability of punishment will deter the criminal activity more. If this answer is correct then criminals prefer risks. In both cases, the expected punishment is the same that is 10,000\$. But if a criminal dislikes the sure thing of losing 10,000\$ more than he dislikes the gamble with the same expected loss, then he will be more deterred by the sure thing than the gamble. If the society wants to deter the criminal activity, it should give the criminal what he does not want. When the criminal prefers, gambles to the equivalent sure thing, the society should give him the sure punishment. If the criminals prefer risk then it is equivalent to say that their utility of money is convex as per the below stated convex graph."<sup>xx</sup> The utility of the criminal is a convex function of the fine. The numbers on the right are utiles. If a criminal is fined \$0 dollars then he has 100 utiles; and if a criminal is fined \$20,000 , he has 50 utiles. If a criminal is always fined \$10,000 he will receive 60 utiles as a sure thing on which there is no gambling required on his part. However, if a criminal receives \$0 fine in certain circumstances and \$20,000 fine in certain other circumstances then the expected fine is \$10,000 but the expected utility is half of 100 + half of 50 which will be 75. Therefore, a criminal prefers the gamble. If the criminal was risk neutral, he would have the straight line utility function. In economics there is an assumption of a person being risk averse (a concave function) and therefore he prefers a sure thing over a gamble . For such person a gamble deters more than a sure fine of 10,000 because a sure fine of 10,000 there will be a gradual increase in the utiles."<sup>xxi</sup>

### Convex Curve



## Concave Curve



## 4. MULTIPLIER PRINCIPLE

The multiplier principle says that the benefit derived by a perpetrator from an offence, is more than the cost of the loss suffered by the victim. This encourages him to commit such a crime in the first place. If the criminal act that benefits him with 80 when the expected penalty is only 20 or 50, it does not create a deterrent effect on the criminal. In order to deter him from committing such an offence the expected cost has to be made 200.<sup>xxii</sup> This becomes an efficient method for the calculation of penalties if the punishment is fixed with regard to the gain to the perpetrator, from the crime rather than the harm which has been caused to the victim.

## 5. MONETARY ESTIMATION OF INTANGIBLE COST

Rape being one of the most heinous crimes against mankind, includes transaction, social and psychological costs in one. Transaction cost being primarily tangible in nature, can be

evaluated in monetary terms. But the question that arises is whether social and psychological costs can be estimated in monetary terms as well. The answer to this question is a definite yes, with the condition that the methods and techniques need to be improved upon, replicated, and revised. Miller et al. utilized the victim-compensation model to determine the intangible costs in relation to crimes of rape. The table below shows the tangible and intangible costs for rape.<sup>xxiii</sup>

**Table 1: Tangible and Intangible Costs of Crime**

Crime	Tangible Costs	Intangible Costs	Total Costs	Cost Relative to Burglary	Ratio of Intangible to Tangible
Murder	\$1,030,000	\$1,910,000	\$2,940,000	2,100	1.85:1
Rape/sexual assault	\$5,100	\$81,400	\$86,500	62	15.96:1
Robbery/attempt with injury	\$5,200	\$13,800	\$19,000	14	2.65:1
Assault or attempt	\$1,500	\$7,800	\$9,350	7	5.2:1
Burglary or attempt	\$1,100	\$300	\$1,400	1	0.27:1

Tangible costs include medical costs, public programs relating to victim assistance, and lost earnings which in the U.S. in 1993 were estimated at \$150 billion. The intangible costs include pain, suffering and quality of life, which were estimated at \$450 billion in 1993 (Miller et al.,1996). When intangible costs of crime are included, crimes come closer to what might be expected in terms of severity. The importance of the intangible costs are clear upon an examination of Table 1.<sup>xxiv</sup> As one example, relative to the tangible costs, the intangible cost of rape is far greater than that for any other type of crime. The cost of rape would be significantly underestimated were intangible costs excluded.<sup>xxv</sup> The standard practice however excludes non-monetary costs from crime prevention evaluations. This practice needs research and revision.<sup>xxvi</sup> Work is needed to refine, improve upon and develop the methodology, and to use alternate methodologies to produce validating or improved estimates.<sup>xxvii</sup> This is required for different times, countries and contexts. Such research seems a necessary step if cost-benefit analysis of crime prevention is to become truly credible.<sup>xxviii</sup>

Routine incorporation of non monetary costs into the cost benefit analysis of crime is tricky. Ideally, if perfect estimates of those costs existed, they would be incorporated.<sup>xxix</sup> At present, estimates can vary widely. Estimates can also be subjective: some people would argue that the life of a persistent violent criminal is not worth the same as that of a responsible hardworking taxpayer — the argument can be made that the net loss to society of the former is less than that of the latter.<sup>xxx</sup>

Since the tangible and intangible costs taken together are incredibly high, it automatically makes it impossible for the state to bear the cost of compensation for such high number of rape victims. Instead, directing funds towards preventing the evil of rape from occurring at all would be a more plausible and cost effective alternative.

## **6. ENSURING COST-EFFECTIVENESS**

### **6.1. Punishment and Compensation**

The Indian Penal Code deals with rape under sections 375 and 376. The maximum punishment which can be awarded is life imprisonment, the outcome of which is inadequate and the deterrent effect of the punishment is almost zero.<sup>xxxi</sup> The minimum punishment is fixed at seven years which can be reduced at the discretion of the Court, however in all cases there should not be any exemption from the minimum punishment. It should be ensured that a greater stigma is attached to the accused with the crime of rape.<sup>xxxii</sup> The accused should be made to suffer economic losses by way of dismissal from his job and he should be barred from further employment post acquittal. Apart from incarceration monetary penalties should also be imposed. Empirical studies have resulted in economist John Lott to come to the conclusion that - "stigma is a very real punishment"<sup>xxxiii</sup>. If charges turn out to be true the loss to be suffered by the rapist should be more than the highest penalty.

Compensation should be higher than the gain to the criminal. It should be exemplary and compulsory. The idea of compensation should include both the aspects: compensation to the victim and compensation to the State as well.<sup>xxxiv</sup> 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. Punishment cost should be made zero. Although it is tricky to equal the compensation with the damage done to the victim in rape cases, the compensation if paid to the State it would ascertain efficiency in controlling rape.<sup>xxxv</sup>



Due to shortage of funds, the State is reluctant to finance necessary measures which may potentially prevent rape, even if it wants to. If the State is compensated by the accused then State would work towards effective rape prevention by illuminating the stray streets, deploying more police on dark roads, providing speedy transportation and proper communication facilities for quicker response etc.<sup>xxxvi</sup> Money should also be directed towards the establishment of special schemes for compensating rape victims. Since the eligibility criteria for the compensation under the existing victim compensation schemes are restrictive and confining, it acts as an impediment for the rape victims to demand compensation. The economic analysis also focuses upon incurring additional costs to health sector for improving condition of rape victims.

A vital aspect of rape prevention is that it ensures cost effectiveness to prevent the expenditures to be offsetting and wasted. It is important to try and draft the legal structure in a manner in which the social costs are minimized. For instance, to formulate a legal structure which creates a safe environment for women so that they do not spend extra amount on their safety, where they are comfortable in travelling via the cheaper public transport than personal vehicles.<sup>xxxvii</sup> Another far reaching change in the legal structure can be to have a cheaper market substitute for rape which would be legalization of prostitution.<sup>xxxviii</sup> Although the vice of marital rape and the desires of the lower rungs of the society remain unanswered, half a loaf is better than none.

Compensation demands justification. Some justifications for compensation include benefit to the victims, symbolic social recognition for the victims' suffering, deterrent and reformatory effects on the offender, as payment of compensation has an “intrinsic moral value of its own”.<sup>xxxix</sup> The Supreme Court has an interesting take on it too, stressing on the need for long-term rehabilitation. On 23rd January 2014, the Chief Justice of India, P. Sathasivam, iterated that survivors of rape should be compensated by giving them half of the property of the rapist as compensation in order to rehabilitate them in Society.<sup>xl</sup> He also further added that mere provision of interim measures is not enough. Long term rehabilitation is needed as family members are all material witnesses and are likely to be socially ostracized.<sup>xli</sup>

The Centre notified the provision for providing relief by amending the Criminal Procedure Code by incorporating a new section. The Union Home Ministry had initiated the process of making states notify the Victim Compensation Scheme in September 2010; however only four states came up with a scheme within one year.<sup>xlii</sup> Sikkim and Karnataka were one of the

first states to come up with it. The provision came into being after the Criminal Procedure Code was amended, by the addition of a new Section 357A which dealt with the modalities for compensating victims of crime.<sup>xliii</sup> According to an analysis of the notifications issued, Goa has fixed the maximum compensation for rape at Rs 10 lakh, followed by seven Union Territories at Rs 3 lakh. The Sikkim State government has framed a scheme to provide compensation to victims who have suffered loss or injury as a result of a crime. Called the “Sikkim Compensation to Victims or his Dependents Schemes”, this was instituted in mid-2011 and not only provides for compensating victims but also their dependents according to the nature of loss or injury suffered.<sup>xliiv</sup> Even now, many states are yet to finalise a scheme for compensation of victims of crime, including violence against women. Many states are yet to finalise a scheme for compensation of victims of crime, including violence against women, nearly four years after the Centre notified the provision for providing relief by amending the Civil Procedure Code. After the notification of a new section in the Civil Procedure Code in December 2009, the Union Home Ministry had initiated the process of making states notify the Victim Compensation Scheme in September 2010 but only four states came up with a scheme within one year. Sikkim was the first to launch a scheme in June 2011, while Karnataka notified it in February, 2012.<sup>xlv</sup> This shows the hesitation on the part of the states to come up with compensation schemes due to the shortage of funds and finance and therefore it is important that crimes such as rape should not be allowed to happen in the first place. This will reduce the burden upon the state as the amount invested in prevention of rape is lower than that amount which the a perfect compensation demands (tangible and intangible costs).

## 6.2. Alternative measures

Apart from offenders, the states' burden can be reduced also by corporations and large corporate bodies. Corporate bodies under section 135 of the Companies Act 2013 are under an obligation to contribute 2 % of their average net profits made during the three immediately preceding financial years towards the advancement or the welfare of society. A portion of such contribution can be channelized towards the amelioration of correctional administration and victim compensation funds. This will prove to be more cost effective by minimizing the cost incurred by the State and maximizing the benefits for the society. The Central Government should take initiatives to encourage the setting up of more companies

with charitable objects to focus more upon research, social welfare and charity. In welfare economics, a social welfare function is considered to affect the economic welfare of a society. In a 1938 article, Abram Bergson introduced the social welfare function. The object was "to state in precise form the value judgements required for the derivation of the conditions of maximum economic welfare". Bergson described an "economic welfare increase" which has later been characterised as Pareto improvement in the sense that at least one individual should move to a more preferred position with everyone else indifferent. The social welfare function could be specified in a substantially individualistic sense to derive Pareto efficiency optimally. <sup>xlvi</sup>

## 8. CONCLUSION

The economic theory of criminal law gives us a lucid perception of a cost effective method of compensating the raped. Although hypothetical in nature it is very attractive and can be practically implemented only with meticulous strategizing which guarantees proper 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. Rape has been made the crime because there is no inexpensive way of protecting a woman's body which is why it becomes difficult for the state to bear the cost of compensation. Instead more funds should be directed towards prevention of rape in a cost effective manner which benefits the entire society. 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. Extensive fact-finding has led us to the conclusion that social equity can be achieved by finding a cost-effective solution towards compensation and prevention of rape.

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