
Laws against Sexual Harassment: An Economic Analysis

1st Author: Jasmine Jha, Panjab University, Chandigarh.

2nd Author: Nitish Kashyap, University of Delhi, Delhi.

Abstract:

This article assesses the laws against sexual harassment in India through the standard economic analysis prevalent to this date. The rudimentary analysis hints at a solution of legalising prostitution to curb the menace of sexual harassment and related crimes e.g rapes, molestation, etc. The analysis points out how a choice to have sexual pleasure without facing criminal proceedings or social stigma would direct the current and potential lawbreakers to engage in paid sexual services and would reduce the burden on police machinery and legal set up. This by no means is suggestive of the fact that legalising prostitution doesn't have its share of trouble but doing so would then recognise prostitution as an ongoing activity and proper laws must be brought up so as to curb and deter any unjust act there.

JEL Classification: k14, k42

Introduction

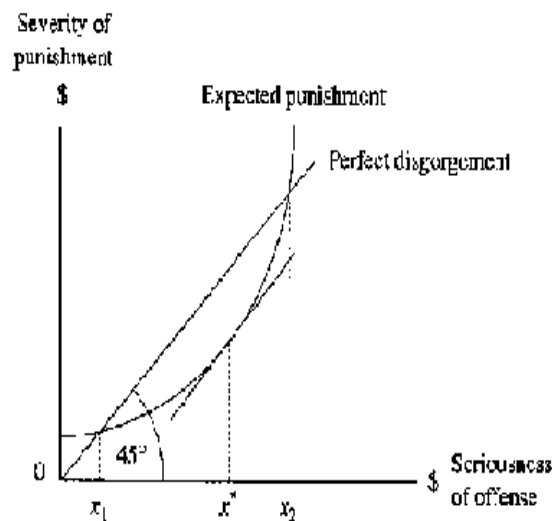
Sexual harassment refers to broad range of unwelcome sexually determined behaviours. So it ranges from gender centric taunting to unsolicited sexual conduct towards victim and any further advances made on him/her. Theoretically speaking it captures both male and female beings, which amounts to say that sexual harassment would be identified irrespective of gender. To consider any punishment or remedies against sexual harassment we must first understand why it's a crime. The traditional theory of criminal law broadly identifies three contours to identify a "wrong" as crime whereby any *wrong* is scrutinised for (a) wrong intention of doer (b) public nature of harm done and (c) wrong against the state; before taking cognizance of it as crime. In this case one can observe that intent of doer is malign and it's not accidental, secondly when an act of sexual harassment takes place it amounts to a public damage of established peace and harmony of a society and finally such acts infringe with basic fundamental rights of individuals curtailing their freedom to move, live a dignified life which in a democratic set-up qualifies to be a wrong against state given state is the custodian of fundamental rights of individuals and thus any violation of such rights is wrong against state.

Criminal Laws & Economics:

Each law in place has a rationale behind it, so before we proceed to analyse criminal laws it becomes imperative to understand the aim of such laws in place so as to make an informed analysis of existing anti-sexual harassment laws. The objectives of criminal laws are more or less same everywhere with variations in emphasis determined by social, cultural and historical peculiarities associated with the place. One can think of *retributive justice, reformative justice and principal of deterrence* as the underlying aim of criminal laws. In Middle-East countries where retributive aspect of justice is bolder also works well in consideration of principle of deterrence, so draconian laws which aim on retributive justice also help achieve the goal of deterrence while they fail on reformative aspect since the accused is severely punished. Similarly one can think of operation of criminal laws in India, we observe that ours is a more tolerant and fair system towards the accused and this makes orientation of our legal system

dealing with criminal acts towards reformative justice and principal of deterrence. Now like any other 'wrong act', sexual offences also impose a cost on victim and society in general, this may be physical harm or cost of protection or loss arising out of safety concerns by individuals. One further observes empirically that sexual violence or harassment incidents are gender biased and in such a scenario it becomes state's prerogative to ensure that one section of society should not feel threatened by virtue of their sex. The National Crime Record Bureau statistics started collecting data on 'rape' since 1971; it's a shame to observe that rape crimes are rising astronomically. From 2487 cases in 1971 to 24923 cases in 2012 and 33707 cases in 2013, the figures only tell us that it's growing like a menace. One has to also understand that increased incidences of such criminal cases besides imposing economic cost also reflect social evils; hence it calls for a comprehensive roadmap to tackle the issue. In an economic analysis of law we usually consider economic efficiency for examining and designing rules and institutions. Understanding efficiency is assumed critical to analysis of criminal law in two ways; (a) In positive analysis, to evaluate the efficiency of current institutions (b) In normative analysis, to propose a better institutional arrangement. The above is based on a compensatory principle whereby one should be careful that monetary or any other form of compensation doesn't remain valid in case of public wrongs. The motive of this analysis is to ascertain if workhorse of anti-sexual harassment laws is efficient or not. The Coase theorem says that "*goal of the legal system should be to establish a pattern of rights such that economic efficiency is attained*". However in criminal cases we can't allow compensation to stand for violating state's norms and disturbing peace and tranquillity of general masses, so we can identify two goals here. One, whereby there is sharp reduction in such crime and second, the set of criminal codes reduces the overall cost to society. So it hints at drafting a legal structure whereby when rational individuals act efficient outcome is reached. In case of rape it amounts to tell that both the parties (injurer and injured) behave in a way that social cost are minimized along with reduced number of cases. In such a case women would not take extra care to protect her and there would be limiting incidences of rape for rational criminal can't afford to do the crime. Now the questions boils simultaneously to two things (a) cost-benefit analysis of rational criminal prohibiting him from raping (b) victim doesn't incur any extra cost to ensure her safety and normal routine (c) the transaction cost of maintaining law and order is at its best minimum. Since it's a criminal offense this becomes a question of state versus the injurer whereby state deploys hurdles (in terms of punishments) to prevent injurer to raise any harm to injured and the later lives with peace. To reach the ideal scenario whereby there are no rapes or cases of sexual harassment we have to ensure that criminal being a rational agent whereby he compares the expected cost and expected benefit of his crime restricts himself from such acts. For this to happen it must be the case that cost of committing such an act be higher than benefits that he enjoys from such acts. We modify the usual marginal cost-benefit analysis since "sexual assault" can't have a monotonic functional expression whereby we have acts of sexual misconduct which are continuously increasing in their severity and can be mapped. We therefore compare cost versus benefit of such acts for the injurer to first access the incidence of such acts.

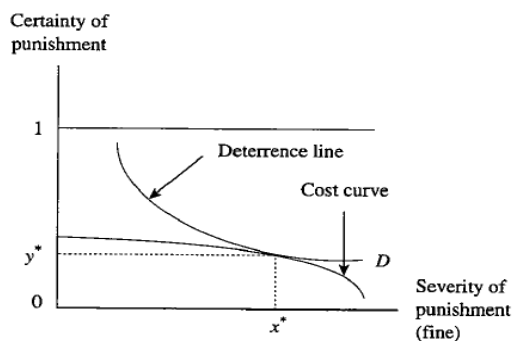
Expected Punishment and Decision to commit crime



Source: Cooter and Ulen

The graph shows how when the expected punishment is less than that of disgorgement level one is tempted to commit crime. Since in the case of rape we don't entertain monetary compensation so as to even treat case of disgorgement, the rationale we are trying to present here is that lower the expected punishment higher are the incidences of such crimes. Now expected punishment here depends upon two factors (i) probability of being caught (ii) amount of punishment which is usually 7 years or more. As pointed earlier we observe enormous rise in number of rape cases in country and there is not even slight decline in number of such cases, we need to propose and examine the reasons behind this. According to the above analysis there are two implications of the same; either the cost of committing rape or other sexual assaults is quite low given the benefits from such a crime or there is considerably higher number of *hate crimes* in cases of sexual assaults, amounting to rising number of rapes and sexual assault cases despite significant likelihood of punishment being there. We believe that among these two abstract aspects it's the former which explains rising number of cases and while explaining we also include how 'lower cost' of committing such crime entails some of the aspect of the latter also. We attribute the lower cost of committing such crime on two basic groundings of our society. One is *patriarchal set-up* and other is *long judicial trials*, while the former downplays the victim's plea and discourages her fight against assaults/rapes this coupled with long judicial trials usually break down victims and has resulted in gradually fewer reporting of cases. This has caused a built-in depressor whereby women usually don't complain about such assaults which in turn boosts injurer's confidence and he roams around attacking women's modesty till one day when he is caught in some case. The classic example of such hypothesis is recently caught driver of Uber cabs in Delhi who happened to be a habitual offender but was never reported for his deeds and was thus roaming free. Now this underreporting of cases actually makes the injurer bolder and aggressive. He perceives a lower probability of even being reported less alone tried and convicted in the case, in fact it can't be argued that people don't fear anti-sexual harassment laws rather it's their surety about not being reported that makes them unlawful and willing to risk it. In fact in most of the high-profile cases the accused are

habitual offenders and their perception of the other sex is often misogynistic. So it's the perception of a woman which is perpetuated to men in this country over generations given our patriarchal society which encourages men to attack the modesty of women. Over years this has resulted in underreporting of such cases for in such cases the victim gets unwanted response than the accused and she is made to feel bad for a foreign act. This results in lower probability of being caught thus amounting to lower cost of committing such crimes. Now it can be very well argued that why can't probability of catch be increased, given underreporting it amounts to tell of increased surveillance and deployment of more security personnel and creating a safe and conducive environment against sexual harassment. These administrative measures are going to increase probability of being caught and encourage victims to immediately report the case. Diagrammatically one can understand interplay of certainty of punishment (probability of being caught and convicted) and severity of punishment (which would refer to an increasing number of years in jail or a combination of fines with jail or capital punishment in our case).



Source: Cooter and Ulen

The above diagram represents allocation of resources to deterrence when certainty of punishment is more expensive than severity of punishment, which holds quite true in our case. It can be fairly assumed that increased surveillances for tapping the crime would be bitterly expensive. So we are left with the option to go for draconian laws, however given there is continuous increase in number of rape cases reported which are not even close to true statistic because of underreporting if we formulate stricter laws say like capital punishment it's very much probable that such draconian laws would invite to sexual assaults followed with murder to remove clues. In India thus the deterrent impact of existing laws is nearly zero given the rising number of rape cases. Given negligible level of deterrent effect and adverse consequences probable with stricter laws it seems that only heightened security cover is a possible cure so as to increase the cost of committing such crime. Thus in present day scenario 'Rape' remains a menace because we don't have a cheap way to protect a woman's modesty. Now despite series of existing legislation and recently passed *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013* one finds little evidence of reduction in such crimes. In fact purpose here isn't to achieve some desirable rape rate rather one aims at elimination of such a heinous crime from the society. In this regard it seems that amendments in existing legislative or judicial structure are less likely to fetch an immediate and considerable result.

Conclusion

As argued before changes in existing legislation or judicial structure are less likely to leave a positive impact soon, it seems that existing legislations are a failure in this regard to prevent such occurrences. It's suggestive in this respect that "Prostitution" be legalized. Given societies' inability to protect women's body inexpensively we should resort to this measure. The above doesn't rest on the idea that most rapes are based on sexual urges rather it tells that given offenders have an option for sexual release which is legally valid (buy than theft) and they will utilize it for it's safer than committing an offence, there shall be reduction in cases of sexual assaults for offenders' sexual appetite is met. So it amounts to be a substitute which is safer than otherwise committing a crime. This is in conformity with our stated principle of efficiency whereby goal of legal policy be such that desired outcome is realized with minimum social cost. Here we ascertain that it would minimize the social cost, for it tackles the genesis of the crime whereby the offender gets a legally valid place for release of sexual urge and women are less worried and more free than before to bear extra cost for their safety. Now what I have suggested here is based on a simple though experiment of "buy than theft", at the core of it remains the fact that sexual urges are natural and demand for sexual release in relatively inelastic, in this case if the government facilitates act of consumption (consuming sexual release) it would lead to less unlawful eruptions. One can certainly ask the validity of such policy experiment, incidentally evidences are in our favor and according to a recent Supreme Court directive, it has asked the government to consider legalizing prostitution.

Case study (from John Lott's blog, first published in "The Economist" *Italics mine*)

Does legalizing prostitution change rape rates? Some evidence from Sweden and Germany

Germany legalised prostitution in 2001 just as Sweden, a country culturally similar in many ways, was going in the opposite direction. In 1999 the Swedes had made it criminal to pay for sex (pimping was already a crime). This provides an interesting opportunity to test to see if making it easier or harder for prostitution impacts rape rates.
Rape Rate per 100,000 populations - rates reported to police

Rape Rates		
Germany	Year	Sweden
NA	1996	6.3
NA	2000	7.5
10.6	2003	25
10.7	2004	25.2
9.9	2005	41.9
9.8	2006	46.3
9.1	2007	51.8
8.8	2008	59
8.9	2009	63.8
9.4	2010	63.5

The above table clearly tells us following criminalization of prostitution in Sweden there was apparently high rise in incidents of rape. It rose from 25.2 to 63.5 during 2004 to 2010 also during the period when it was legal one observes moderate rates during 1996 and year 2000 which is immediately after criminalization. In case of Germany it's noted that following the liberatory regime there is definitely a fall in incidence of rapes. In an another study of The earth Insitute by Kirby Cundiff of North eastern State University "It is estimated that if prostitution were legalized in the United States, the rape rate would decrease by roughly 25% for a decrease of approximately 25,000 rapes per year...[T]he analysis seems to support the hypothesis that the rape rate could be lowered if prostitution was more readily available. This would be accomplished in most countries by its legalization."

These studies point positively towards our proposal and given the scenario we are facing, along with limitations posed by changing law as discussed earlier, it would be in best of interest to legalize prostitution to curb the menace of rape and other sexual assaults.

References

1. Cooter & Ulen; Law and Economics (chapters on crime)
2. Posner, A Richard; An Economic Theory of Criminal Law
3. GNLU; Research Paper on Sexual harassment Act (2013) (<http://www.gnlu.ac.in/Directorate%20of%20Research%20Activities/Research%20Paper%20-%20Sexual%20Harassment%20Act%20-%20Critical%20Analysis.pdf>)
4. Prostitution: Legal Provisions in India (<http://www.gangothri.org/node/9>)
5. Kamthan, Manika; Rape and compensation: An Economic analysis of the Criminal law on Rape in India; NALSAR Law Review (2013)
6. Supreme court asks for considering legalization of prostitution (<http://infochangeindia.org/human-rights/news/supreme-court-asks-govt-to-consider-legalising-prostitution.html>)
7. Brief history of laws against sexual harassment at workplace (<http://infochangeindia.org/women/analysis/a-brief-history-of-the-battle-against-sexual-harassment-at-the-workplace.html>)
8. Cundiff , R K; Prostitution and sex crimes: The Independent Institute (http://www.independent.org/pdf/working_papers/50_prostitution.pdf)
9. Does legalizing prostitution change rape rates? Some Evidence from Germany and Sweden (<http://johnrlott.blogspot.in/2013/11/does-legalizing-prostitution-change.html>)
10. Website of National Crime Records Bureau