



# An Economic Analysis of the Criminal Law on Rape in India

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## I. INTRODUCTION:

Any civilised nation's criminal law serves as its foundation. It seeks to keep society under control. The criminal law defines and punishes a wide range of wrongs as 'crimes.' In general, criminal law is based on the 'deterrence' principle, which means that it punishes wrongdoers in order to serve as a warning to others. In addition to 'retributive justice,' the criminal law have evolved to encompass the concept of 'reformatory justice.' Rehabilitative programmes are used to try to change the wrongdoers' ways. Most laws deal with "private wrongs," whereas criminal law treats offences as "public crimes," necessitating higher penalties because of this. Criminal offences involve harm to the state, and as a result, the state is one who brings accusations against those who violate the law.

When resources are limited and society's goal is to maximise "benefit welfare," economics studies the problem of choice. Economics are becoming increasingly important for the study of law and legal issues, in part because they may be utilised to determine the most efficient penalty. In addition to harming the victim, committing a crime entails a number of other consequences. To put it simply, when someone commits a crime or inflicts bodily harm on someone else in order to get away with it, the victim's family suffers the loss of their financial resources. As a result, all crimes have an impact on the economy at some point. Law and economics are both concerned with improving the welfare of the society by reducing the number of crimes committed. In the paper that follows, we'll attempt to conduct an economic study of criminal law, focusing on the crime of rape.

**Research objective**  
**Research Question**

## II. RESEARCH METHODOLOGY

Analytical and descriptive methods are among the various forms of study that belong under

this umbrella. This study is based on previously collected data, which was then evaluated to produce new findings. Secondary data is used in this investigation. These researchers conducted their investigation mostly through the use of written materials such as books, papers, journals, and the like. There has been no empirical method or field study performed while writing this research paper, as it is heavily reliant on secondary and electronic sources. Scholars will use historical analysis to learn more about this right's emergence and development. In order to bring this project to a successful conclusion, we'll do doctrinal research. A great deal of the information needed for this project will be gleaned from secondary sources such as academic journals, books, and reports. However, a Google form questionnaire will be sent out in order to capture this primary data.

## SYNOPSIS

### Economic Analysis of Criminal Law

The social science of law is also one of the strictest since it lays out everything in the black and white, the economic analysis of law and legal concerns has been a mainstay for economists like Posner, Robert Cooter, Thomas Ulen or Steven Shavell, as well as G.S.Becker. In order for a change to be considered efficient, the winners or losers<sup>1</sup> must compensate each other such no one else is worse off as a result of the change. The well-known "Pareto Efficiency" is based on this principle. The economic study of criminal law relies on efficiency in two ways:

1. Positively, to assess the present institutions' efficiency.
2. The normative aspect is to suggest more efficient institutions.

<sup>1</sup>Nuno Garoupa, —An Economic Analysis of Criminal Law, [www.estig.ipbeja.pt/~ac\\_direito/Garoupa\\_criminalaw01.pdf](http://www.estig.ipbeja.pt/~ac_direito/Garoupa_criminalaw01.pdf)



### The cost and the crime:

The "transaction cost" theory of Ronald H. Coase may help us understand the costs of crime and justice. The transaction cost is the expense of preserving and safeguarding rights. The goal of the criminal law is to protect and safeguard civil rights and freedoms, hence the state's expenditures for police, prisons, and compensations are included in the transaction cost. Coase also created the Coase Theorem, that asserts that the goal of a legal system should be to provide an efficient set of rights. As noted before, economic efficiency may be used to provide compensation. But under criminal law<sup>2</sup>, compensation cannot make up for wrongdoing. However, fines may be designed to be economically efficient. Punishing criminals is costly for the state. The Coase theorem states that the legal system must be tailored to minimize crime while retaining economic efficiency. With a high crime rate, the state would not be able to maintain economic efficiency. It also suggests that sanctions must be severe enough to dissuade future wrongdoers. This criminal law's "deterrence" purpose will be lost if the penalties are not high enough.

### Economics and Punishment:

The goal of criminal law theory is to resolve two fundamental questions:

1. What types of offences should be punished?
2. To what extent can this be true?

As long as an act falls within the scope of "crime," it should be punished. A crime is a crime if it has a nefarious aim and results in damage to a person or the society.

Process of creating a measurement of social loss caused by offences and identifying resource expenditures and punishments that minimise<sup>3</sup> loss should be the method. The concept of 'perfect compensation' has already been considered. Perfect disgorgement is now a notion, which is a quantity of the money that makes an injured party indifferent about the existence of disgorgement or not. The real punishment should be greater than the 'ideal disgorgement' sum.

### An analysis of the economics of rape:

Rape is one of the most heinous of these crimes. There is no other crime that includes all of the costs, such as the transaction cost, the societal

cost, and the psychological cost, into a single act. A rape survivor is socially humiliated as well as psychologically traumatised. Victims of rape are increasingly receiving monetary recompense. Some railway staff gang raped a Bangladeshi woman. Under **Art.226** of the Railway Act, she was awarded damages against the **Railway Administration in Chairman, Railway Board**.

Assume that a rapist enjoys that fact his or her conduct is forceful in some manner. Consequently, rape would be unaffordable, and some would argue that it isn't a pure kind of forced transfer and shouldn't be criminalized as a result. There is, however, one problem with this argument: In order to safeguard the marriage market or, more generally, to safeguard women's property rights, rape prevention is essential. A large effort would be required in order to avoid these precautions if rape were allowed. The benefits would outweigh the costs, making it a bad investment for society as a whole. The rapist's failure to come up with an acceptable alternative does not mean that he respects a rape more than the victim does, according to the economic idea of value.

Economic research is also concerned with creating a legal framework that permits sensible people to act efficiently. To arrive at an effective result in criminal law, it is necessary to consider both sides' motives.

According to the legal system in the United States, women don't have to spend additional money on security, such as private taxis, since they feel so safe that they don't feel the need. Because public transit is cheaper and more efficient, they should be just as safe. To prevent rapists from committing acts of rape, the law should be very harsh and draconian. All crimes have a less costly market alternative<sup>4</sup>, such as buying instead of stealing. Although this does not solve the problem of marital rape, it is unrealistic to expect destitute individuals who are already trying to the make ends meet also pay prostitutes. Instead, it will lead to the exploitation of prostitutes, and prostitutes will still be able to reject<sup>5</sup>. In order to prevent and encourage offenders to take action, the rape punishment should be made extremely severe.

A cost-effective answer is what we're going to try to find. If the value of the crime or the profit it brings is higher than the price of his punishment,

<sup>2</sup>Medem, Steven G. & Richard O.Zerbe, Jr.; — The Coase Theorem, [encyclo.findlaw.com/0730book.pdf](http://encyclo.findlaw.com/0730book.pdf)

<sup>3</sup>Supra2, p.426

<sup>4</sup>AIR 2000 SC 988: (2000) 2 SCC 465

<sup>5</sup>Donohue III, John J & Ian Ayres; —Book Review: Posner's Symphony No.3 : Thinking About The Unthinkable!; [www.jstor.org/stable/1228766](http://www.jstor.org/stable/1228766)



then he has committed a crime; otherwise, he would not have committed it. Because of India's chaos, rape is completely free. Due to the shockingly low conviction rate for rape cases, the value of pleasure acquired via rape significantly surpasses the cost paid by the rapist. As a result, there is only a shard of hope that rapes will be reduced.

### **Towards an efficient punishment:**

#### **Law in India:**

Section 375 of Indian Penal Code makes rape a criminal offense. Section 375 of the Penal Code defines the definition of rape, whereas Section 376 outlines the punishments associated with it. The maximum sentence for a crime is life in prison. The mandatory minimum is seven years in prison. The Court, on the other hand, has the authority to reduce it. Punishment has no purpose other than to inflict pain. There must be no exceptions to minimal requirements. The crime of the rape necessitates a more severe punishment<sup>6</sup> for the offender than for the victim. The reverse is true in India. Following his conviction, his sources of income will likely decrease. Victims in India are unfortunately subjected to all of this. White-collar criminals and companies accused of scamming customers were the focus of two studies by economist John Lott. So, he came to this conclusion: Stigma is a heavy consequence. Losses suffered by the alleged rapist should be larger than any fine imposed if the charges are confirmed to be true.

#### **Optimal punishment:**

At the very least, the intended punishment should be proportionate to the criminal's benefit. As a result, the punishment must be greater than the benefit to the criminal in order to dissuade the criminal. Compensation enters the<sup>7</sup> scene at this point. In terms of the other penalties, they are rather severe. It should be a model for others to follow as well as a legal requirement Compensation should cover both the victim and the state. The cost of punishment rises as a result of this. The cost of punishment should be nil. Compensation, on the other hand, will never be enough to compensate the victim of rape. It's not that the government doesn't

want to prevent rapes; it's just that it's unwilling to pay the price

The purpose of economic analysis is to document that, additional costs of improving post-rape care to the health-care system. Because the state does not appear to care about maintaining and safeguarding citizens' rights, the transaction costs for rape are not extremely expensive. A perfect reparation is impossible in situations of rape. As a result, there seems to be no efficient pattern of the rights emerging in the situation of rape, which violates the Case theorem. There seems to be no way for a rapist to undo the damage they caused on their victim using the Pareto Efficient criteria.

### **BARGAINING IN MARRIAGE AND THE COASE THEOREM**

According to Ronald Coase in "The Problem of Social Cost," "the judgment of the courts about liability for harm would have no influence on resource allocation" in cases of the private property rights conflicts involving externalities.

"When parties can interact and trade together<sup>8</sup>, their conduct will be efficient regardless of any specific form of law," according to Coase's theorem,

Coase focused on factors such as social cost<sup>9</sup>, externality, equal sharing of the property rights and resources among parties to a contract, and the absence of transaction fees or other small particulars in economic transactions.

An external cost is created when someone creates it or someone pays it, according to Coase. In another sense, the externality is bilateral: the opposing preferences of the two parties must harm one of them. This highlights the underlying problem of shared or social costs: From such economic point of the view, the Coase argues that minimizing total harm maximizes the social product. If either side is given a legal right or entitlement, total social cost will change.

The assumption of no transaction costs has important legal implications. Simply no transaction costs means no law. Party will easily contract to the most effective allocation of resources irrespective of original property rights<sup>10</sup> (and entitlements) and

<sup>6</sup>Friedman, David.D; —Law's Order- What Economics Has To With Law and Why it Matters!; Princeton University Press, Princeton & Oxford (2000); pp.223

<sup>7</sup>Ibid; pp.230

<sup>8</sup>Walter Block, Coase and Demestz on Private Property Rights, 1 JOURNAL OF LIBERTAN STUDIES 111 (1977).

<sup>9</sup>ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (4th ed. 2007).

<sup>10</sup>DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS (2011).



legal norms regulating resource use. According to Coase, the purpose of such a law system should be to provide a set of rights that encourages economic efficiency.

When it comes to transaction costs, the legal system has a major impact.

Let us use an example to clarify the concept of property rights allocation. A baker or a dentist share a wall in Coase's illustration. The baker uses loud machinery that disturbs the dentist's work. The baker can buy a quiet machine for Rs. 50 or the dentist can soundproof his walls for Rs. 100.

In order to fix the problem, the baker intends to buy quiet machinery for Rs. 50. Also, the baker was made to bake in quiet by the dentist. Identifying who owns the "sound" or property rights is critical. A court may then rule on who has 'sound rights,' at which point either party may file suit. The dentist has a right to a noise-free working environment and may compel the baker to buy less noisy equipment. In this case, if the Court sides with the baker, he can utilize his noisy equipment. It also means the dentist can't force that baker to use a quieter machine and soundproof his walls. They would rather pay Rs. 50 for a less noisy equipment than spend Rs. 100 on sound proofing their walls because they are logical. Most efficient and cost-effective outcome. To get the most efficient<sup>11</sup> and cost-effective outcome, both parties would bargain or come to one of the most efficient and cost-effective outcomes. To support his position, Coase argues that both parties have full knowledge of costs incurred but who owns the property rights. With no transaction expenses, bargaining between two or more parties is the most efficient and cost-effective.

It is acceptable to assume that a woman has the right to her own private property, such as her body. Anybody who abuses their position or damages her private property has right to be restrained by her.

We may conclude two things about the concept of shared social costs. Private property rights were at conflict with husband's right to the sex in this case. When there is a clear contrast of rights, the Coase theorem may be utilized to settle it.

When comparing the above example<sup>12</sup> to a case when a husband rapes his wife, there is a conflict of rights. This paper's purpose can be best achieved by using Coase theorem & arguing for criminalization of marital rape:

<sup>11</sup>STEVE MEDEMA & RICHARD ZERBE, THE COASE THEOREM (2000).

<sup>12</sup>Bryan A. Garner, Garner's Dictionary of Legal Usage (3rd ed. 2011).

#### 1) Assuming Marital Rape Is Criminal

This implies that the wife's property rights override the husband's conjugal rights to sex. Marital rape happens when a husband violates his wife's rights and demands sex. So the husband would be penalised or fined heavily. The cost is lower if a husband oversteps but the wife refuses. In the first case, the husband is severely penalized. We may assume that it not a raping his wife is a bigger punishment. Thus, committing marital rape is expensive.

#### 2) Assuming there is no legal framework that criminalizes marital rape.

In other words, when property is distributed, the parties are unaware of who has the dominant position. Assuming the spouse is the legal owner of the property. Because she may be forced to pay for various private and social costs if her husband uses the conjugal right to the engage in sexual relations without her consent, she may lose her private property in such a situation. As a result, rape has a heavy social cost. However, the husband pays a lower fee if he utilizes to his conjugal right to the sexual relations without the consent of his wife. If the woman refuses, the husband would be held guilty for not being enough to satisfy his need in this situation. However, it is reasonable to presume that this private cost would've been less than wife's cost in first case. Prohibition or criminalization of marital rape is the most cost-effective solution to this problem.

Hence, the efficiency and cost-effectiveness of marital rape are determined by the legal framework and the initial allocation of property rights. Because of this, rape in the bedroom must be punished. As a result, the Coase theorem says that the woman has the greatest claim to the family home. It's also best to criminalize rape of a spouse.

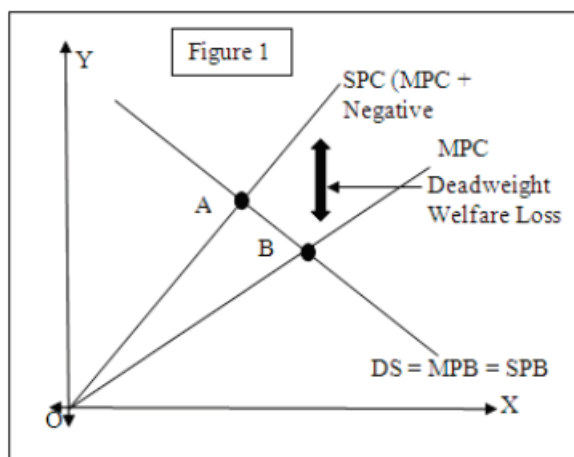
#### NEED TO CRIMINALIZING MARITAL RAPE

There are several reasons to criminalize marital rape. It is important to recognize the several cost kinds involved with this topic: 1. Private and 2. Social Costs

- Private Cost-Private costs, on the other hand, are those that only harm one person and have no influence on the rest of society. Individuals' purchasing power may be reduced without affecting society using this approach.
- Social Cost-This social cost is equal to the overall cost. It is made up of both private or public expenses. To be specific, the private cost for a smoker would be, say, £6 for such a package of 20



cigarettes<sup>13</sup>. The external costs on society are caused by air pollution and the consequences of passive smoking. An increase in social costs reduces society wealth, while an increase in private costs redistributes it. Let us now apply this to the crime of marital rape. The crimes committed by the husband against his wife might well have serious ramifications for the woman, rather than for society as a whole. Due to the fact that costs are private. It impacts the wife without affecting society. There are no law to the control or regulate it. Externalities enter the picture at this stage. These are costs and benefits that do not accrue to the person or firm<sup>14</sup> doing the transaction. External Costs may include environmental damage caused by mining, whereas external benefits may include pleasure received from an artificial lake created by hydroelectric works. Externalities (mostly negative) might be many in cases of marital rape. Examples include a wife's insecurity contributing to her suicide or having a negative influence on her children. Because of this, the private cost-plus externalities equal the social cost, which impacts of the whole society at this point.



(GRAPH 01)

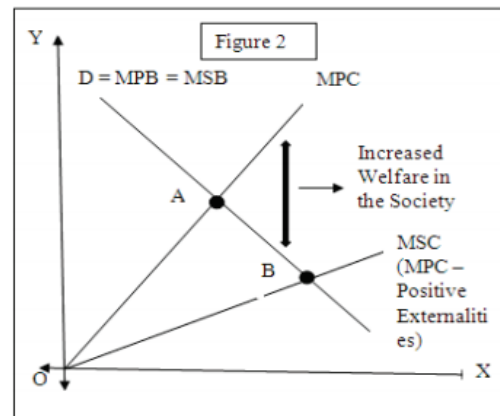
Figure 1: As a result, the cost incurred as high (A) and the atrocities faced by the wife are high (B). (Figure:1) Negative externalities would be irrelevant if we imposed laws and regulations on the same

<sup>13</sup>Tejvan Pettinger, Social Cost Economics Help, (Aug

<http://www.economicshelp.org/blog/glossary/social-cost>

<sup>14</sup>RICHARD A POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014). 25, 2016),

circumstance, according to the theory<sup>15</sup> of positive externality, rules and regulations are founded. Because rape in marital is a crime, husbands are more likely to exercise control, and women are more likely to feel safe., which in turn increases family love and respect, lowering the cost (B)



(Graph 02)

The idea of "Sunk Cost" may also be used to justify criminalizing rape. When a company goes out of business, all of its committed expenditures are lost and cannot be recovered. A few examples are advertising costs and building costs. A rational actor's judgments on pricing and quantity are untouched by sunk costs. Suppose an existence porcelain white elephants cost \$1,000 to make but only sells for \$10. This fact that it cost \$1,000 to make will not alter the sale price if the vendor is sensible. If he insists on selling it less than he paid for it, he would lose \$1,000 instead of \$990. Given that a wife's MPC is high, the marginal benefit gained if she reports the rape will be lower than if she does not report it. Because if she says she shouldn't complain because the benefit received is minimal, this will lead to high MPC for wife, which might eventually leak into in the social cost, as well as a geometric increase in the MPC. There should also be laws in the place for this to work.

### MARITAL RAPE PUNISHMENT

The Protection of Women from Domestic Violence Act, 2005, Section 3(d)(iii), recognizes marital rape as a kind of sexual<sup>16</sup> violence that 'abuses, humiliates, degrades or otherwise violates the woman's dignity'. However, the Protection of

<sup>15</sup>P. H COLLIN, DICTIONARY OF ECONOMICS (2006)

<sup>16</sup>RICHARD A POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).



Women from Domestic Violence Act, 2005<sup>17</sup> is a civil legislation, not a criminal law.

This provision does not prevent a woman from the suing her husband for sexual abuse of any kind. The penalty for prosecution under this<sup>18</sup> provision is three years in imprisonment and a fine.

The current legal stance does not criminalise marital rape, making this clause useless to the wife.

A criminal wrong can be defined as follows:

#### 1. Criminal Intent-

Criminal intent is known as mens rea. In cases of marital rape, his husband's use of physical force or forced sexual intercourse without the wife's permission are clearly illegal.

#### 2. Damage to the public

Unlike tort, contract, or property laws, criminal law harms others as well as the victim. The impact of a raped wife's private costs on society is not limited to her.

#### 3. Proof standard:

The prosecution must also prove the crime to a high level under criminal law. To convict in a common law country like India, an prosecutor must establish beyond reasonable doubt. It doesn't make sense to not punish a crime like marital rape because it's hard to prove.

In criminal law, punishment is separate from compensation. The purpose of under civil law compensation is just to the return the injured party to their pre-injury status.

Marital rape, which combines both the civil and criminal wrongdoings, should be punished with both compensation and prison time, since it is fair to believe that this combination would be effective.

For the following reasons:

#### For a criminal offense:

The imprisonment under the criminal law has the deters future criminals. If convicted, the offender faces social stigma. Also, jail is efficient in penalizing the offender's psychological commitment.

#### Civil law punishment:

Perfect compensation helps the wife overcome her injury. The physical force used to extract sexual intercourse stresses and victimizes the wife, undermining her trust in her husband.

In the case of a rape in the marital, the best course of action would be to punishment and compensate the victim.

<sup>17</sup>The Protection of Women from Domestic Violence Act, Section 3(d)(iii) (2005)

<sup>18</sup>The Protection of Women from Domestic Violence Act, Section 20 (2005)

### III. CONCLUSION

An economic analysis for law looks to be a highly appealing concept; however, there have only been a few instances of this method being used in practice. It is the most accurate method of estimating the severity of the penalty. The expenses of rape are just too high to be covered or paid for by the government in any way. Compensation, on the other hand, should be paid in return for such punishment being provided free of charge. With little doubt, economic theory on criminal law is a corpus of work that has contributed to our understanding of crime and legal systems. Rape has been classified as a crime since there are no economically viable measures of protecting women's bodies. Some communities achieved this by limiting women to the confines of their own houses. In today's society, this is a very expensive solution to implement. As a consequence, the state has certainly been entrusted with responsibility of defending women's freedom to control their own bodies. Rape is crime because that interferes on the this constitutionally protected right.

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