

## The Cost of Criminal Justice and Efficiency

Seyyed Mahmoud Mir-Khalili<sup>1</sup>, Mostafa Jalaly<sup>2</sup>

<sup>1,2</sup> Faculty of Law, Farabi College, University of Tehran, Iran

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### ABSTRACT

The most obvious goals in law and economics are respectively justice and efficiency. Since second half of 19<sup>th</sup> century, under the effects of some economists' works as of Ronald Coase and Guido Calabresi and Gary Stanley Becker economics has had more and more influence on law. One of the most important effects of economics on law is inclusion of some efficient institutions into law and undermining those institutions which are not efficient. In this article, having reviewed "efficiency" and "justice" concepts and described their relation, I will address the most important institutions in laws that have been formed under the effects of economic thought.

**KEY WORDS:** Justice, efficiency, corrective justice, criminal policy, criminal justice, law and economics.

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### INTRODUCTION

In law, achieving justice traditionally has been the most important goal and in economics the most important goal has been achieving to more efficiency. Studying law by economic approach inevitably exposes these two goals against each other. Although there isn't a consensus that efficiency could be a goal, and it has been said that it is an instrument, yet economics without efficiency, in the broadest concept, have nothing to do. So here I assume that efficiency is a goal.

In criminal policy making, justice and efficiency should both be considered. Analysis of justice is more difficult than analysis of efficiency. Efficiency is an objective goal with definite proof areas, while justice is usually assessed by prescriptive judgments mainly related to political philosophy (Mankiw, 2001, p182).

What is the relation between these two goals? Are these goals reducible to a single one? Which relation do they have: harmony, neutrality or conflict?

If the relation is harmony, the pursuing of one of them would be beneficial for the other. If it is neutrality, pursuing of one has no effect on achieving the other. In the state of conflict, approaching one of them, results in moving away from the other.

The majority of economists assume that the relation is conflict, and up to a certain point, are interchangeable which is known as "trade-off". According to Brian Barry, these two goals need not to be reduced to a single one; one might be to some extent substitutable for one another (Mathis, 2008, p185).

One aim of studying costs of crime is to examine efficiency of designed institutions for combating crime or broadly to achieve "corrective justice". In following this relation, which forms a basis for economic study of law, will be examined in more details. Before studying the relation, must first determine what is meant by justice and efficiency here.

### Efficiency

When people talk about efficiency, they usually mean productivity or performance of the economy (Mathis, 2008, p190). Efficiency corresponds to the size of the pie, while justice to how it is sliced. Efficiency closely relates to the rationalization of programs and policies. In fact, where a mechanism prevents waste of resources and changes unfavorable and unpleasant situation into a satisfactory situation, there efficiency would arise.

In economics, generally, there are three criteria for evaluating efficiency: Wealth maximization, Kaldvor-Hicks criterion, and Pareto criterion.

*Wealth maximization.* Nowadays in the field of law and economics, the dominant concept of efficiency is wealth maximization which has been proposed by Posner. He proposed his theory by virtue of the shortcomings of utilitarianism, which its aim is to maximize utility. He believes that the main aim of human behavior is to maximize wealth, not utility (Ansari, 2011, p101).

*Pareto efficiency.* According to the Pareto efficiency criterion, moving from a state to another state is more efficient if results in increase the minimum level of welfare and satisfaction of a person, without decreasing the other's welfare (Ansari, 2011, p122).

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\* **Corresponding Author:** Seyyed Mahmoud Mir-Khalili, Faculty of Law, Farabi College, University of Tehran, Iran.  
Email address: mirkhalili@ut.ac.ir.

*Kaldvor-Hicks criterion.* A state is more efficient if adopted policy makes it possible for those who have benefited, to maintain their welfare, and at the same time, compensate for the loss of those who have been injured (Ansari, 2011, p129).

On one hand, Pareto efficiency has difficulties in application; on the other hand, wealth maximization and Kaldvor-Hicks criteria are almost the same in effect. So we have actually no more than one way in this field, that is, an increase in efficiency means an increase in economic output (wealth) (Mankiw,2001,p191).

### **Justice**

The first division of justice goes back to many years ago. The famous division is in Aristotle's Nicomachean Ethics paper which divides justice into two types: distributive, commutative. Distributive justice relates to allocation of benefits by the state. Rights and benefits are distributed among people according to some criteria (Mankiw, 2001, p186). Commutative justice relates to private transactions both voluntary and involuntary, without considering the distinction of individuals and requires equalization of goods and their considerations. For example, in a sale contract, the goods tendered must be equal to their considerations in value (also known as justice in exchange), or the compensation shall be equal to the inflicted loss and punishment shall be proportional to crime (also known as corrective justice).

When economists talk about the conflict between justice and efficiency, distributive justice, especially just distribution of income is considered. But for economic analysis of law, this approach is too narrow, because corrective justice and justice in exchange are inevitable in criminal law, contract law and non-contractual law.

### **Corrective justice and efficiency**

Since second half of 19<sup>th</sup> century, under the effects of some economists' works as of Ronald Coase and Guido Calabresi and Gary Stanley Becker economics has had more and more influence on law.

Traditionally the most important role of tort law and criminal law is respectively to provide the injured party with compensation for damages sustained and punishing the criminals whilst the preventive functions is a by-product that is of secondary importance.

According to Guido Calabresi, when it comes to the analysis of legal rules, efficiency must be examined before justice. So he wholly means that inefficient legal rules shall be excluded from codes whether are just or not. The most important reason in preferring efficiency to justice is that we cannot achieve to absolute justice or, at least, it is very costly (Mankiw, 2001, p195).

Posner believes that civil courts shall be committed to efficiency and public sectors shall concern to distributive justice.

Most of the countries have attention to efficiency in their criminal codes. For example, in Iran, in criminal codes, both procedural and substantive, there are institutions which have been designated to meet more efficiency. Amongst these institutions there are some that clearly conflict to justice, but improve efficiency, so it is clear that the relation is trade-off.

Some of the most important of these institutions that have been included in modern criminal codes are addressed below. It should be noted that these institutions may partially be beneficial to justice but are mainly designated to improve the efficiency of criminal justice system.

### **Principle of proportionality of prosecution**

Proportionality is against the principle of legality of prosecution and means that prosecution shall be done when, in addition to incidence of crime, some requirements are also provided, and incidence of crime is not sufficient. Among these requirements is seriousness of crime, effectiveness of enforcing the sentence, having reasonable and economic justification (Sprack, 2006, p80). The prosecution shall analyze the circumstances in every case. So the prosecution, according to the requirements, has arbitrary and power to prosecute a crime or not. It means that for legislature, efficiency of prosecution is important. By contrast, legality of prosecution means that all of incidences of crime shall be prosecuted, and incidence of crime is sufficient for prosecution. So the principle of proportionality of prosecution helps to improve the efficiency of criminal justice (Akhondi, 1991, p166).

### **Deferring sentence**

In some countries, after proving the criminality of an offender, according to individual and social status and the circumstances that have caused the crime, courts have the power to postpone sentencing usually for six months to two years (Islamic Panel Code of Islamic Republic of Iran, 2013, Art 40-45). Courts may also issue some demands that require the offender to do or not to do some things. After elapsing the term, depending on commitment of the offender to the court demands and the status of him, courts might sentence him or might award to exemption

of punishment. Certainly, one of the most important issues that court considers in this regard is changing the probability of reoffending before and after the term. If this institution could cause a reduction in the probability, albeit a little, it would help to improve efficiency, because it diverts the criminal justice from imprisonment to exemption or a mitigated punishment (Sprack, 2006, p368).

### **Lapse of time**

In most countries, prosecuting a crime after lapsing a certain term is legally impossible (Procedure of General and Revolution courts in criminal cases, 1989, Art173-175). Certainly this institution is contrary to justice, but it is inconformity with efficiency. The most important reasons for this are as follows: disappearance or difficulty of collecting evidences of proof, reducing the grandeur of criminal justice in the society, increased probability of wrong decisions (Akhondi, 1991, p246). Though the term is different depending on the crime, as the more serious the crime is, the longer the term is. The result is that, those crimes which punishing their perpetrators is void of benefit for society would be remained unprosecuted so that lots of the budget would be diverted to more important crimes which are still in the mind of society and this results in efficient decisions.

### **Specialization**

Dividing police, courts, prison and law enforcement division in to some subdivisions according to crimes is a policy that is designed to reach more efficiency and also correct decision which results in closing to justice more and more. Juvenile courts, courts for drug related crimes, press crimes, internet related crimes, political crimes and... are amongst the courts that are usually devoted to special crimes to be addressed. Even if judges and other involved persons have not been trained in the academy for their specialty, yet by practice, they would be professionally experts. There is no doubt that specialization is more beneficial for efficiency than achieving justice.

### **Plea bargaining**

A plea bargaining or plea guilty is an agreement in a criminal case between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession by the prosecutor (Sprack,2006,p285). This may mean that the defendant pleads guilty to a less serious charge or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant pleads guilty to the actual criminal charge in return for a more lenient sentence.

A plea bargain allows both parties to avoid a lengthy criminal trial and may allow criminal defendants to avoid the risk of conviction at trial to a more serious charge. For example, in U.S. legal system, a criminal defendant charged with a felony theft charge, the conviction of which would require imprisonment in state prison, may be offered the opportunity to plead guilty to a misdemeanor theft charge, which may not carry a custodial sentence (Aamaha,1996,p577) Although this institution is contrary to justice, it certainly causes time and resources saving in criminal justice. In relation to plea bargaining, it should be noted that today's main goal in criminal justice system is to solve disputes, not any other thing, so solving more cases means more efficiency.

### **Alternatives to imprisonment**

An alternative to incarceration is any kind of punishment or treatment other than time to lapse in prison or jail that can be given to a person who is convicted of committing a crime (Sprack, 2006, p442). Alternatives can take the form of restorative justice, transformative justice, or the abolition of incarceration entirely. Incarceration may be the most costly punishment and unfortunately the majority of crimes are punishable by imprisonment. Today there is almost no disagreement that imprisonment has not desired results, if is not counterproductive. So achieving desired results by alternatives is to some extent more efficient. The most important alternatives to incarceration are as follows:

#### **- Probation**

In criminal justice probation is a period of time in which enforcing sentence is suspended. It may be added supervision over the offender, ordered by the court instead of serving time in prison (Cromwell. Del Carmen. 1999. P2)

An offender on probation is ordered to follow certain conditions set forth by the court, often under the supervision of a probation officer. During this testing period, the offender faces the threat of being sent back to prison, if found breaking the rules. The results of probation are the same as imprisonment, even better. In addition, reoffending rate among offenders subjected to probation is lower than imprisoned offenders. So probation is a step to improve efficiency.

#### **- Parole**

Parole is provisional release of a prisoner who agrees to certain conditions prior to the completion of the maximum sentence period. There are three objectives in establishing parole: firstly, not to remove offenders from social

relations and institutions that interact with them helps to rehabilitate offenders. Secondly, offender's behavior and socialization process is supervised directly or indirectly but effectively. Thirdly, saving resources. These objectives form the elements of efficiency. Conditions of parole are different in different countries (Cromwell. Del Carmen. 1999.p 186)

- **Diversion programs**

A diversion program in criminal justice system is a form of sentencing and such programs are often run by a police department, court or outside the agency designed to enable offenders to avoid criminal charges and a criminal record. Problem-solving courts typically include a diversion component as a part of their program. The purposes of diversion generally include: a relief for courts, police department and probation office, better outcomes compared to direct involvement of the court system, and to provide an opportunity for the offender to avoid formal prosecution by meeting various requirements of the program. So diversion is also in line with efficiency. Of course it must be done carefully otherwise it is counterproductive (White.Perrone.1997.p 179).

Mediation, as used in law, is a form of alternative dispute resolutions (ADR), i.e. a way of resolving disputes between two or more parties with concrete effects. Mediation is an instance of diversion. Typically, a third party, i.e. the mediator, assists the parties to negotiate for a settlement. Disputants may mediate for disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters. The mediator acts as a neutral third party in the dispute and facilitates the process rather than directs it. Participation in mediation is typically voluntary.

Since mediation is voluntary, and it attempts to settle the dispute through negotiation it is, potentially more efficient than bureaucratic formal justice.

- **Domestic incarceration**

Domestic incarceration requires the offender to spend some hours in his/her house for a given term and be subjected to partial restrictions (Ashori, 1993, p391). Offender shall not go out in the specified hours of day, so has not any opportunity to commit crime, as if he is in prison. The most important differences are the way of supervision which may be done physically or electronically, and the other is that in domestic incarceration all costs of sentence implementation as food, dwelling, health care and ... are imposed on offender. It follows the same results as imprisonment without its high costs.

- **Fines**

The most important alternative to imprisonment is different types of fine (Sprack, 2006, p453). In some crimes and about some offender fine is not suitable; in other the most suitable punishment is fine. Suitability lays on efficiency. Critiques made to fine resulted in developing different types of fine. Punishment generally imposes cost on government, but fine is a profit except the cost made for collecting it.

**Aggravated punishment**

When a convicted reoffends after releasing from prison, it seems that the enforced punishment has not been effective and an aggravated punishment is required. In most countries the punishment for reoffending is more than the punishment that is required for offending for the first time (Ardebili, 1993, p232). Of course in this case at the first glance, increasing efficiency means increasing the cost of the criminal justice, but ultimately, by annihilating the reoffending causes, it would decrease the total cost. In addition, it should be noted that efficiency is not equal to decreasing the cost. In efficiency, achieving the desired aim is also important, so among two policies, that policy is preferred which makes us closer to the aims, even if it is more costly than the other.

**Mitigated punishment**

When a person engages in crime in special circumstances, it is to some extent predictable that in future, in usual circumstances, probability of reoffending by him is low, and so he does not need to be punished as a person who engages in crime in usual circumstances or as a person whose reoffending probability is high. So the courts by taking into consideration, for example, the social, cultural and familial background and factors that make a circumstance unusual and...-which altogether cause that reoffending probability to be low, decide to decrease the primary punishment (Islamic penal code 2013, Art 37-39). If this mitigation has been done carefully and appropriately, it certainly would help to improve the efficiency of the system, even though it is clearly contrary to justice and "equity against the law" principle.

**Security measures**

Reaction of criminal justice system to an offender may be punishment, or rehabilitation measures or a combination of them depending on offenders' situation(s). Rehabilitation is required when there is some disease, harmful addiction or mental-psychological deficiency in the offender which requires treatment in addition to

punishment (Ardebili, 1993, p178). It is the court that recognizes the requirement of treatment. Without rehabilitation, imposing punishment is not effective, and so the criminal justice system, despite charging, can't effectively prevent reoffending, but by rehabilitation, the obstacles in the way of annihilation of reoffending are attempted to remove, so probability of reoffending will decrease significantly. This means improved efficiency.

### **Conclusion**

Justice and efficiency are not mutually exclusive with each other, but their relationship is very complicated. Justice and efficiency are not always in a trade-off relationship, but to large extent, this relationship is cooperative. Economic growth leads to increased tax revenue for the state public purse. This in turn helps to better redistribution of income which results in distribution of justice. In corrective justice, especially criminal justice, decreasing the cost of the system would increase the budget of other fields like education, health, insurances, transportation, and after all, welfare. Decreasing the cost of criminal justice system is not advisably possible, unless through improving efficiency.

So amongst the different criminal policies, we should adopt the most efficient policy or the policy that, by minimum cost, bring the best possible consequences for us.

In criminal justice there are some institutions that are clearly unjust, but are apparently beneficial to efficiency like plea bargaining, proportionality of prosecution. Some other institutions such as mitigation and aggravation of punishment, apparently, consider both efficiency and justice. Finally, there are some institutions as legality of prosecution principle in some countries' criminal justice such as Iran and Germany, which have no attention to efficiency and attempts solely to meet the traditional goal of criminal justice.

Anyway, modern criminal justice systems turn increasingly more attention to efficiency rather than justice. May be the main reason of this preference, is the increasing importance of economics given the restricted recourses in the current world.

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