UNDERSTANDING RAPE ADJUDICATION IN DELHI TRIAL COURTS

Arushi Garg

Supervisors: Carolyn Hoyle and Lucia Zedner

Word Count: 96,800

A dissertation submitted in fulfilment of the requirements for the Doctor of Philosophy in Law, University of Oxford

ACKNOWLEDGEMENTS

I am grateful to my supervisors, Carolyn Hoyle and Lucia Zedner for their constructive critique and unremitting care. They never doubted that I would successfully complete this thesis, so over time, I stopped doubting it too. Countless thanks to both of you not just for your feedback, intellectual engagement, references, moral support, wisdom and laughter, but also for showing me the sort of mentor I want to be to my students one day.

I thank my assessors Prabha Kotiswaran and Jonathan Herring for engaging so deeply with my work and pushing me to develop and finetune my ideas. I am also indebted to Ravinder Barn, Ratna Kapur and Alpa Parmar who provided transformational feedback at various stages during the development of this thesis.

I have benefited through academic and financial support from the Rhodes Trust, Oxford Pro Bono Publico, the Oxford Law Faculty, the Oxford Centre for Criminology, Tim Corner, Andrew and Elle Grant (through the Murray Speight Fund) and Hertford, Magdalen and St Hilda's Colleges at Oxford. I am thankful to these organisations and persons for enabling this project. I must specifically acknowledge the contribution of Mary Eaton, Dev Gangjee and Katharine Grevling. Meetings with them infused me with optimism and self-confidence whenever it was most needed.

My doctoral fieldwork would have been impossible without the support of friends and colleagues in India. I am grateful to all those who trusted me enough to participate in this study – particularly victims and members of their family, whose

participation entailed a significant risk of retraumatisation. Thank you to all the judges, lawyers and victim-support personnel who allowed me to be part of their world for a few months. I am particularly thankful to Justice Madan Lokur, Justice G Rohini, Justice S Muralidhar, Justice Gita Mittal, Justice Vinod Goel, Justice Talwant Singh, Alok Agarwal and Hari Krishna Paliwal for their invaluable support in facilitating my access to court proceedings and key decision-makers within the criminal justice system. Thank you also to Aarthi Rajan, Dhvani Mehta, Mrinal Satish, Nishant Gokhale, Pratiksha Baxi, Rahela Khorakiwala, Rupam Sharma, Sakshi, Shivendra Singh, Siddhartha Basu, Swathi Sukumar and Vrinda Bhandari, for their frank and useful suggestions regarding the empirical component of this project.

I am grateful for the friends who have kept me going over the half decade that it took to see this project through, including (but not restricted to) Ben Abraham, Camilla Pickles, Daniel Kaliski, Diego Rubio, Eshanee Shukla, Harish Chand, Jodi Gardner, Kiron Neale, Mikesh Udani, Miriam Zachau Walker, Mythili Vijay Kumar, Natalya Din-Kariuki, Natasha Chilundika, Parisha, Ruchita Brajabasi, Shreya Atrey, Shuchita Thapar, Victoria Miyandazi and Zoe Fannon. Thank you to my most constant library companions, Kalpana Sivabalah and Rishika Sahgal. Thank you to my OxCrim crew for consistently pushing me to be a better person and academic. Thank you (especially) to Kate West, Leila Ullrich, Maayan Ravid and Roxana Willis.

I am grateful to my partner Ninad Rajgopal for his patience, love and sweetness. My biggest thanks of all goes to Shiva, Divyani, Nalini and VN Gargs for a lifetime of love and faith. All my successes are owed to you, now and always.

ABSTRACT

This thesis undertakes a socio-legal analysis of rape prosecutions in Delhi. It explores the hypothesis that rape adjudication is best understood by examining the implementation of law in its postcolonial context, rather than by reference solely to its formal scope. Specifically, this thesis deploys a postcolonial feminist framework. Postcolonial feminism highlights that the scope and operation of law assumes fixed gendered, racial and other social hierarchies. It critiques these assumptions.

The key question addressed in this thesis is what are the factors associated with acquittal and conviction in rape prosecutions in Delhi? The data sources used to respond to this question include judgments (n=254); observation in six courtrooms and interviews with victims, victim-support personnel, lawyers and judges (n=61). A thematic analysis is used to identify the factors influencing adjudication in four categories of cases: where the victim's testimony supports the defendant; where her consent is vitiated by deception ('deceptive sex'); where elopement is prosecuted as rape; and other contested cases.

This thesis concludes that the criminal justice system is entrenched in its historical and socio-economic context. This context includes intersecting power structures such as those of gender, caste and class. Women's experiences within and outside the legal system are shaped by these structures. Finally, the operation of the criminal justice system is influenced by multiple constitutive agencies with distinctive institutional cultures.

This thesis is one of the only academic studies to focuss on Indian rape trials, following extensive legal reform in 2013. It is one of the first socio-legal analyses of deceptive sex cases in South Asia. It demonstrates the potential of using postcolonial feminism to analyse legal materials. It also engages with the methodological hurdles encountered by researchers in opaque, bureaucratic postcolonial environments. Its findings are relevant for scholars and practitioners interested in feminist analyses of criminal justice institutions.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ALD	Andhra Legal Decisions
AP	Andhra Pradesh
APP	Additional Public Prosecutor
ASJ	Additional Sessions Judge
BLJR	Bihar Law Journal Reports
CIC	Crisis Intervention Centre
Cr App R	Criminal Appeal Reports
Cri LJ	Criminal Law Journal
CrPC	Code of Criminal Procedure 1973
DCP	District Commissioner of Police
DCW	Delhi Commission for Women
DLSA	New Delhi District Legal Services Authority
DPP	Director of Public Prosecutions
DSJ	District and Sessions Judge
DV Act	Protection of Women from Domestic Violence Act 2005
EWHC	England and Wales High Court
FIR	First Information Report
HIV	Human Immunodeficiency Virus
IEA	Indian Evidence Act 1872
ILR	Indian Law Reports

IPC	Indian Penal Code 1860
JCC	Journal of Criminal Cases
Kar LJ	Karnataka Law Journal
LGBTI+	Lesbian, Gay, Bisexual, Trans, Intersex and others
MLC	Medico-legal certificate
MoU	Memorandum of Understanding
MP	Madhya Pradesh
NGO	Non-Governmental Organisation
OSC	One Stop Centre
PLJR	Patna Law Journal Reports
POCSO	Protection of Children from Sexual Offences Act 2012
QBD	Queen's Bench Division
RCC	Rape Crisis Cell
RG	Registrar General
RTI	Right to Information
SC	Sessions Case
SCALE	Supreme Court Almanac
SCC	Supreme Court Cases
SCR	Supreme Court Reporter
UKHL	United Kingdom House of Lords
UP	Uttar Pradesh
WP	Writ Petition

TABLE OF AUTHORITIES

TABLE OF CASES (INDIA)

TABLE OF CASES (ENGLAND AND WALES)

TABLE OF STATUTES (INDIA)

TABLE OF STATUTES (ENGLAND AND WALES)

OTHER PRIMARY SOURCES (INDIA)

OTHER PRIMARY SOURCES (ENGLAND AND WALES)

OTHER PRIMARY SOURCES (INTERNATIONAL)

LIST OF TABLES (EXCLUDING APPENDICES)

CHAPTER ONE: INTRODUCTION

This thesis undertakes a socio-legal analysis of rape prosecutions in Delhi. It explores the hypothesis that rape adjudication is best understood by examining the implementation of law in its current postcolonial context, rather than by reference solely to its formal scope. The key research question addressed is: What are the factors associated with acquittal and conviction in rape prosecutions in Delhi?

Yet, like most academic work, the story behind this thesis began long before this research was undertaken. It began seven years ago in a swanky nightclub in India with neon walls and tequila shots. My host was a good friend, who had kindly agreed to let me spend the night in his house so I could catch my flight home the next day. Ten months later, just as I was going to leave for my postgraduate education in Oxford, I recounted the events of the night to him through the following (redacted) email:

> From: Arushi Garg <...@gmail.com>
> Date: 23/09/2013 01:33 (GMT+05:30)
> To: … <...@gmail.com>
> Subject: …
>
> …I remembered pushing you back and saying *No, let's not do this, [your girlfriend] is going to feel really bad.* I remembered this happening multiple times, and I remember you pulling me back every single time, like I hadn't said anything. I don't know, maybe you thought I had some Guilty Pleasure thing going, but then the last time I checked, everyone on the streets was screaming "No means No." I also remembered shaking my head and crying [when] you got on top of me, and I remember everything hurting very badly even as you assured me you're trying to be gentle. After that, I passed out.
>
> In a nutshell, I remember things not being consensual…

I really wanted to believe that it was consensual. So badly. You were a friend, and I didn't want to think of you as an offender any more than I wanted to think of myself as a victim. I *really* didn't want to think of myself as a victim. So I told myself a different story...

Except the second time I was in your bedroom, this illusion also shattered.

I could fuck you tonight, and you won't remember a single thing in the morning, you said. I was horrified, but I didn't know what to do. So I didn't do anything. I switched on denial mode again and continued like nothing [bad] was happening. I was confused, a little bit stricken and entirely unsure of everything suddenly.

Stop being a stupid village girl, you said, when I said No to sex for about the tenth time.

I won't cum inside you, you said, when I said No to sex for about the sixteenth time.

The whole night, we had the same conversation, over and over again. Me saying No, you ignoring it. I literally had to pull my legs together to stop you, but I was still trying to pretend everything was normal…

To say that November upset me, would be an understatement. It traumatised me in more ways than I can tell you now. When I first told [my friend X] what had happened, I couldn't get myself to utter the word 'rape.' Non-consensual sex, I said, and started crying. She understood the rest and didn't know what to say.

[…] I slept with this guy in Holland. When I woke up the next day, I told [X] that he had been so kind. She asked me why, and I said that because when I said No to intercourse, he respected that. [X] looked at me so strangely, I thought I would sublimate.

Imagine – educated, liberated, feminist me.

Lawyer, Rhodes Scholar me. I had come to *expect* rape. To not be raped was kindness…

I revisited this story many times in the following days, months and years. Rape trauma notwithstanding, two aspects of this episode piqued my intellectual curiosity. The first thing that puzzled me was why I did not go to the police. To my surprise, my friend wrote back to me with an apology. I now had stronger evidence of non-consent than can be expected in cases of intoxicated rape. Yet, despite my own legal training (or perhaps because of it?), I instinctively knew that nothing was to be gained by filing a criminal case. Was I worried about familial rejection? Social shaming? Secondary victimisation? What were the social messages that had led me to reject the legal

system? Did my affection for my friend extend to protecting him from jail? Or, had his apology already given me the justice I wanted? I had no answers, but it became impossible thereafter to think of rape complainants solely as the atomistic, universal, ahistorical individuals of liberal thought. I did not feel I was an individual who could approach the legal system for an offence committed against me. It became relevant that I was a woman who had faced gender-based violence. Inhibited by certain restrictive ideas of womanhood, I was unwilling to report the incident to a patriarchal, corrupt state in a postcolonial society. The specifics were important.

The second puzzle that presented itself to me on re-reading my email was my own emphasis on formal education and class. Did I expect my privileged social identity to influence my response to rape? Was I suggesting it would be acceptable for working class women to expect rape? In what ways was my privilege relevant, if at all? It was immediately evident to me that my experience of rape was subjective and non-representative. But could something more be said about how my relationship with the legal system was simultaneously shaped by my gender, class, caste, non-disabled status and religion? Moreover, why had my friend compared me to a 'village girl' when I refused to have sex? Do rural women have no sexual desires or rights? Are urban women always 'up for it'? It is against this background that the thesis took shape. Many of these questions re-emerged in different forms as I analysed my data, leading to better informed answers than I could have hoped for all those years ago.

This chapter introduces the following key concepts that are used throughout the thesis: conviction rate; attrition and justice gap; rape; victims and caste. It then assesses

the implications of choosing Delhi as a research site. Finally, it provides an overview of the thesis. While this thesis prioritises literature on South Asia, it also draws on scholarship from other adversarial jurisdictions where there is more extensive research on rape trials. Given the variability in the usage of the term 'rape' across jurisdictions, it also relies on literature on gender-based and sexual violence more generally. I considered this to be a fruitful exercise because many common themes arise in the adjudication of rape and sexual assault cases.

1. CONVICTION RATES IN RAPE CASES

Convictions in rape cases are significantly less common than they are for other offences. This is borne out by statistics from the National Criminal Records Bureau (NCRB) in India. According to NCRB data, the overall conviction rate for offences in India is 64.7%; the conviction rate in rape cases is 25.5%.[1] Further, the overall conviction rate for Delhi is 52.8%.[2] While specific figures for rape trials in Delhi are not available, the overall conviction rate for crimes against women in Delhi is 28.4% and the rape conviction rate across all metropolitan cities is 23.9%.[3] The conviction rate in my data set is 6.2%, which is even lower than what the NCRB data suggests.[4]

---

[1] National Crime Records Bureau, *Crime in India: 2016 Statistics* (Ministry of Home Affairs, 2017) Tables 3A.7, 18A.1 and 18A.3 (hereafter 'NCRB 2016'). The NCRB is a government agency, operating under the Ministry of Home Affairs, for the collection and dissemination of crime-related information: Resolution Number 24013/13/85-GPA-VI, Ministry of Home Affairs, March 1986.

[2] NCRB 2016 (n 1) Tables 18A.2, 18A.4.

[3] Ibid Tables 3A.8 and 18B.1.

[4] Similar to NCRB data, this figure is the proportion of convictions (15) against the total number of cases which resulted in either an acquittal or a conviction (242). I counted *State v Udaivir and Ram Rattan* SC Number 1369/16 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts) once

Some scholars suggest that it is not useful to compare the rape conviction rate with the overall conviction rate.[5] For example, Barbara Krahé suggests that it would be most productive to compare the rape conviction rate with that for other violent offences where the perpetrator is known.[6] These factors tally more closely with sexual violence, which is typically carried out by persons known to the victim.[7] In respect of 'offences affecting the human body', the NCRB provides data for seven violent offences, excluding offences that deal with sexual and gender-based violence.[8] The overall conviction rate for these seven offences is 57.3%, which is considerably higher than it is for rape.

Helen Reece suggests that figures for sexual violence, including rape and other sexual offences, should be considered together since 'convictions for lesser offences generally play a well-established role in the criminal justice system.'[9] This can be the

---

as an acquittal and once as a conviction. This is because one defendant was convicted in this case and the other one was acquitted. I counted *State v Sahid Qurashi* SC Number 34/13 (Special Fast Track Court (Central), Tis Hazari Courts) as two acquittals since the victim alleged there were two rape incident and turned 'hostile' to the prosecution in respect of one incident but not the other. For a discussion on hostile witnesses, *see* Chapter Four. *State v Vijeta and Mahendra* SC Number 70/15 (Special Fast Track Court, Patiala House Courts) involved two defendants, of whom one was acquitted and the other was convicted. I counted this case once as an acquittal, and once as a conviction.

[5] Helen Reece, 'Is Elite Opinion Right and Popular Opinion Wrong?' (2013) [33] 3 Oxford Journal of Legal Studies 445, 449; Barbara Krahé, 'Myths about Rape Myths? Let the Evidence Speak: A Comment on Reece (2013)' <www.uni-potsdam.de/fileadmin01/projects/sozialpsychologie/images/pdf/Comment_Reece_Paper.pdf> accessed 11 July 2017 2 – 3.

[6] Krahé (n 5) 2 – 3.

[7] Ibid.

[8] These include murder, culpable homicide not amounting to murder, causing death by negligence, attempt to commit murder, attempt to commit culpable homicide, grievous hurt and causing injuries under rash driving. See NCRB 2016 (n 1) Table 17A.1.

[9] Reece (n 5) 449.

case, for instance, where the prosecution service decides to charge for a lesser offence for reasons of expediency.[10] According to NCRB figures, the joint conviction rate for rape, unnatural offences,[11] attempt to commit rape and assault on a woman with intent to outrage her modesty, is 23.2%. This is even lower than the 25.5% figure for rape.[12]

Apart from the question of what the appropriate comparator offence to rape is, there are different opinions on how the conviction rate should be measured. [13] The NCRB works out the conviction rate by calculating convictions as a proportion of all cases in which a verdict of acquittal or conviction was reached. It thus uses the smallest possible base to calculate the conviction rate, leading to an extremely generous estimate of this rate. The conviction rate would immediately decrease if the

[10] Antonia Cretney and Gwynn Davis, *Punishing Violence* (1st edn, Routledge 1995) 136 – 146. However, it should be noted that prosecutors are typically disinclined to oppose the framing of rape charges where a rape complaint is made. For an analysis of prosecutorial discretion in this regard, *see* Section 2 of this chapter.

[11] This refers to Section 377 of the Indian Penal Code 1860 (hereafter 'IPC'), which provides: 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.' This provision does not extend to consensual sex acts between adults: *Navtej Singh Johar and Others v State* Writ Petition (Criminal) Number 76 of 2016 (Supreme Court of India). There is no clarity regarding what is 'against the order of nature' though historically, this expression has referred to a broad range of sexual acts excluding penile-vaginal penetration. For an overview of relevant case law, *see* John Sebastian, 'The Opposite of Unnatural Intercourse: Understanding Section 377 through Section 375' (2017) 1 Indian Law Review 232, 238; Sumit Baudh, 'Sodomy in India: Sex Crime or Human Right?' (2006) 37 IDS Bulletin 58, 59.

[12] NCRB 2016 (n 1) Table 18A.1. It is not clear what happens where a rape case results in a conviction for a lesser or inchoate offence. In my email correspondence to the NCRB dated 22.2.2019, I have asked if such a case is counted as a 'rape conviction.' I am yet to receive a response.

[13] For instance *see* Vivien Stern, *The Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Government Equalities Office and Home Office, 2010) 10. On the construction of crime statistics generally, *see* Hanns Von Hofer, 'Crime Statistics as Constructs: The Case of Swedish Rape Statistics' (2000) 8 European Journal on Criminal Policy and Research 77, 88.

base were increased, such as by including cases where no charge was framed (laid) against the accused; or where the prosecutor decided to withdraw the case against the accused.

Despite shortcomings in how the NCRB data are calculated,[14] they provide a strong indication that there is something unique about rape adjudication, which leads to a significantly lower conviction rate in rape cases. This thesis addresses the question of what these distinctive factors might be.

2. PRE-TRIAL ATTRITION AND THE 'JUSTICE GAP': WHERE DO ALL THE RAPE CASES GO?

This section highlights the relevance of two major criminological concepts to the study of rape prosecutions.[15] The discrepancy between the number of rapes reported to the

[14] The NCRB is also criticised for undercounting crime by relying on the 'principal offence' rule. This means that where there are multiple charges, only the charge that attracts the maximum penalty is counted. Further, the NCRB uses the criminal case as a unit for counting crime, leading to undercounting where multiple offences are committed by multiple offenders. *See* Marcelo F Aebi, 'Measuring the Influence of Statistical Counting Rules on Cross-national Differences in Recorded Crime' in Kauko Aromaa and Markku Heiskanen (eds), *Crime and Criminal Justice Systems in Europe and North America 1995-2004* (1st edn, European Institute for Crime Prevention and Control (HEUNI), Publication Series Number 55, Criminal Justice Press 2008) 205; Rukmini Shrinivasan, 'There's A Fatal Flaw At The Heart Of India's Crime Records Data That Needs Urgent Fixing' (*Huffington Post*, 7 July 2017) <www.huffingtonpost.in/2017/07/07/theres-a-fatal-flaw-at-the-heart-of-indias-crime-records-data_a_23020554/> accessed 23 February 2019; Rukmini Shrinivasan, 'India Officially Undercounts All Crimes Including Rape' (*The Hindu*, 13 September 2013) <www.thehindu.com/news/national/india-officially-undercounts-all-crimes-including-rape/article5121114.ece> accessed 21 February 2019; R Rajasekaran, 'NCRB Follows International Practice to Count Crime' (*The Hindu*, 17 September 2013) <www.thehindu.com/opinion/op-ed/ncrb-follows-international-practice-to-count-crime/article5135345.ece> accessed 21 February 2019.

[15] Here, these ideas are discussed only in relation to rape prosecutions. But these concepts are also found in more general criminological literature. For example, Richard Garside, *Crime, Persistent Offenders and the Justice Gap* (Crime and Society Foundation, King's College London, Discussion Paper Number 1, 2004) 7, 19 (England and Wales).

police and the number of rape convictions recorded is referred to as the 'justice gap.'[16] The cognate concept of 'attrition' refers to the process by which rape cases fail to reach or progress through the criminal justice system.[17] Both these ideas allow for a more granular analysis than one that focusses solely on conviction rates. This is because they necessarily entail a study of pre-trial processes. This thesis focusses on the trajectory of cases following the framing of charges, but pre-trial attrition remains an important part of the context in which prosecutions are ultimately carried out.

The calculation of attrition rates in India is complicated by the absence of a comprehensive victimisation survey along the lines of the Crime Survey for England and Wales.[18] This is important because rape is an especially under-reported offence.[19] For instance, the victim may not want it to be publicly known that she was raped or may fear secondary victimisation by the criminal justice system.[20] She may be unable or unwilling to identify what has happened to her as rape, or think the violence

---

[16] Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap* (1st edn, Hart Publishing 2008) 9 (England and Wales).

[17] S Caroline Taylor and Leigh Gassner, 'Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-reporting of Sexual Offences' (2010) 11 Police Practice and Research: An International Journal 240, 243 (Australia); Susan J Lea, Ursula Lanvers and Steve Shaw, 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43 British Journal of Criminology 583, 583 (England and Wales).

[18] The Legal Systems Reform Project, 'The Need for Crime Victimisation Surveys in India' (*Hub for Law and Policy, Azim Premji University, Bangalore*, 30 November 2016) <thelsr.wordpress.com/2016/11/30/the-need-for-crime-victimisation-surveys-in-india/> accessed 21 February 2019; The Legal System Reforms Project, 'The Problems with Official Crime Data in India' (*Hub for Law and Policy, Azim Premji University*, 18 October 2016) <thelsr.wordpress.com/2016/10/18/the-problems-with-official-crime-data-in-india/> accessed 21 February 2019.

[19] Monica A Walker, 'Some Problems in Interpreting Statistics Relating to Crime' 146 Journal of the Royal Statistical Society, Series A (General) 281, 284 (England and Wales).

[20] Carole Goldberg-Ambrose, 'Unfinished Business in Rape Law Reform' (1992) 48 Journal of Social Issues 173, 183 (USA).

perpetrated was justified.[21] According to Tia Palermo et. al, only 1.2% of the gender-based violence carried out in India is reported to the police.[22] If this measure can be seen as a proxy for figures on rape, this would mean that for the 32,45,583 rape incidents perpetrated in India every year, there are only 4,739 convictions – an attrition rate of 99.8%.[23]

Once the victim has approached the police, her case might still not progress through the system, for six main reasons. First, the police might endorse regressive attitudes towards victims and consequently refuse to file their complaints.[24] In such circumstances, the victim can complain to the Superintendent of Police[25] and/or initiate criminal proceedings against the relevant police officer for failure to lodge a First Information Report (FIR) in a rape case.[26] The criminalisation of this conduct sends a strong symbolic message that non-registration of rape FIRs is unacceptable.

---

[21] Taylor and Gassner (n 17) 241 – 243.

[22] Tia Palermo, Jennifer Bleck and Amber Peterman, 'Tip of the Iceberg: Reporting and Gender-based Violence in Developing Countries' (2013) 179 American Journal of Epidemiology 602, 605 (Web Table 4, supplementary data). This analysis was based on figures from 2005 – 2006. According to the National Family Health Survey (2015 – 2016), only .8% of the women experiencing sexual violence only or sexual and physical violence report the incident to the police. This figure is calculated from: International Institute for Population Sciences and ICF, *National Family Health Survey (NFHS - 4)* (Ministry of Health and Family Welfare, 2017) 572, 597.

[23] This calculation is based on figures mentioned in NCRB 2016 (n 1) Table 17A.1, 18A.1. I recognise the methodological limits of extrapolating in this way. I do it only to emphasise the prominent role played by under-reporting in rape attrition.

[24] Abhishek Bhalla and G Vishnu, 'The Rapes will go on' Tehelka Magazine <archive.tehelka.com/story_main52.asp?filename=Ne140412Coverstory.asp> accessed 26 May 2015.

[25] Code of Criminal Procedure 1973, s 154(3) (hereafter 'CrPC').

[26] IPC, s 166A(c) as introduced through the Criminal Law (Amendment) Act 2013. The FIR is filed under Section 154 of the CrPC. It is the official document upon registration of which the investigation is carried out.

Nonetheless, it is questionable if victims will feel confident complaining about the police *to* the police. Mandating registration of FIRs might also result in legally weak cases progressing through the system. This might lead to an increase in other forms of attrition, such as the police filing a cancellation report at the conclusion of their investigation, as discussed below. However, it would at least ensure that an investigation is carried out. More relevant to this thesis, providing for compulsory rape FIRs regardless of the strength of the case might eventually lead to lower conviction rates. It may also entrench the idea that an overwhelming number of 'false' cases are reported to the police.[27]

Secondly, even where the FIR is lodged, the High Court has inherent powers to quash it in order 'to prevent abuse of the process of any Court or otherwise to secure the ends of justice.'[28] Thirdly, the judicial magistrate who is required to take 'cognisance' (judicial notice) of the case before a prosecution can be initiated might refuse to do so.[29] This may be because the police officer concludes that the investigation did not disclose the commission of an offence. In such circumstances the police will file a 'cancellation' or 'closure' report in court and release the defendant where he is in custody.[30] In rare circumstances, the magistrate might refuse to take

[27] Mrinal Satish, 'Comments on PLD's Study on Rape Trials in Delhi' (Report Launch by Partners for Law in Development: Pre-Trial and Trial Stages of Rape Prosecutions in Delhi, New Delhi, 1 September 2017) from 00:01.

[28] CrPC, s 482.

[29] CrPC, s 190.

[30] CrPC, s 169; *Abhinandan Jha v Dinesh Mishra* 1967 SCR (3) 668.

cognisance of the offence even without an adverse police report. Fourthly, once a magistrate has taken cognisance of the offence, a sessions judge might still refuse to frame charges against the defendant if she finds that a criminal case is not made out against him.[31]

These forms of attrition that are linked to the exercise of judicial discretion are not problematic in principle. However, it is likely that the exercise of this discretion is influenced by similar prejudicial beliefs to those endorsed by criminal justice practitioners in this study, as brought out in Chapters Four to Seven. Pulling in a somewhat opposite direction from this hypothesis is the high institutional priority afforded to rape cases. For example, most sessions judges observed for this thesis were reluctant to discharge the defendant in rape cases.[32] They seemed to be worried that their order might be appealed, overturned and adversely commented upon by appellate judges. There was heightened sensitivity around rape cases and sessions judges appeared to be more comfortable acquitting the defendant after a complete scrutiny of all the evidence than discharging him at a preliminary stage. The unwillingness to discharge rape defendants is evident in the following vignette, where the judge framed charges in a case that was regarded as legally weak even by the relevant prosecutor:

[31] CrPC, s 227. Sessions courts are established under Section 9 of the CrPC. They are local courts that fall directly under the High Court and are typically used for trials involving serious offences: CrPC, s 26 read with First Schedule.

[32] For a discussion of research methods, *see* Chapter Three.

Vignette 1.1
A rape victim had alleged that the defendant's parents should be charged for conspiracy to rape in a promise to marry case.[33] She claimed that she had complained about the defendant's misconduct to them, mentioning that he had had sex with her. In turn, his parents had assured her they would ensure that the defendant married her. The parents' counsel opposed the framing of charges against them, pointing out that they could not be held responsible for the defendant's sexual choices or his refusal to marry the victim. Somewhat melodramatically, he added that if the parents were not discharged, this would have an adverse impact on the institution of the family. Couples would think a hundred times before having children, in case they were later held liable for the actions of their children. I was seated next to the DCW lawyer who was of the opinion that a *prima facie* case was made out against the parents since they had 'permitted' the sex. Though it is rarely done, the prosecutor conceded before the court that the parents should be discharged. Both the judge and the defence counsel were pleased that the prosecutor had put legality and fairness before the prosecutorial culture of consistently opposing the defence. However, the judge ultimately did frame charges against the parents. Later in his office, the prosecutor admitted that he had felt intolerably guilty throughout the proceedings because of the ordeal the parents were being put through.

Fifthly, at any point before the judgment is pronounced, the prosecution may, with the consent of the court, withdraw the criminal case against the defendant.[34] However, prosecutorial discretion to make such applications is exercised extremely rarely. It is especially uncommon for prosecutors to discontinue a rape case because of the intense public scrutiny of such cases. The vignette presented above is atypical in this regard. Many private lawyers interviewed for this study thought this was for the best, given the high levels of corruption in the prosecution service. But this was not a unanimous opinion. One prosecutor pointed out that allowing judges to discontinue cases was no

[33] Her claim rested on Sections 90 (definition of consent), 120B (providing punishment for criminal conspiracies) and 375 (defining rape). Legal provisions relating to rape are discussed in Section 3 of this chapter. In 'promise to marry' cases, the defendant deceives the victim into having sex with him based on an insincere promise of marriage. Such cases can be prosecuted as rape. For a detailed analysis, *see* Chapter Five.

[34] CrPC, s 321.

greater guarantee of fairness since the prevalence of judicial corruption is an open secret in court. Another lawyer stated:

> There has to be some kind of screening, not just in rape cases but in all cases, which is absent in India…Everything is sent for [trial]…that's part of the reason why we have this burden of [pending] cases in India… It just goes on and on in routine and it's very mindless, you know? There is…no application of mind in this whole process. We don't give our prosecutors that power…Even in indefensible situations, they have to [prosecute] their case… Prosecutors have to have a little more power than they are given in India.

The following vignette from the fieldwork captures the conservative exercise of prosecutorial discretion in rape cases:

Vignette 1.2

One judge who was new to rape adjudication was puzzled by the prosecutor's insistence on framing charges in what he understood to be a weak case. He asked the prosecutor why she was wasting time and resources by pursuing this case when the accused should just have been discharged. She laughed sheepishly, saying that since the woman had alleged that the consent was given under the threat of defamation, it was not a fit case for discharge. She turned back to ensure that the victim and victim's counsel had left, and she could not be heard by them. She then stated that while a discharge was possible in this case, she was wary of negative publicity. She added that if the judge started discharging the defendant in rape cases, he should be prepared for candle-lit vigils from India Gate up to the door of his court because the public was bound to protest. She reinforced that the second the victim mentioned any kind of threat, a *prima facie* charge was made out, so this was an especially unfit case for discharge. The judge pointed out that discharging the defendant at an early stage could ensure that the conviction rate did not dip too low. She placated the judge by assuring him that there was another case in which she was a hundred percent confident that there would be a conviction because the evidence was so strong. The judge seemed less convinced, pointing out that even in that case, the victim and defendant were not strangers. The implication seemed to be that acquaintance rape cannot lead to convictions.

A few months later, I was told by a different prosecutor that he was in the process of assessing a series of discharge orders from the court where I had witnessed the above exchange. He said he could not understand why these orders were being passed because he understood the relevant prosecutor to be a good one.

As noted above, prosecutors and judges alike seem wary of discontinuing rape cases, even where they think a conviction is virtually impossible. While legal proceedings in these cases tend to enjoy a longer life span, it is not clear if and why this in itself is a positive outcome.

Finally, in the event of the defendant's death, the criminal case against him terminates. In other cases, the defendant may deliberately abscond to avoid the execution of a warrant against him. In such cases, the court can serve a notice requiring his attendance under Section 82 of the CrPC, non-compliance with which can result in a prison sentence for the defendant.[35] Where the defendant is evading execution of a warrant, the case file is usually consigned to the Record Room, though legal proceedings can be revived if he is found.

This thesis is concerned with a specific stage of the criminal proceedings, the trial. While this stage is distinct from pre-trial attrition, or appellate decision-making, or sentencing, all of these taken together form the life cycle of the rape case. Pre-trial attrition is an important, partial explanation for the justice gap and the pre-trial treatment of the rape cases exerts an important influence on how the trial unfolds at a later stage.

[35] CrPC, s 174A.

3. RAPE

This section analyses the legal definition of rape under Section 375 of the Indian Penal Code ('IPC') (for the full definition and sentencing provisions, see the **Appendix 1**). It highlights which types of sexual violence are excluded from the legal definition of rape and therefore also from the scope of this thesis. It also underlines certain ambiguities in how rape is understood. It critiques the following aspects of the definition of rape: its heteronormative underpinnings; the lack of clarity about what the *mens rea* for rape is; inconsistent legal definitions of consent; the prejudicial treatment of voluntarily intoxicated rape victims; the impunity provided to doctors and husbands committing non-consensual sexual acts; and the scope of statutory rape. Each of these will be discussed in turn.

3.1 Rape, gender and sexuality: The heteronormativity underpinning the offence of rape

The rape offence in India is gender specific and heteronormative, since it only punishes acts perpetrated by men against women. Two issues arise as a result of this definition. First, this definition excludes sexual violations experienced by transgender and intersex people. The descriptor 'intersex' refers to those who are born with both male and female sex genitalia or with ambiguous sex organs. 'Transgender' refers to people whose gender identity does not match the sex they were assigned at birth. Under Section 10 of the IPC, '[t]he word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.' This

understanding of gender is unscientific and exclusionary. As feminist writers have pointed out, the assertion that there are only two natural sexes, male and female is flawed.[36] Sex itself is a combination of several attributes, such as a person's external and internal genitalia, hormones and genetic chromosomal patterns.[37] These are not necessarily linked and can exist in various combinations apart from the male/female binary.[38] Section 375 is thus underpinned by, and serves to entrench, an artificially constructed sex binary. The definition of 'man' and 'woman' in terms of their sexual characteristics also excludes trans men and trans women from the ambit of legally defined rape.[39] For example, a trans woman with a penis cannot claim to have been raped if she is forced to perform oral sex on a cis man.[40]

Feminist theory has highlighted how rape is used to perpetuate the subordination of women in a patriarchal world.[41] However, cis women are not the only ones subordinated by gendered power relations. In fact, cis women can often act in a way

[36] Joanne Conaghan, 'Sex, Gender and the Trans Debate' (*University of Bristol Law School Blog*, 18 December 2018) <legalresearch.blogs.bris.ac.uk/2018/12/sex-gender-and-the-trans-debate/> accessed 6 March 2019; Nivedita Menon, *Seeing Like a Feminist* (1st edn, Penguin UK 2012) 82; Erin Buzuvis, 'Caster Semenya and the Myth of a Level Playing Field' (2010) 6 The Modern American 36, 37.

[37] Buzuvis (n 36) 37.

[38] Menon (n 36) 82.

[39] Nivedita Menon, 'The Gap Between the Feminist Understanding of Sexual Violence and the Law' (*The Wire*, 24 February 2019) <thewire.in/women/sexual-violence-rape-law-india> accessed 13 March 2019.

[40] This is unlike the situation in other jurisdictions, such as England and Wales where anybody with a penis can commit rape. *See* Section 1 of the Sexual Offences Act 2003.

[41] Charlene L Muehlenhard and others, 'Definitions of Rape: Scientific and Political Implications' (1992) 48 Journal of Social Issues 23, 37.

that oppresses other sexual subalterns,[42] including transgender persons.[43] Tackling the cis-sexist assumptions of Indian criminal law is imperative so that gendered minorities can deploy the criminal justice system as equal citizens to dominant gender groups.

Secondly, even if the legal system operates with a binary understanding of sex and gender, rape is defined in narrow terms. In India, the offence of rape cannot be committed by men against men, women against women, or women against men.[44] The category of women-on-men sexual assault is considered especially contentious by feminist groups who justifiably fear that recognising this category of sexual wrongs will lead to the increased harassment of women through false complaints.[45] They also point out that empirically, most sexual violence is not inflicted by women against men.[46] Women-on-men sexual assault is an exceptional offence, typically committed in circumstances where women are in a position of power over men, such as women

[42] 'Sexual subalterns' is a term coined by Ratna Kapur to refer to the full range of: 'counter-heteronormative movements [that] have included a vast array of sexual identities: gay, lesbian, bi-sexual, transgendered, kush, queer, hijra, kothis, panthis and many more. They have has also included sexual practices and behaviours such as adult and consensual pre-marital, extra-marital, non-marital, auto-erotic/masturbatory, promiscuous, and paid-for sex, as well as MSM (men who have sex with men).': Ratna Kapur, 'Out of the Colonial Closet, but Still Thinking inside the Box: Regulating Perversion and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns' (2009) 2 National University of Juridical Sciences 381, 384 – 385 (citations omitted).

[43] Sally Hines, 'The Feminist Frontier: On Trans and Feminism' (2019) 28 Journal of Gender Studies 145.

[44] Here, I use the terms 'men' and 'women' in the same way as they are used in the IPC, *i.e.*, to refer to cis men and women.

[45] Flavia Agnes, 'Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law' (2002) 37 Economic and Political Weekly 844, 847.

[46] Ibid 846 – 847.

guards who sexually exploit men in prison.[47] If this is the case, then Indian law should at least recognise women-on-men rape in these exceptional circumstances as rape. Further, there seems little justification for excluding sexual violence within gay or lesbian relationships from the purview of rape.[48] In addition, heteronormative understandings of rape ignore the use of sexual assault in perpetrating multiple power hierarchies and not just those of gender.[49] To give but one illustration, men-on-men rape has been documented in ethnic or political conflict zones where sexual assault is perpetrated to dominate men from the opposing side.[50] Currently, Indian law criminalises sexual assault by persons of the same gender (used interchangeably with sex in the IPC) as the victim as 'unnatural offences', which carry a lower sentence than rape.[51] These offences might therefore be perceived as less stigmatic.[52] There is a need to recognise that depending on the circumstances, non-consensual sexual

[47] For instance, *see* Cynthia Enloe, 'Wielding Masculinity inside Abu Ghraib: Making Feminist Sense of an American Military Scandal' (2004) 10 Asian Journal of Women's Studies 89.

[48] Sneha Annavarapu, 'Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India' (2013) 8 International Journal of Criminal Justice Sciences 248, 257 – 259.

[49] Melanie Richter-Montpetit, 'Empire, Desire and Violence: A Queer Transnational Feminist Reading of the Prisoner 'Abuse' in Abu Ghraib and the Question of 'Gender Equality'' (2007) 9 International Feminist Journal of Politics 38.

[50] For example, *see* Christine Okot Akumu, Isabella Amony and Gerald Otim, *Suffering in Silence: A Study of Sexual and Gender Based Violence (SGBV) in Pabbo Camp, Gulu District, Northern Uganda* (The Gulu District Sub-Committee on Sexual and Gender Based Violence (SGBV) 2005) 10; Gerry Adams, 'I Have Been in Torture Photos, Too' (*The Guardian*, 5 June 2004) <www.theguardian.com/politics/2004/jun/05/northernireland.northernireland> accessed 6 March 2019; Amnesty International, *Bosnia - Herzegovina: Rape and Sexual Abuse by Armed Forces* (AI Index: EUR 63/01/93, 1993) 9.

[51] The full text of this provision, including the definition and punishment is excerpted in footnote 11.

[52] On the particular stigma associated with rape, *see* JS Verma, Leela Seth and Gopal Subramanium, *Report of the Committee on Amendments to Criminal Law* (2013) 107.

conduct can be perpetrated by and against people of various genders. These instances of assault should not be treated as less grave solely because they do not fit a heteronormative mould.

3.2 The *mens rea* for rape: Guilty is as guilty does?

This section emphasises the need for clarity on the issue of what *mens rea* needs to be proved in rape cases. Section 375 is silent on the *mens rea* requirement, except to a limited extent in Clause (4).[53] Clause (4) criminalises the relevant sexual acts where they are perpetrated by a man against a woman:

> [w]ith her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Further, Section 375 is often read in conjunction with Section 90, which provides a general definition of consent for all IPC offences.[54] Under Section 90, the *mens rea* requirement is specified for certain cases where the victim's consent is absent:

> A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

Apart from these two provisions, rape laws contain no express mention of *mens rea*. This raises the issue of whether rape is a strict liability offence under Indian law, subject to the above-mentioned exceptions. There is little academic discussion on this

[53] This is in contrast with the law in England and Wales, where Section 1 of the Sexual Offences Act 2003 specifies that the defendant in a rape case must lack reasonable belief in the victim's consent.

[54] For a critique of how Section 90 relates to Section 375, see Section 3.3 of this chapter.

point.[55] It could be argued that since some rape provisions mention *mens rea* but others do not, this must mean that liability is strict in respect of those other clauses. Similarly, it could be argued that since the *mens rea* is expressly mentioned for some offences in the IPC, where it is absent it can be assumed that liability is meant to be strict. This is in keeping with the principle of *expressio unius est exclusio alterius*, which has been accepted and applied by the Supreme Court in other case law.[56]

However, the Supreme Court has held that while interpreting statutory offences, courts must presume that proof of *mens rea* is required unless this is expressly or implicitly ruled out by the Parliament.[57] The question of *mens rea* in rape cases has not come up directly before the Court, but the Court made passing reference to it in *Nagesh*.[58] Without any legal discussion on the point, the Court found that based on the evidence, 'the presence of the element of *mens rea* on part of the accused cannot be denied.'[59] In any case, the Court does not typically regard serious, stigmatic offences,

---

[55] This has also been pointed out in Simon Bronitt and Ashutosh Misra, 'Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law' (2014) 2 Griffith Asia Quarterly 37, 39. A notable exception is MV Sankaran, 'Mens Rea in Rape: An Analysis of Reg v Morgan and Sections 375 and 79 of the Indian Penal Code' (1978) 20 Journal of the Indian Law Institute 438. Passing references can also be found in Prabha Kotiswaran, 'Governance Feminism in the Postcolony: Reforming India's Rape Laws' in Janet Halley and others (eds), *Governance Feminism: An Introduction* (1st edn, University of Minnesota Press 2018) 116; Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (1st edn, Cambridge University Press 2017) 35.

[56] For example, *Jitendra Singh and Others v Uttar Pradesh* 2013 (9) SCALE 18 [92]. The maxim literally translates to 'the expression of one, excludes the other.'

[57] *Maharashtra v MH George* AIR 1965 SC 722 [51], [65]. For a discussion of similar case law in England and Wales and Hong Kong *see* Alan Reed, 'Strict Liability and the Presumption of Innocence Criminal' (2009) 173 Criminal Law and Justice Weekly 409. There are also conflicting judgments on whether this presumption can be applied to IPC offences. For an overview of authorities on this point, *see* Sankaran (n 55) 456.

[58] *Radhakrishna Nagesh v AP* (2013) 11 SCC 688.

[59] Ibid [28].

which carry a harsh punishment, as strict liability offences.[60] Rape is a grave offence with a mandatory minimum sentence of ten years' imprisonment, which can go up to life imprisonment.[61] Based on the judicial understanding of *mens rea* more generally, it is unlikely to be understood as a strict liability offence.

It is difficult to ascertain which version of *mens rea* will be read into Section 375. A purely subjective understanding of *mens rea* might lead to acquittals where the defendant, however unreasonably, convinced himself that the victim had given her consent. Since stereotypical, regressive thinking about rape and sexual consent remains commonplace today, it is important for the *mens rea* requirement to be mediated by reasonableness.[62]

In the unlikely event that rape is accepted to be a strict liability offence by the Court, a defendant lacking a culpable state of mind could still avoid liability through reliance on Section 79 of the IPC. This provision absolves the defendant from legal liability where he 'by reason of a mistake of fact … in good faith, believes himself to be justified by law…' Thus, if the defendant believes in good faith that he was having consensual sex with the victim, he could rely on Section 79 to argue for an acquittal. A 'good faith' belief is found only where the defendant acted with 'due care and attention,'[63] indicating that the defendant's conduct should be reasonable. Despite the

[60] *Gujarat v Acharya D Pandey and Others* (1971) SCC (Cri) 1 [14]; *Nathulal v MP* AIR 1966 SC 43 [4].

[61] IPC, s 376(1).

[62] Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (1st edn, Ashgate 2005) 197 (USA).

[63] IPC, s 52.

somewhat confused state of law, *mens rea* issues were barely mentioned in the cases analysed.[64]

3.3 The many faces of consent: Cherry-picking legal definitions in rape trials

The 2013 amendment to Section 375 introduced the following definition of consent:

> Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

The definition casts consent in positive terms and provides that a lack of physical resistance does not amount to consent.[65] There is no clarity regarding how Section 375 relates to Section 90 of the IPC, which provides a negative definition of consent (See **Appendix 1**). Under Section 90:

> A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception…[66]

Before the Criminal Law (Amendment) Act 2013, Section 90 provided the only available definition of consent under the IPC. Despite the introduction of a specific

[64] In some cases, *mens rea* was confused with motive as discussed in Section 4.4.4 of Chapter Seven.

[65] The requirement to prove physical opposition has been proven to result in unfair acquittals in other jurisdictions. For instance, *see* PW Ferguson, 'The Definition of Rape' (2002) 20 Scots Law Times 163, 169.

[66] Sexual consent of young persons is discussed under Section 3.7 of this chapter.

definition under Section 375, courts continue to use Section 90 to interpret the concept of consent.[67] This leads to confusion in the implementation of law, since these provisions are inconsistent in three ways.

First, any misconception of fact can vitiate sexual consent under Section 90 and could lead to a rape conviction for the defendant for having non-consensual sex with the victim.[68] However, Section 375 expressly mentions a particular category of mistake, the exploitation of which could lead to the defendant being convicted for rape. This is where the wife mistakenly thinks the defendant is her husband. Secondly, under Clause (3) of Section 375 the defendant can be punished for rape where the victim's consent was based on 'fear of death or of hurt' of the victim or 'any person in whom she is interested.' The term 'persons in whom she is interested' has not been defined but has been held to include her husband, her children and her parents.[69] However, under Section 90, consent can be negated where it is based on fear of any person's injury. Finally, Section 90 clearly mandates which *mens rea* needs to be established where the consent was given under fear or misconception of fact. As discussed above, it is not clear if and which *mens rea* is required to be proved under Section 375 in cases involving force. In light of these discrepancies, it is important that the relationship between these provisions be clarified, since they can otherwise pull

[67] For example, courts rely on Section 90 to rule in cases where the victim's sexual consent is based on the defendant's deception. For a detailed discussion on this point, *see* Chapter Five.

[68] IPC, s 375 (Clause (2)).

[69] KD Gaur, *The Indian Penal Code* (4th edn, Universal Law 2009) 654; *Maharashtra v Prakash* 1993 Supp (1) SCC 653.

in different directions in the same case. An example of why a resolution of this issue is important is found in the Delhi High Court judgment of *Farooqui* (2018).[70]

In *Farooqui*, the victim repeatedly refused the defendant's sexual advances and tried to pull up her underwear as he pulled it down.[71] He then pinned her down and performed oral sex on her.[72] Following her many unheeded refusals, she froze in fear of violence from him, since he was physically stronger than her.[73] Finally, she faked an orgasm and then he stopped.[74] The Court laid the foundation for acquittal by asserting that when women say 'no', they might mean 'yes.'[75] It held this to be especially true of educated women who have a sexual history with the defendant:

> Instances of woman behavior are not unknown that a feeble "no" may mean a "yes". If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic "no" would only communicate the intention of the other party. If one of the parties to the act is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble "no", was actually a denial of consent.[76]

---

[70] *Mahmood Farooqui v Delhi* 2018 Cri LJ 3457.

[71] Ibid [2].

[72] Ibid.

[73] Ibid [2], [3].

[74] Ibid [3].

[75] Ibid [78].

[76] Ibid. Any spelling, syntactical, grammatical or other errors in direct quotations are a reflection of those found in the original. For the most part, quotations have been produced without corrections.

The Court later accepted that the victim did not experience the acts as consensual. But instead of referring to the definition of consent under Section 375, the Court inexplicably grounded its reasoning completely in the narrower definition of consent under Section 90. Referring to Section 90 instead of Section 375 enabled the Court to do two things. First, instead of holistically assessing the facts to determine the presence or absence of consent, the Court only had to look at the narrow issue of whether or not the consent was negated by fear of violence. Having already indicated that express refusals are of low relevance to the case, the Court was then able to ignore them altogether. It also failed to explain why provisions under Section 375 that specifically relate to the fear of violence were considered less relevant by it than those under Section 90 – though the Court's approach to consent would have been reductionist in either case. Secondly, the Court was able to avoid the issue of *mens rea* under Section 375, since Section 90 already provides for specific *mens rea*. Ultimately, the Court in *Farooqui* held that the defendant lacked *mens rea* under Section 90, since he had no way of knowing about the victim's fear of violence:

> There is no communication regarding this fear in the mind of the prosecutrix to the appellant. The prosecutrix makes a mental move of feigning orgasm so as to end the ordeal. What the appellant has been communicated is, even though wrongly and mistakenly, that the prosecutrix is okay with it and has participated in the act. The appellant had no opportunity to know that there was an element of fear in the mind of the prosecutrix forcing her to go along.[77]

The introduction of the definition of consent under Section 375 was meant to re-orient courts towards a more affirmative understanding of the concept, thereby

[77] Ibid [82].

providing a greater emphasis on sexual agency. The Delhi High Court's prioritisation of Section 90 over this definition provides a dangerous precedent for subverting the underlying logic of this reform – one that trial courts now increasingly rely on.[78] This case illustrates the broader point that Sections 90 and 375 need to be either harmonised, or de-linked so that an independent and better-suited legal regime for deceptive sex can develop.

3.4 Are drunk women 'asking for it'?

Clause (5) criminalises the sexual act as rape if because of the administration of stupefying or unwholesome substances by the defendant, the victim is unable to understand the nature and consequences of her consent. However, if the victim's capacity to consent is impaired by the consumption of these substances, it is not logical to criminalise the conduct only where the defendant administered them to her. Interestingly, the requirement that the defendant be responsible for the victim's impairment does not extend to cases of 'intoxication' under Clause (5), though the difference between 'intoxicants' and 'stupefying and unwholesome substances' is unclear.

3.5 Can doctors get away with rape?

The first exception to the definition of rape under Section 375 provides that '[a] medical procedure or intervention shall not constitute rape.' It is not clear what

[78] Based on ongoing research by Aradhana Vadekkethil (M Phil in Law (2018 – 2019), University of Oxford).

purpose this exception is serving. It could be argued that doctors delivering bona-fide medical care should be protected from prosecution where this is done either with the victim's consent, or in an emergency situation where obtaining consent is not possible. However, in the former situation, the conduct would not amount to rape in any case. In case of medical emergencies, there is a general exception in the IPC for 'acts done in good faith for benefit of a person without consent,' which absolves doctors of liability.[79] Consider a situation where a doctor non-consensually inserts his fingers or medical instruments in the victim's vagina during a medical examination. This might be particularly likely to happen where a rape victim reports the incident to the police and is thereafter taken to the doctor in order to prepare her medico-legal certificate.[80] There is good reason to classify this conduct as rape. If anything, the power asymmetry inherent in the doctor-patient relationship suggests an enhanced responsibility on the doctor to explain the procedure to the victim, to avoid inflicting secondary victimisation and trauma.

3.6 Can married women refuse to have sex?

The second exception to the definition of rape specifies that sexual intercourse between a man and his wife cannot amount to rape unless is she is under eighteen

[79] IPC, s 92.

[80] The insertion of fingers is sometimes done to see if the victim is 'habituated to sexual intercourse', even though this is not legally permissible. This unscientific procedure is referred to as the 'fingers test' and is discussed more extensively in Section 4.2 of Chapter Seven.

years old (hereafter 'the marital rape exemption').[81] These women can avail themselves of other legal protections, such as the Protection of Women Against Domestic Violence Act 2005 (hereafter 'the DV Act'), but the conduct is not recognised as rape.[82] This availability of other legal provisions is particularly important in India, where the DV Act was crafted after considerable consultation with stakeholders. The statute is a primarily civil legal intervention that provides women with immediate protection so that they can then contemplate long term options including divorce, maintenance, reconciliation or prosecution.[83] Accordingly, the remedies provided include a right to residence in the shared household, irrespective of the respondent's ownership rights; protection orders; monetary relief; and custody orders over the complainant's children.[84] Despite the availability of these extensive remedies, it is important to challenge the marital rape exemption, which is based on archaic ideas of male proprietary interests over their wives' bodies.[85] It symbolically reinforces the

[81] IPC, s 375 read with *Independent Thought v State* WP (Civil) Number 382 of 2013. Where the parties are below 18 years of age, the marriage is treated as voidable at the option of either minor: *see* footnote 91.

[82] For a discussion of the differential treatment of marital rape in other jurisdictions, *see* Megan Lutz-Priefert, 'A Call for a More Permanent International Definition of Rape' (2015) 6 Creighton International and Comparative Law Journal 85, 85 (providing an international overview); Jessica Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law' (2011) 48 American Criminal Law Review 1819 (USA). In England and Wales, the marital rape exemption was effectively abolished by the House of Lords in *R v R* [1991] UKHL 12. This was legislatively confirmed through the Criminal Justice and Public Order Act 1994.

[83] Indira Jaising, 'Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence' in Kalpana Kannabiran (ed), *Women and Law-Critical Perspectives* (1st edn, Sage Law 2014) 6 – 8.

[84] Protection of Women from Domestic Violence Act 2005 (No 43 of 2005) ss 18 – 21.

[85] Vibhuti Patel, 'Campaign Against Rape by Women's Movement in India' (*Ca' Foscari University of Venice*, 2014) <www.unive.it/media/allegato/dep/n24-2014/Ricerche/03_Patel.pdf> accessed 26 May 2015 40. Cf. Flavia Agnes, 'Section 498A, Marital Rape and Adverse Propaganda' (2015) 50 Economic and Political Weekly 12, 14.

misplaced notion that married women are chattel owned by their husbands. In any case, the removal of the marital rape exemption will not mean that sexual assault within marriage is excised from the broader concept of domestic violence under the DV Act.

Pending a challenge to the constitutionality of this exception before the Delhi High Court,[86] petitioners have pursued innovative ways of labelling non-consensual sex within marriage as sexual assault. For example, in *Nimeshbhai*, the petitioner successfully argued that forced oral and penile-vaginal sex within marriage is an 'unnatural sexual offence' under Section 377 of the IPC.[87] It is understandable that this could be a useful strategy for petitioners seeking a criminal response that captures the gravity of their suffering.[88] But even the success of this petition leaves a hierarchy between rape and sexual assault of wives, given discrepant sentences for these two offences and the particular stigma associated with the label of 'rape.'[89] There seems no

[86] Scroll Staff, 'Marriage Does Not Oblige a Woman to Have Sex with Her Husband, Says Delhi High Court' (*Scroll*, 18 July 2018) <scroll.in/latest/886975/marriage-does-not-oblige-a-woman-to-have-a-physical-relationship-with-her-husband-says-delhi-hc> accessed 14 March 2019.

[87] *Nimeshbhai Bharatbhai Desai v Gujarat* R/Criminal Misc Application Numberss 26957, 24342 of 2017 and R/Special Criminal Application Number 7083 of 2017. *See also* Nandita Saikia, 'Rape Laws: Why the Supreme Court Must Read Down Section 377 – But Not Strike It Down in Its Entirety' (*Scroll*, 12 July 2018) <scroll.in/article/886189/rape-laws-why-the-supreme-court-must-read-down-section-377-not-strike-it-down-in-its-entirety> accessed 7 March 2019. For a brief discussion on Section 377, *see* footnote 11.

[88] Section 377 allows the judge to sentence the defendant for imprisonment up to ten years. In contrast the main penal provision dealing with domestic violence, s 498A, only allows for imprisonment up to three years.

[89] Verma, Seth and Subramanium (n 52) 107.

justifiable reason to prevent the recognition of persons as rape victims simply because they are married.

3.7 Does rape include consensual, premarital sex?

The 'statutory age for sexual consent' refers to the age below which sexual activity with an individual is regarded as rape, regardless of consent (hereafter 'statutory rape'). The need for this legal device arises because young individuals may not fully understand the meaning and consequences of sexual acts. Statutory rape provisions also serve to prevent exploitation of children where the victim's youth may otherwise inhibit her from refusing an adult's sexual advances.

In 2013, the statutory age for consent in India was increased from 16 to 18 years. This was possibly done to make the law of rape consistent with the Protection of Children from Sexual Offences Act 2012 (hereafter 'POCSO'), which defines a 'child' as someone below the age of 18 years and criminalises sexual activity with children irrespective of consent.[90] It was believed that treating consensual sex between adolescents (between 16 and 18 years of age) as non-criminal would encourage them

[90] Protection of Children from Sexual Offences Act 2012, ss 2(1)(d), 3,5,7,9,11,13. Under POCSO the victim can be of any gender while under Section 375, charges can only be framed against the male party for 'raping' a female victim.

to enter into child marriages.[91] As Flavia Agnes has pointed out, this belief stems from the puritanical position that sex and marriage are synonymous.[92]

The amendment to the statutory rape provision has been heavily criticised since it 'has merely strengthened patriarchal power and weakened the negotiating power of young girls contracting marriages of choice.'[93] For example, if a 17-year-old girl elopes with her 18-year-old boyfriend in the face of familial opposition, it is possible for the girl's family to file a rape complaint against him. This is frequently done, particularly if the proposed marriage is inter-caste or inter-religion.[94] Consensual sexual relationships are more likely made the subject of rape prosecutions in India, since there is no 'close-in-age' exemption for those accused of statutory rape. This is in contrast with other jurisdictions, which exempt consensual adolescent sexual activity from criminal liability when both parties are close in age since such sexual relations

[91] Flavia Agnes, 'Controversy over Age of Consent' (2013) 48 Economic and Political Weekly 10, 10. Under Indian law, 'child marriage' means a marriage where the woman is under 18 years of age or the man is under 21 years old. Such marriages are voidable at the option of either party: Prohibition of Child Marriage Act 2006, ss 2, 3. This statute is not applicable to Muslim marriages, which are valid as long as both parties have reached puberty: *Court on Its Own Motion v State* 2012 (3) JCC 2148 (High Court of Delhi) [14], [29]. Child marriage continues to be a common phenomenon in India: Jacqueline Mercier, 'Eliminating Child Marriage in India: A Backdoor Approach to Alleviating Human Rights Violations' (2006) 26 Boston College Third World Law Journal 377; Camellia Burris, 'Why Domestic Institutions are failing Child Brides: A Comparative Analysis of India's and the United States' Legal Approaches to the Institution of Child Marriage' (2011) 23 Tulane Journal of International and Comparative Law 151, 158 – 162.

[92] Agnes, 'Controversy over Age of Consent' (n 91) 10.

[93] Ibid 10.

[94] Ibid 11. Such prosecutions are also common where the victim is an adult. For a detailed analysis of such cases, *see* Section 4.2 of Chapter Four, and Chapter Six.

are less likely to be coercive.[95] There is thus a need to address the overbreadth of India's statutory rape clause. Doing this will reduce the ability of women's families to use rape laws against the consensual exercise of young people's sexual agency.

Notably, Section 90 negates consent of young persons only where the 'consenting' party is under twelve years of age, 'unless the contrary appears from the context.' However, unlike in *Farooqui*, courts have never preferred Section 90 over Section 375 while adjudicating cases in involving young victims.

To conclude, this section critiqued the concept of rape under Indian law. It highlighted how the definition of rape is exclusionary in some ways (such as when it comes to transgendered victims) and over-inclusive in others (when it comes to young people having sex). This thesis examines those rape cases in which charges were framed against the defendant. Thus, with all its limitations, it is the understanding of rape analysed in this section that guides and limits the scope of this thesis.

4. VICTIMS

Throughout this thesis, the term 'victim' is used to describe the person alleged to be raped, even where the case results in acquittal. This choice was made with some reluctance because to use the term 'victim' pre-trial might be read to negate the presumption of innocence. However, a term such as 'alleged victim' would have led

[95] Jordan Franklin, 'Where Art Thou, Privacy: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception in Illinois' (2012) 46 The John Marshall Law Review 309, 311.

to similar problems, since it would have been inaccurate in case of convictions. The word 'complainant' was rejected since in a large number of cases it was another member of the victim's family who had filed the complaint. The term 'victim-witness' was rejected since it reduces the identity of the victim only to her role in the trial as a witness for the prosecution. This term was only considered appropriate in parts of the thesis that deal with hostile witnesses, since the focuss there is on the link between the victim's testimony and the defendant's acquittal. The term 'survivor', which has become popular feminist terminology, was seriously considered because it suggests affirmation and positivity in contrast with the powerlessness, passivity and negativity implied by the term 'victim.'[96] Ultimately the word 'victim' was preferred, precisely because it conveys the trauma experienced during and after the assault, which may be exacerbated on account of secondary victimisation by the legal system.[97] The term 'victim' has the subsidiary advantage of being recognised in law as a status that confers certain rights, such as applying for compensation.[98]

5. CASTE

The concept of caste continues to exert a significant influence in India and is frequently invoked throughout this thesis. Caste is a system of graded inequality linked to

[96] Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (1st edn, Springer 2018) 4 (England and Wales); Muehlenhard and others (n 41) 24.

[97] For a detailed analysis of secondary victimisation, *see* Chapter Four.

[98] CrPC, s 357A. However, the CrPC only recognises such persons as victims in whose cases the defendant has been charged with an offence (CrPC, s 2(wa)). This thesis uses the term more broadly to cover all women in rape cases, right from the point in time when the incident is alleged to have taken place.

the *varna* system. There are four *varnas* (broadly in descending order of socio-economic and political power): *Brahmin*, *Kshatriya*, *Vaishya* and *Shudra*. '*Dalit'* refers to those who are excluded from the caste system altogether and are lower in the hierarchy than even the *Shudras*. Within this group, *dalit* women are among the most silenced sub-groups and their experiences are especially ignored in academic and policy discussions.[99] Each caste is associated with particular occupations and caste identity is hereditary. While caste was originally a Hindu phenomenon, it now pervades other religions as well.[100] It remains an important determinant of education, income, land ownership and consumption in India.[101] Mass crimes against *dalits* continue to be committed with impunity.[102] A ban on inter-caste marriage remains a fundamental way of sustaining the caste system. Thus, given the childbearing role of women, caste is a system premised on and reproduced through the patriarchal control of women's sexuality.[103] For this reason, BR Ambedkar suggested that the only way to annihilate caste is through intermarriage, which is only

[99] Susie Tharu, 'The Dalit Woman Question' (2014) 1 India@logs 152; J Devika and others, 'Sharmila Rege (1964-2013): Tribute to a Phule-Ambedkarite Feminist Welder' (2013) 48 Economic and Political Weekly 22.

[100] Tushar Agarwal, 'Gender and Caste-based Wage Discrimination in India: Some Recent Evidence' (2014) 47 Journal for Labour Market Research 329, 330. Others argue that caste-like stratifications already existed in non-Hindu religions. For example, *see* Zarina Ahmad, 'Muslim Caste in Uttar Pradesh' (1962) 14 The Economic Weekly 325.

[101] Sonalde Desai and Amaresh Dubey, 'Caste in 21st Century India: Competing Narratives' (2012) 46 Economic and Political Weekly 40.

[102] Kalpana Kannabiran, 'Pursuing Elusive Justice: Mass Crimes in India and Relevance of International Standards' (2014) 5 Journal of Indian Law and Society 256, 258.

[103] Kalpana Kannabiran, 'Storytelling in the Time of Hate' (2015) 50 Economic and Political Weekly 77, 82.

possible following the destruction of the Hindu *Shastras* (scriptures).[104] Inter-caste marriages remain uncommon, though their incidence is gradually rising.[105]

In law, *dalit* groups are referred to as 'Scheduled Castes.' Along with indigenous groups in India, legally known as 'Scheduled Tribes', *dalits* are described as '*avarna*' or 'those without a varna.' People from the four varnas mentioned above are described as '*savarna*.' Caste manifested itself throughout the research conducted for this thesis – whether it was my own caste that enabled access to certain research participants, or ideas of inter-caste marriage that underpinned the filing and prosecution of rape complaints.[106]

6. RESEARCH SITE: DELHI

Delhi was selected as the location of this study for analytical and pragmatic reasons. The National Capital Territory of Delhi includes New Delhi, which is the capital of India. It is also the physical space where the social movement leading to the latest set of reforms on sexual violence began in 2012.[107] In some ways, having Delhi as the prime location for the 2012 protests seems to have steered the substance of the

[104] BR Ambedkar, 'Annihilation of Caste' (*Dr Babasaheb Ambedkar: A Dalit Bahujan Media*, 1 December 1944) <www.ambedkar.org/ambcd/02.Annihilation%20of%20Caste.htm> accessed 2 March 2019.

[105] Srinivas Goli, Deepti Singh and TV Sekher, 'Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-wide Survey' (2013) 44 Journal of Comparative Family Studies 193, 194.

[106] *See* Chapter Three for an account of my experience during fieldwork; Chapters Four and Seven for examples of the specific forms of discrimination that *dalit* and/or 'lower' caste women have to contend with; Chapter Five for an account of how inter-caste marriage is considered a judicial impossibility; and Chapter Six for an account of how inter-caste couples are often harassed by their families through the use of rape complaints.

[107] Soma Chaudhuri and Sarah Fitzgerald, 'Rape Protests in India and the Birth of a New Repertoire' (2015) 14 Social Movement Studies 622, 623.

reforms.[108] It was therefore anticipated that the impact of reforms would be felt most keenly in Delhi. As a result, it was hypothesised that Delhi might be among the more progressive jurisdictions in the country in respect of the prosecution of sexual assault, making it a stimulating case study. Pragmatically, it was hoped that being at the centre of legislative reform would make it easier to obtain access to data and interviewees.

Courts and criminal justice practitioners in other parts of the country, particularly where they are not based in metropolitan cities, are likely to be less organised and professional than those in Delhi. This point was frequently emphasised by research participants for this study who work in different states across the country. This suggests that the implementation of recent legal reforms might be more imperfect in those jurisdictions than is portrayed in this thesis. However, observations relating to the heterogenous experience of women – depending, for example, on their class or religion – are likely to be true across the country, as well as in most jurisdictions where multiple social stratifications exist. Underlying ideas about gender, sexuality, marriage and justice that were found to heavily influence rape prosecutions are likely to be true in other parts of India, perhaps to a greater degree. These ideas are also relevant for understanding legal systems in other postcolonial developing countries that are facing anxieties about how nationalism and 'Westernisation' should be

[108] For example, the Armed Forces (Special Powers) Acts of 1958 and 1990 require permission from the central government before prosecutions (for any crime, including rape) can be initiated against military personnel in areas declared to be 'disturbed'. Such declarations are often made in respect of India's border regions and result in creating a culture of impunity around rape. However, the territorial jurisdiction of these Acts does not extend to Delhi. Thus, in spite of the Verma Committee's recommendation that they be repealed, this was not a central issue in the protests and no reform has been introduced on this front.

understood in the wake of colonialism. This thesis thus provides a useful foundation for understanding adjudication in cases of sexual and gender-based violence throughout India, unless exceptional circumstances exist, such as the armed conflict in parts of north, north-eastern and central India.

7. STRUCTURE OF THE THESIS

This chapter introduced the topic and the main research question guiding this thesis, which is: What are the factors associated with conviction and acquittal in rape prosecutions in Delhi? It went on to analyse the key legal and conceptual ideas underpinning this research, including conviction rates, attrition and justice gap, rape, victims and caste. It then discussed the reasons for and implications of locating this research in Delhi.

In what follows, **Chapter Two** ('Locating the Thesis in Current Scholarship') introduces the two main bodies of scholarship that this thesis draws from and contributes to. It critically engages with academic literature on the use of stereotypical reasoning in rape trials, rape victims' experience in the criminal justice system, evidentiary rules in rape cases, and the use of rape laws to prosecute consensual sex in postcolonial societies. It also engages with the main ideas underlying postcolonial feminism. In all, it makes the case for a socio-legal study of rape prosecutions in Delhi, which includes an examination of how the colonial encounter shapes the working of the legal system today. It argues that women's experiences of the trial process are

influenced not just by their gender, but also other power systems such as caste, class and disability.

Chapter Three ('Data Gathering and Analysis – Reflections on Research Methods') justifies the research methods and data sources used for this thesis. These sources include the total population of trial court judgments in rape cases over a period of 12 months (n=254); ethnographic observation in six court complexes; and interviews with victims, victim support-persons, judges and lawyers (n=61). This chapter analyses the institutional challenges posed by the legal system examined to researchers and suggests strategies for overcoming them.

Chapter Four ('Justice as a Process – The Hidden Link between 'Hostile' Witnesses and Hostile Institutions') evaluates the various factors that are associated with the victim's refusal to support the prosecution. It assesses how this phenomenon is connected to the perception of formal dispute settlement procedures in the postcolony. Further, it asks whether and how the victim's experience within the legal system influences her decision to testify in favour of the defendant.

Chapter Five ('Consent, Conjugality and Crime – Rape Based on a 'False' Promise to Marry') provides a socio-legal analysis of 'promise to marry' cases, in which the defendant deceives the victim into having sex with him based on an insincere promise of marriage. It first addresses the question of why victims in these cases approach the legal system and what they are hoping to achieve by doing so. It then examines the manner in which 'marriage' and 'sexual consent' are understood in these cases and

how that influences the verdict. Finally, this chapter explores whether the use of criminal law in promise to marry cases is appropriate.

Chapter Six ('Pleasure as a Feminist Goal: The Perils of 'Protecting' Women') discusses 'love' cases, where rape law is used to harass consenting couples whose intimate relationship disrupts dominant notions of acceptable sexuality. It seeks to understand why these cases are characterised as rape by the families of the parties. Further, it reviews the implications of this characterisation for societal beliefs about sexual agency – not only of women, but also of all disadvantaged persons.

Chapter Seven ('An Empirical Analysis of Judicial Decision-Making in Contested Rape Cases') discusses factors associated with cases where the victim does not turn hostile, which are not promise to marry or love cases. It provides a detailed critique of the reasoning in these judgments and the social and medical assumptions informing them.

Following a summary of key findings, the **Conclusion** discusses the implications of the analysis presented in this thesis. It presents concluding observations on the relationship between social justice and criminal justice. Further, it examines how the legal system should understand the experiences of gender-based and other minorities. Drawing on the theoretical frameworks and empirical evidence, it discusses ways in which academics could produce more granular accounts of legal decision-making in district courts. It emphasises the contributions made by this thesis, which is one of the only empirically-based, academic analyses of the enforcement of wide-ranging reforms introduced in rape trials in 2013. It demonstrates the advantages of partly

deviating from postcolonial feminism's largely critical stance, while maintaining a healthy scepticism of state action. Finally, it argues in favour of designing a criminal justice system that serves the needs of all women, especially those who are marginalised on account of caste, disability, class and other power structures.

CHAPTER TWO: EMPIRICAL AND THEORETICAL CONTEXTS FOR UNDERSTANDING RAPE TRIALS

This thesis draws from and develops two bodies of scholarship: studies on rape prosecution and adjudication, and postcolonial feminist scholarship.[109] This chapter critically engages with the existent scholarship in these two areas and justifies the use of a postcolonial feminist theoretical framework to make sense of the data presented in this thesis. It highlights the novelty of this study both in terms of the methods it relies on, and its focuss on the extensive reforms introduced in India's rape laws and policy in 2013.[110]

1. RAPE IN THE CRIMINAL JUSTICE SYSTEM

This section engages with international scholarship on the treatment of rape cases in the legal system, drawing on the limited research based in India where relevant. The following key themes, that emerge from a survey of this literature, are critically analysed in this section: the use of stereotypical reasoning in rape cases; the prejudicial treatment of rape victims in the criminal justice system; the impact of evidentiary and procedural rules in the prosecution of rape cases; and the use of rape laws by the victims' families to harass the victim and her intimate partner.

[109] Other empirical and theoretical literature is mentioned in subsequent chapters, as and when it is relevant.

[110] For a detailed discussion of research methods, *see* Chapter Three.

A caveat is in order before this discussion commences. Literature on sexual and gender-based violence has been characterised by a 'knowledge explosion' in recent decades.[111] Multiple frameworks have been used to understand violence against women. For example, sexual violence is a healthcare and economic issue as much as it is a legal issue.[112] Within a legal framework, gender-based violence implicates human rights law and private law in addition to criminal law.[113] Given the focuss of this thesis, this section foregrounds scholarship that deals with the enforcement of sexual assault laws in the criminal justice system. Literature about substantive law, punishment, sentencing and desistance is referred to where necessary but does not form a central part of the analysis.

1.1 Of rape myths and truths: The use of stereotypical reasoning in rape cases

Nils Christie argues that the idea of an 'ideal victim' underpins decisions made in the criminal justice system, such as those about credibility and prosecution.[114] The ideal

---

[111] Nicole Westmarland, 'Co-ordinating Responses to Domestic Violence' in Jennifer M Brown and Sandra Walklate (eds), *Handbook on Sexual Violence* (1st edn, Routledge 2012) 303.

[112] For an overview of the health-related impact of sexual violence, *see* Sylvia Walby and others, *Overview of the Worldwide Best Practices for Rape Prevention and for Assisting Women Victims of Rape* (Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs (Gender Equality), 2013) 47 – 74 (hereafter 'the Walby Report'); Rachel Jewkes, Purna Sen and Claudia Garcia-Moreno, 'Sexual Violence' in Etienne G Krug and others (eds), *World Report on Violence and Health* (1st edn, World Health Organisation 2002). For an analysis of how economic inequality increases vulnerability to sexual violence, and the economic costs borne by victims of sexual violence, *see* the Walby Report (n 112) 113 – 122.

[113] For a discussion on sexual violence as a human rights issue, see Verma, Seth and Subramanium (n 52) 55; Walby Report (n 112) 35, 76. For an analysis of how tortious legal remedies, such as injunctions and compensation orders, have been used in domestic violence cases in India, *see* Jaising (n 83).

[114] Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st edn, Macmillan 1986).

victim is weak, respectable and blameless,[115] and, importantly, is seen in contrast to their big, bad offender, who has no prior relationship with the victim.[116] Deviation from these characteristics makes the commission of crime less credible or worthy of prosecution.[117] Rape literature describes the use of similar but more extensive stereotypes influencing the progress of rape cases through the legal system.[118] Susan Estrich coined the term 'real rape' to describe what is regarded as the only unambiguously believable rape scenario in judicial and popular imagination - one in which a woman from a dominant group is violently raped by a man from a socially disadvantaged group who is a stranger to her.[119] Research shows that the further a scenario falls short of being a 'real rape', the less likely it is to be successfully prosecuted.[120] However, these stereotypes are not fixed in content. Their scope and salience changes across time and society. They sometimes take the form of 'rape myths', defined by Gerd Bohner as:

> descriptive or prescriptive beliefs about rape, its causes, context, consequences, perpetrators, and victims that serve to deny, downplay, or justify male sexual violence against women.[121]

---

[115] Ibid.

[116] Ibid 19.

[117] Ibid.

[118] For instance, *see* Sue Lees, *Carnal Knowledge: Rape on Trial* (2nd edn, The Women's Press Limited 2002) xii (England and Wales).

[119] Susan Estrich, *Real Rape* (1st edn, Harvard University Press 1988) (USA).

[120] Jan Jordan, 'Here We Go Round the Review-Go-Round: Rape Investigation and Prosecution — Are Things Getting Worse Not Better?' (2011) 17 Journal of Sexual Aggression 234 (England and Wales, New Zealand); Temkin and Krahé (n 16) 237, 243; Ann Althouse, 'Thelma and Louise and the Law: Do Rape Shield Rules Matter?' (1991) 25 Loyala of Los Angeles Law Review 757, 771 (USA).

[121] This definition is taken from Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggresive

Examples of rape myths include the idea that most rapes are committed by strangers;[122] or that 'promiscuous'[123] or voluntarily drunk[124] women are to blame for their own rapes. As Bohner notes, some rape myths can also take a prescriptive form. For instance, while some might fallaciously believe that all victims respond by resisting their rapist, others believe this is how victims ought to react.[125] Scholarship on rape trials highlights the prevalence of these myths among members of the public as well as decision-makers within the criminal justice system, though the nature and extent of rape myth acceptance is varied.[126] For instance, Rachel Venema's analysis of

Behaviour 422, 423 (Germany) citing a translation from Gerd Bohner, *Vergewaltigungsmythen [Rape Myths]* (1st edn, Verlag Empirische Pa¨dagogik 1998) 14.

[122] Susan Leahy, 'Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland' (2014) 14 Irish Journal of Applied Social Studies 18, 21.

[123] Bettina Spencer, 'The Impact of Class and Sexuality-based Stereotyping on Rape Blame' (2016) 2 Sexualization, Media and Society 1, 5 – 6 (USA); Darci E Burrell, 'Myth, Stereotype, and the Rape of Black Women' (1993) 4 University of California Los Angeles Women's Law Journal 87, 92 – 94 (USA).

[124] Rachel M Venema, 'Making Judgments: How Blame Mediates the Influence of Rape Myth Acceptance in Police Response to Sexual Assault' (2019) 34 Journal of Interpersonal Violence 2697 (USA), 2711 – 2712; Regina A Schuller and Anne-Marie Wall, 'The Effects of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault' (1998) 22 Psychology of Women Quarterly 555, 557, 568 (Canada).

[125] DJ Angelone, Damon Mitchell and Danielle Smith, 'The Influence of Gender Ideology, Victim Resistance, and Spiking a Drink on Acquaintance Rape Attributions' (2018) 33 Journal of Interpersonal Violence 3186, 3190 – 3191, 3203 (USA); DJ Angelone, Damon Mitchell and Laura Grossi, 'Men's Perceptions of an Acquaintance Rape: The Role of Relationship Length, Victim Resistance, and Gender Role Attitudes' (2015) 30 Journal of Interpersonal Violence 2278, 2281, 2294 – 2295 (USA).

[126] Rachel M Venema, 'Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports' (2016) 31 Journal of Interpersonal Violence 872 (USA); Leahy (n 122); Haley Clark, 'Judging Rape: Public Attitudes and Sentencing' (2007) 14 Australian Centre for the Study of Sexual Assault Newsletter 17, 20 – 24 (Australia). Cf. Reece's argument that the prevalence of these myths has been overstated: Reece (n 5); Helen Reece, 'Debating Rape Myths' LSE Law, Society and Economy Working Papers 21/2014, London School of Economics and Political Science Law Department <www.lse.ac.uk/collections/law/wps/WPS2014-21_Reece.pdf> accessed 11 July 2017. *See also* methodological and conceptual critiques of Reece's view: Joanne Conaghan and Yvette Russell, 'Rape Myths, Law, and Feminist Research: 'Myths About Myths'?' (2014) 22 Feminist Legal Studies 25; Krahé (n 5).

police officer interviews from the Great Lakes provides evidence of the unjustified scepticism of rape victims by these officers, with one of them stating:

> We find that girls utilize the rape card to mess with people . . . because they use it to get back at a boyfriend or they need attention, they're having a bad week, you know, "If I cry rape my whole family will come to me and I need that."[127]

Other officers were specifically sceptical about complaint made by sex workers, claiming that such complaints were filed in response to non-payment by the sex worker's client.[128] Similarly, scholarly works focussing on India highlight the continued prevalence of these myths in the legal system and their impact on the victim's experience.[129] This thesis builds on this scholarship by evaluating the reference to rape myths in judicial reasoning in the total population of trial court judgments in Delhi over a period of 12 months.[130] It is the only detailed, socio-legal exposition of Indian trial court judgments to have been undertaken after the introduction of extensive legal reform through the Criminal Law (Amendment) Act 2013.

---

[127] Venema (n 126) 881.

[128] Venema (n 126) 880.

[129] For instance, Madhu Mehra, *The Rape Law and Constructions of Sexuality* (Partners for Law in Development, 2018); Partners for Law in Development, 'Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-trial and Trial Stages of Rape Prosecutions in Delhi (Jan 2014 to March 2015)' (*Department of Justice, Ministry of Law and Justice, Government of India*, 1 May 2017) <doj.gov.in/sites/default/files/PLD%20report.pdf> accessed 19 June 2018, 31 – 36 (hereafter 'PLD Report'); Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (1st edn, Oxford University Press 2014).

[130] *See* Chapters Five and Seven.

1.2 Secondary victimisation in the criminal justice process

In this thesis, secondary victimisation refers to the process by which victims experience trauma similar to that of their sexual assault, while engaging with the legal system, including healthcare professionals, police and lawyers.[131] There is ample evidence from many countries that rape victims are met with insensitivity, hostility, disbelief and/or contempt as they navigate through the criminal justice system.[132] Secondary victimisation can also result from aggressive litigation strategies whereby the defence counsel tries to 'break' or 'butcher' the victim.[133] This not only has the potential to damage the victim's well-being, but can also lead to confused and unconvincing testimony and consequently, low conviction rates.[134] Victims who have a negative experience in the legal system might also be less willing to assist the prosecution by giving testimony in court.[135] A slew of support measures has been introduced across various jurisdictions to minimise the secondary victimisation faced

---

[131] Venema, 'Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports' (n 126) 873. *See also* Meghna Bhat and Aimee Wodda, 'Examining Legal Responses to Sexual Violence: A Review of Court Systems in India' in N Prabha Unnithan (ed), *Crime and Justice in India* (1st edn, Sage Law 2013); Rebecca Campbell, 'Changing the Community Response to Rape: The Promise of Sexual Assault Nurse Examiner (SANE) Programmes' in Jennifer M Brown and Sandra L Walklate (eds), *Handbook on Sexual Violence* (1st edn, Routledge 2011) 460 (USA); Jennifer Temkin, *Rape and the Legal Process* (2nd edn, Oxford University Press 2002). Note that criminological literature uses the term 'secondary victimisation' in several different ways, including where the consequences of victimisation extend to another party, apart from the victim: Rachel Condry, 'Secondary Victims and Secondary Victimization' in Shlomo Giora Shoham, Paul Knepper and Martin Kett (eds), *International Handbook of Victimology* (1st edn, CRC Press 2010) 219 – 220.

[132] *See* the references under footnotes 120 to 127.

[133] Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology 298, 304 (England and Wales).

[134] Ibid.

[135] Aviva Orenstein, 'Special Issues Raised by Rape Trials' (2007) 76 Fordham Law Review 1585, 1602 (USA).

by rape victims.[136] Many such measures have also been implemented in India, including anonymity for rape victims in the criminal justice system,[137] *in camera* trials in rape cases,[138] free medical assistance for rape victims[139] and the introduction of victim support personnel into the proceedings, such as the victim-support lawyer associated with the Delhi Commission for Women (DCW) in Delhi.[140] This thesis maps the extent and implementation of such support measures in Delhi. It assesses the specific impact of the victim's disengagement from the legal system in a pluralistic, postcolonial society such as India.[141]

1.3 The impact of evidentiary and procedural rules on rape convictions

Feminist legal scholars have long argued for reforms relating to evidentiary rules followed in rape cases.[142] This section engages critically with some common areas of reform that are discussed in the literature on rape trials in adversarial jurisdictions: evidence of the victim's sexual history, bad character evidence relating to the defendant and the requirement that the victim's testimony be corroborated. A detailed

---

[136] For example, *see* Goldberg-Ambrose (n 20).

[137] IPC, s 228A.

[138] CrPC, s 327.

[139] CrPC, s 357C

[140] Delhi Commission for Women, 'Rape Crisis Cell' (*Government of National Capital Territory of Delhi*) <delhi.gov.in/wps/wcm/connect/lib_dcw/DCW/Home/Rape+Crisis+Cell> accessed 19 June 2018 (hereafter 'DCW Introduction to the RCC'). For a detailed analysis of the DCW lawyers' role, *see* Section 5.2.2 of Chapter Four.

[141] *See* Chapter Four.

[142] For instance, Lisa Van Amburg and Suzanne Rechtin, 'Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims' (1978) 22 Saint Louis University Law Journal 367 (USA).

empirical exposition of the enforcement of these evidentiary rules in India follows later in this thesis.[143]

1.3.1 Rape shield laws: Once a yes, always a yes?

'Rape shield' refers to the legal restrictions on adducing evidence of the victim's prior sexual history with the defendant or other persons.[144] The victim's prior sexual history is generally not relevant to the facts of the case at hand. In many cases where this evidence is introduced, it fallaciously comes to be regarded as relevant based on the myth that sexually active women will never say 'no' to sex.[145] Rape shield laws have been introduced in many jurisdictions to prevent this line of thinking in judicial or juror decision-making, though with varying degrees of success.[146]

In India, the primary rape shield law is Section 53A of the Indian Evidence Act 1872 (hereafter 'IEA'), as introduced by way of the Criminal Law (Amendment) Act 2013. It provides that for certain offences against women, including rape:

> where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

[143] *See* Chapters Four, Five and Seven.

[144] Lees (n 118) xxvi.

[145] Althouse (n 120) 760.

[146] For instance, in England and Wales, Section 41 of the Youth Justice and Criminal Evidence Act 1999 covers the '[r]estriction on evidence or questions about complainant's sexual history.' There is scholarly criticism that this provision is imperfectly implemented. *See* Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81 The Journal of Criminal Law 367.

Despite this clearly-worded exclusion, even where there are no overt references to the victim's sexual history during cross-examination, it may still be introduced in covert ways, such as through the victim's medical report.[147] Further, the victim's sexual history with the defendant is sometimes fallaciously regarded as relevant by the prosecution itself, and therefore introduced without controversy.[148] This happens even though the victim's sexual history with 'any person' is legally irrelevant – 'any person' arguably includes the defendant.

In comparison with other jurisdictions where such legislation has been introduced, there has been surprisingly little litigation or academic discussion about the Indian rape shield. This is despite the fact that the restrictions it introduces are only relevant where consent is at issue. If the factual dispute is in respect of any issue apart from consent, the rape shield becomes inoperative. To give one illustration, the defence may try to adduce sexual history evidence with third persons to establish why the defendant believed the victim had given her consent to sex.[149] There are also other, more legitimate circumstances in which the defendant might rely on sexual history evidence, such as where semen stains are found in the victim's forensic samples, but

[147] Baxi (n 129) 61 – 103.

[148] This was done, for example, in *State v Mahmood Farooqui* New SC No 1590/2016 (Special Fast Track Court, Saket).

[149] A similar argument was raised unsuccessfully by the defendant in *R v Gjoni (Kujtim)* [2014] EWCA Crim 691 (England and Wales). It should be noted that in England and Wales rape is committed where the defendant lacks a reasonable belief in consent. Where such a belief is based on sexual history with other persons, it can be presumed that it is unreasonable: Laura Hoyano, 'Case Comment on R v Gjoni (Kujtim)' (2014) 10 Criminal Law Review 765, 768; Brian Brewis, 'Sexual History Evidence and Impact on Belief in Consent' (2014) 78 The Journal of Criminal Law 290.

DNA tests cannot be carried out.[150] However, once information about the victim's sexual history is provided to the judge in respect of one issue, it may be artificial to expect her to disregard it while assessing consent.[151] Greater legal and academic engagement is needed to delineate the scope and limitations of the rape shield legislation in India.

1.3.2 Evidence of the defendant's bad character: But what if good men do bad things?

Another evidentiary rule frequently analysed in literature about rape prosecutions is the prohibition on character evidence about the defendant, especially where it restricts citing his past acquittals for rape charges.[152] This is considered particularly unjust given that the victim's sexual history – often portrayed as character evidence – is frequently adduced at trial through loopholes in rape shield legislation.[153]

Bad character evidence relating to the defendant is typically excluded to ensure that the accused is convicted based on the facts of that case, rather than on the basis that he is the *kind* of person who would commit the crime in question.[154] Focussing on character evidence in rape cases can also generate a new type of mythology where only certain 'bad men' are held to be rapists.[155] There are thus good reasons to restrict

---

[150] Orenstein (n 133) 1598.

[151] Lees (n 118) xxvi - xxxiiii.

[152] Ibid xxxv.

[153] Temkin (n 131) 248.

[154] Aviva Orenstein, 'No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials,' (1998) 49 Hastings Law Journal 663, 684, 690.

[155] Ibid 684, 690.

the introduction of bad character evidence relating to the defendant at trial, as a general rule.

Some authors take specific issue with the restrictions on the prosecution in adducing evidence of similar past incidents of sexual assault for which the defendant may not have been reported or convicted.[156] Exclusion of such evidence is assumed to impede convictions of serial rapists who use the same *modus operandi* to rape different victims at different times and places.[157] Where the allegations involve similar fact patterns, there is arguably a stronger case for regarding such evidence as relevant but requiring judges to exercise caution in assessing it. Nonetheless, an over-reliance on past similar allegations against the defendant could promote the idea that women who allege rape are untrustworthy, unless corroborated by other victims.[158]

In India, the bad character of the defendant is deemed irrelevant to criminal proceedings, unless he claims to have a good character.[159] However, the previous commission of offences, including previous convictions is relevant.[160] Similar fact evidence is particularly relevant where the issue at trial is whether the defendant's act

---

[156] Sara Sun Beale, 'Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse' (1993) 4 Criminal Law Forum 307, 318 – 319.

[157] Ibid 321.

[158] Orenstein, 'No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials,' (n 154) 695.

[159] Section 54 of the IEA reads as follows: 'Previous bad character not relevant, except in reply.—In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant. Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue. Explanation 2.—A previous conviction is relevant as evidence of bad character.' The good character of a witness is relevant in a criminal trial under Section 53 of the IEA.

[160] IEA, s 14.

was accidental or not.[161] Academic and policy discussions on the use of character evidence are conspicuous by their absence in India.[162] This is true not just of scholarship on rape cases, but also of legal and criminological literature more generally. Neither was character evidence mentioned by research participants in their interviews, nor was there any mention of it in any of the proceedings observed or cases studied. The use of evidence relating to the defendant's bad character evidence is an important but under-explored issue in India that is, as one academic put it, 'hiding in plain sight.'[163]

1.3.3 He said, she said and the requirement of corroboration

Historically, the requirement for a rape victim's account to be corroborated by independent evidence has been a key factor associated with acquittals. Corroborating evidence is especially difficult to obtain in rape cases, given the low likelihood of there being eyewitnesses or (since the reporting of sexual assault offences is frequently delayed) medical or forensic evidence.[164] Further, the requirement of corroboration

[161] IEA, s 15.

[162] For a notable exception, *see* Kaustav Saha, 'The Relevance of Bad Character in Indian Law' (*The Proof of Guilt*, 13 February 2015) <theproofofguilt.blogspot.com/2015/02/guest-post-relevance-of-bad-character.html> accessed 6 March 2019.

[163] Abhinav Sekhri, 'Hiding in Plain Sight: The Relevance of Character Evidence in Indian Criminal Law' (*The Proof of Guilt*, 29 December 2018) <theproofofguilt.blogspot.com/2018/12/hiding-in-plain-sight-relevance-of.html> accessed 6 March 2019.

[164] Rosemary C Hunter, 'Gender in Evidence: Masculine Norms vs. Feminist Reforms' (1996) 19 Harvard Women's Law Journal 127, 157; Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors 'Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology 202, 203.

was based on the rape myth that women frequently or nearly always lie about rape.[165] While India was under colonial rule, this requirement was weighted even more heavily against 'native' Indian women, particularly if they belonged to oppressed castes and classes.[166] Many jurisdictions now allow for rape convictions in the absence of independent evidence, but in practice this is rare.[167] This also seems to be the case in India, where the Supreme Court has indicated that rape convictions are permitted based solely on the victim's testimony as long as she is a 'sterling witness', *i.e.*, her testimony is free from material contradictions and inconsistencies.[168] Drawing from a data set of 254 trial court judgments over 12 months, this thesis analyses how trial courts' operationalise the 'sterling witness' standard in routine rape cases.[169]

1.4 'Love cases': Prosecuting elopement as rape

There is a growing body of literature on the prevalence of 'love cases,' where the victim and defendant elope, but the family tracks them down and coerces the victim to file a rape complaint. This is usually because the family opposes the consensual intimate relationship, often because it is inter-caste, inter-religion or inter-class.[170]

---

[165] Leahy (n 122) 20.

[166] Elizabeth Kolsky, '"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860–1947' (2010) 22 Gender and History 109, 111.

[167] For example, *see* Temkin (n 131) 187-267.

[168] *Rai Sandeep v Delhi* (2012) 8 SCC 21 [15]; *Punjab v Gurmit Singh and Others* (1996) 2 SCC 384 [8]; Baxi (n 129) 33.

[169] *See* Chapter Seven.

[170] Ravinder Barn and Ved Kumari, 'Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India' (2015) 55 British Journal of Criminology 435, 442.

These cases are frequently marked by withdrawal of the victim's support for the prosecution mid-way through the trial, when she refuses to testify in court against her lover.[171] The role of these prosecutions in controlling women's sexual agency has already been highlighted in existing scholarship.[172] This thesis builds on the literature on love cases through an exposition of how evidence is legally weighed by trial court judges in love cases. It teases out the broader implications of this analysis for feminist engagement with the legal system.[173]

In conclusion, this thesis engages in a socio-legal analysis of rape prosecutions in a major metropolitan city in the postcolonial nation of India. It is the first project to triangulate the detailed study of a large volume of trial court judgments with ethnographic observation and interviews with multiple stakeholders. It is especially significant since it assesses the implementation of extensive legal and policy reform introduced after the infamous Delhi gang rape incident of 2012, including the Criminal Law (Amendment) Act 2013.[174] It provides an institutional analysis of how the criminal justice system functions, the power structures that underpin its working and the various ways in which differentially disadvantaged women deal with its

[171] Baxi (n 129) 234-276; Barn and Kumari (n 170) 16.

[172] Srila Roy, 'Enacting/Disrupting the Will to Empower: Feminist Governance of "Child Marriage" in Eastern India' (2017) 42 Signs 867, 873 – 874.

[173] *See* Chapter Six.

[174] For an account of this gangrape incident and how it led to national protests, ultimately leading to legal reform, *see* Anupama Roy, 'Critical Events, Incremental Memories and Gendered Violence: The 'Delhi Gang Rape'' (2014) 29 Australian Feminist Studies 238.

challenges. Having situated this study in the broader literature on rape trials, the next section introduces and justifies the use of a postcolonial feminist framework for this thesis.

2. POSTCOLONIAL FEMINISM

In general, feminist legal scholarship highlights how laws and legal systems have hidden and often adverse impacts on women's lives.[175] Within the umbrella of feminist legal studies there exist many different ideologies, some of which pull in opposite directions from each other.[176] The specific strand of feminist scholarship that frames this research is that of postcolonial feminism. This section introduces the main attributes of this theory and justifies its use in this thesis.

Postcolonial feminism emphasises the 'historical diversity and local specificity' of feminist accounts.[177] Postcolonial feminists oppose sweeping generalisations about women and recognise that theory and analyses are bound to the historical and social context within which they are generated. They are thus especially interested in how an adherence to traditional ideas of womanhood came to symbolise opposition to colonial intervention in many former colonies, including India.[178] The continued

[175] For an overview, *see* Margaret Davies and Vanessa Munro, 'Editors' Note' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (1st edn, Routledge 2013).

[176] Margaret Davies, 'Unity and Diversity in Feminist Legal Theory' (2007) 2 Philosophy Compass 650, 653 – 655.

[177] Claire Chambers and Susan Watkins, 'Postcolonial Feminism?' (2012) 47 The Journal of Commonwealth Literature 297, 299; Brenda Cossman, 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project' (1997) 2 Utah Law Review 525, 540 – 541.

[178] Reina Lewis and Sara Mills, 'Introduction' in Reina Mills and Sara Lewis (eds), *Feminist Postcolonial Theory: A Reader* (1st edn, Routledge 2003) 3, 17; Rajeswari Sunder Rajan and You-me Park, 'Postcolonial

signification of the woman as 'the pre-colonial, the traditional and the untouched' is a legacy of the anti-colonial, nationalist movement.[179] This legacy has been frequently highlighted and challenged by postcolonial feminists. Further, postcolonial feminism is interested in how gender-based oppression is influenced by ongoing global, colonial relations under 'neo-colonialism', which is understood to include:

> ...the massive economic restructuring in progress in most developing nations of the world today, under pressure from international financial institutions and Western governments, the entry of multinational capital, global trade, patent and military agreements, the modernization agendas of development projects, and the cultural impact of global media and telecommunications.[180]

Analysis under a postcolonial feminist framework thus permits an examination of how gender-based issues are shaped by the historical, material and social context of the postcolony. Second, resulting from its opposition to the universalising tendencies of ''sisterhood is powerful' feminism',[181] postcolonial feminism is interested in the heterogeneity of women's experiences. It highlights that the scope and operation of law assumes fixed gendered, racial, religious, linguistic and other social hierarchies.[182]

Feminism/Postcolonialism and Feminism' in Henry Shwarz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (1st edn, Blackwell Publishing 2000) 61, 63.

[179] Lewis and Mills (n 178) 3; Poulami Roychowdhury, 'Victims to Saviors: Governmentality and the Regendering of Citizenship in India' (2015) 29 Gender and Society 792, 795.

[180] Rajan and Park (n 178) 62 – 63.

[181] Gita Sahgal and Nira Yuval-Davis, 'The Uses of Fundamentalism' (1994) 5 Women Against Fundamentalism 7, 9; *see also* Monica Mookherjee, 'Affective Citizenship: Feminism, Postcolonialism and the Politics of Recognition' (2005) 8 Critical Review of International Social and Political Philosophy 31, 33.

[182] Maneesha Deckha, 'Postcolonial Feminism Liberal Feminism's (Humanist) 'Sister'? ' in Ashleigh Barnes (ed), *Feminisms of Discontent: Global Contestations* (1st edn, Oxford University Press 2015) 177; Amalia Sa'ar, 'Postcolonial Feminism, the Politics of Identification, and the Liberal Bargain' (2005) 19 Gender and Society 680, 683; Ratna Kapur, 'The Other Side of Globalization: The Legal Regulation of Cross-Border Movements' (2003) 22 Canadian Woman Studies 6, 6.

It excavates and critiques these assumptions. Focussing on the multiple oppressions facing women enables postcolonial feminists to engage with all forms of socio-economic disadvantage, rather than treating sexuality as the predominant basis of gender-based subordination.[183]

Within Indian postcolonial feminist work, scholarly attention has been directed to how gender affects women who have *inter alia* different castes, tribes, migrant statuses, geo-political regions, religions, sexualities, classes, educational statuses, professions and disabilities.[184] To give but one example, Virginus Xaxa analyses the manner in which women from certain Indian tribes have withdrawn from public life.[185] He suggests many factors associated with such withdrawal, including their adoption of conservative Hinduism; their acceptance of white collar jobs rather than ones involving physical labour; and their numerical and ethnic minority status in the multi-ethnic, multi-caste villages to which they migrate for work.[186] He further highlights that women from different tribes in India have been differently affected by

[183] This has been the tendency for some radical feminists: Judith R Walkowitz, 'The Politics of Prostitution and Sexual Labour' (2016) 82 History Workshop Journal 188, 189 - 90. For example, *see* Deborah Cameron and Joan Scanlon, 'Introduction' in Deborah Cameron and Joan Scanlon (eds), *The Trouble and Strife Reader* (1st edn, Bloomsbury Academic 2010) 10; Catharine A MacKinnon, *Towards a Feminist Theory of the State* (1st edn, Harvard University Press 1989) ix (this book aims to '…reconstruct feminism on the epistemic level through a critique of sexuality as central to women's status'); Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1st edn, Harvard University Press 1987) 5 – 8.

[184] For example, *see* Mary E John (ed), *Women Studies in India: A Reader* (1st edn, Penguin 2008).

[185] Virginius Xaxa, 'Women and Gender in the Study of Tribes in India' (2004) 11 Indian Journal of Gender Studies 345, 350.

[186] Ibid 350 – 351.

changes in the post-independent political economy of India.[187] For instance, where conversion to Christianity was preferred by members of some tribes, this actually led to greater public participation by women in church activities, even though it also resulted in some other greater restrictions, such as complications in the process of obtaining divorce.[188] Thus Xaxa's analysis shows that gender interacts with ethnicity, religion and migrant status to produce unique constraints on women. In line with postcolonial feminist theory, his research suggests that women's freedoms are continually affected by the broader changes in the social and economic context.

By challenging stereotypical, monolithic and essentialist constructions of 'third world' women as victims of their culture,[189] postcolonial feminism speaks directly to its twin framework, intersectionality theory.[190] Emerging from black feminist thought, intersectionality theory suggests that human experience is a product of conjoined and intersecting patterns of oppression.[191] While gender is one aspect of this experience, gender intersects with class, caste, religion, disability, race, and many other power structures to produce unique forms of discrimination.[192]

---

[187] Ibid 351.

[188] Ibid 352.

[189] Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 Harvard Human Rights Journal 1, 6; Raksha Pande, ''I arranged my own marriage': Arranged Marriages and Post-colonial Feminism' (2015) 22 Gender, Place and Culture 172.

[190] Deckha (n 182) 179.

[191] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 Stanford Law Review 1241, 1243.

[192] Shreya Atrey, 'Lifting as We Climb: Recognizing Intersectional Gender Violence in Law' (2015) 5 Oñati Socio-legal Series 1512, 1516.

The emphasis on specificity of context forms the basis for postcolonial feminist critiques of much (but not all) scholarship emerging from the West about women in the global South. To quote Reina Lewis and Sara Mills:

> Second wave Anglo-American feminist theory had generalised from Western middle-class women's experiences and developed a form of theorising - 'sisterhood is global' - which assumed that those white concerns were the concerns of women everywhere. This type of essentialising led to a silencing of Black and third-world women's interventions within early Anglo-American feminist theory.[193]

Further, where differences amongst women are taken into account, a monolithic idea of Third World culture is often used as an exhaustive explanation for gender-based oppression, to the exclusion of other more relevant factors.[194] This can result in reinforcing racist stereotypes, yielding a limited and/or misleading analysis of the feminist issues.[195] Chandra Talpade Mohanty refers to this tendency of some Western feminists to essentialise Third World womanhood as 'discursive colonisation.'[196] Like other forms of colonisation, it is premised on and constitutes a 'relation of structural domination and a discursive or political suppression of the heterogeneity of the subject(s) in question.'[197] However, these colonising tendencies are not just a

---

[193] Lewis and Mills (n 178) 4.

[194] Uma Narayan, 'Cross-Cultural Connections, Border-Crossings, and "Death by Culture"' in Uma Narayan (ed), *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (1st edn, Routledge 1997).

[195] Ratna Kapur, 'Revisioning the Role of Law in Women's Human Rights Struggles' in Saladin Meckled-García and Basak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (1st edn, Routledge 2005) 98 – 99.

[196] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61.

[197] Ibid 61.

manifestation of 'white Western self-centeredness.'[198] Research carried out by Third World scholars can similarly be colonial and homogenising, especially when it comes to 'the range of women who…do not speak on a first-world stage.'[199] It is important for all feminist researchers to be alive to these issues and reflective about any stereotypical assumptions they might reinforce.

Thirdly, postcolonial feminism recognises that depending on context, women can be victims, agents and/or oppressors. It thus rejects the 'm>f' logic underlying some other feminist theories.[200] For example, postcolonial feminism has been deployed to highlight the oppressive role played by wives of British soldiers in the postcolony in entrenching class- and race-based hierarchies under colonialism.[201] Similarly, Gee Imaan Semmalar suggests that gay and lesbian legal advocacy in India, led by urban, upper class lawyers, has directed public attention away from the issues faced by more marginalised LGBTI+ groups.[202] For example, these advocates have focussed

---

[198] I borrow this phrase from Adrienne Rich, 'Notes Towards a Politics of Location' in Reina Lewis and Sara Mills (eds), *Feminist Postcolonial Theory: A Reader* (1st edn, Routledge 2003) 34.

[199] Mary E John, *Discrepant Dislocations: Feminism, Theory, and Postcolonial Histories* (1st edn, University of California Press 1996) 24 – 25.

[200] I borrow the 'm>f' terminology from Janet Halley. She describes feminism as being a 'subordination theory that seeks to undo the subordination of 'women, femininity, and/or female or feminine gender' (f) to 'men, masculinity, and/or male or masculine gender' (m) without exploring 'other kinds of power.' I agree that it is legitimate to describe some, but not all, feminist theory in this way: Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (1st edn, Princeton University Press 2006) 17 – 18; *see also* Vanessa E Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companian to Feminist Legal Theory* (1st edn, Routledge 2013) 237.

[201] Alison Blunt, 'Spatial Stories Under Siege: British Women Writing from Lucknow in 1857' (2000) 7 Gender, Place and Culture: A Journal of Feminist Geography 229.

[202] Gee Imaan Semmalar, 'Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India' (2014) 42 Women's Studies Quarterly 286, 289.

exclusively on decriminalising consensual homosexual conduct Section 377 (punishing unnatural sexual offences).[203] Their campaigns have not engaged with other legal provisions such as Sections 268 (criminalising public nuisance) and 320 (defining grievous hurt, including emasculations) of the IPC, which are habitually used to harass less privileged sexual minorities, such as *hijras*.[204]

At the same time, postcolonial feminism has produced complicated accounts of masculinity as an unstable category which is co-constituted by other social systems such as race and caste. To illustrate, Mrinalini Sinha analyses how colonialism was premised on the masculine superiority of British men over Indian men, while simultaneously creating and sustaining hierarchies within the 'native' men.[205] Thus, Mrinalini Sinha describes how 'the recruitment of men of different regions, religions, castes and classes into various colonial institutions' was based on distinctions between:

> the so-called 'manly' peoples of the Punjab and the North-West Frontier Provinces[;]…the 'effeminate' peoples of Bengal…or between virile Muslims and effeminate Hindus…[206]

---

[203] Ibid. *See* footnote 11 for a discussion on this provision.

[204] Ibid. The *hijra* community in India includes intersex or transgender persons, often trans women, who face high rates of social ostracism and police harassment. *Hijras* often set up households and kinship systems within their community. *See* Kira Hall and Veronica O' Donovan, 'Shifting Gender Positions among Hindi-speaking Hijras' in Victoria Bergvall, Janet Bing and Alice Freed (eds), *Rethinking Language and Gender Research: Theory and Practice* (1st edn, Longman 1996). *See also* footnote 669.

[205] Mrinalini Sinha, 'Giving Masculinity a History: Some Contributions from the Historiography of Colonial India' (1999) 11 Gender and History 445, 447.

[206] Ibid.

This recognition of the multiple roles inhabited by both men and women is in sharp contrast with 'dominance' or 'radical' feminism, which presumes a strict 'structure of male domination and female subordination in the context of sexuality.'[207] The focuss on women's victimisation, especially through male violence, is used as an 'equalizer' to bring together women from various political and historical contexts.[208] On one hand, this effaces the differences in the socio-economic position of different women, since an acknowledgment of these differences could irretrievably fragment feminism.[209] On the other hand, it also limits the recognition of women as agents, survivors or oppressors, as opposed to their role as victims.[210]

Finally, postcolonial feminism has been ambivalent, or even sceptical, about the use of legal remedies in attaining feminist ends.[211] This cynicism is partly rooted in the history of colonial regimes, which relied on legal institutions to establish and uphold their government.[212] This has resulted in the postcolonial feminist efforts for equality being directed co-equally at law and society.[213] This approach stands in contrast with

---

[207] Ratna Kapur, 'Feminism's Estrangement Critical Reflections on Feminist Engagements with Law in India' in Ashleigh Barnes (ed), *Feminisms of Discontent: Global Contestations* (1st edn, Oxford University Press 2015) 23; Susan B Boyd and Debra Parkes, 'Looking Back, Looking Forward: Feminist Legal Scholarship in SLS' (2017) 26 Social and Legal Studies 735, 739.

[208] Kapur, 'Feminism's Estrangement Critical Reflections on Feminist Engagements with Law in India' (n 207) 30, 31.

[209] Ann Stewart, 'Debating Gender Justice in India' (1995) 4 Social and Legal Studies 253, 271.

[210] This argument is made in Ratna Kapur, 'Sexcapades and the Law' (*Seminar Magazine: Towards Equality—A Symposium on Women, Feminism, and Women's Movements*, 2001) <www.india-seminar.com/2001/505/505%20ratna%20kapur.htm> accessed 2 August 2018.

[211] Kapur, 'Revisioning the Role of Law in Women's Human Rights Struggles' (n 195) 95.

[212] Chiara Correndo, 'Of Women and Myths: Revising Analytical Approaches to Gender Issues in India' (2016) 6 South Asian Chronicle 93, 100 – 101.

[213] Ibid 102 – 103, 106.

what Elizabeth Bernstein has referred to as 'carceral feminism', which invokes criminal law as the pre-dominant solution to women's oppression.[214] I accept that universal claims about feminist legal interventions are difficult and 'it would be a mistake to regard all legal reformist strategies as equally flawed.'[215] However, relying on a postcolonial feminist framework served as a useful reminder that greater legal reform on feminist issues does not necessarily amount to greater feminism.

In conclusion, adopting a postcolonial feminist framework for this thesis facilitated a 'consistent concern with the particularities of the way identities and political positions are worked out within the postcolonial context.'[216] It allowed a healthy scepticism about realising feminist goals through legal reform, particularly while reading suggestions that greater punitiveness will adequately address the issue of sexual violence. At the same time, it encouraged caution while making generalisations about women's experiences, and required constant reflection on how marginalised women might be facing intersectional discrimination.

---

[214] In the context of feminist activists that support sex work abolition, Bernstein describes carceral feminism as 'a rightward shift on the part of many mainstream feminists and other secular liberals away from a redistributive model of justice and toward a politics of incarceration': Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36 Signs 45, 47. The term 'carceral' might fit less well with jurisdictions where incarceration is not the primary punitive response to offending.

[215] Nicola Lacey, 'Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?' in Nicola Lacey (ed), *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1st edn, Hart Publishing 1998) 180; Munro (n 200) 242.

[216] Lewis and Mills (n 178) 20.

CHAPTER THREE: DATA GATHERING AND ANALYSIS – REFLECTIONS ON RESEARCH METHODS

This chapter justifies the selection of each of the three data sources used for this thesis: cases, interviews and court observations. In respect of each of these sources, it reflects on the practical and ethical difficulties encountered while conducting the research. Finally, it describes the methods used to analyse the data.

1. DATA COLLECTION

1.1 Judgments

Judgments were studied to assess the 'circumstances and reasoning that led to the particular decision.'[217] The project originally envisaged analysing all Delhi trial court judgments in rape cases from January 2014 to June 2016. However, due to the volume of decisions (both the number of cases and the length of each judgment) this target was revised. The final data set includes the total population of Delhi trial court judgments over a period of twelve months – from January to June in 2014 and 2016. I included the second block of judgments to explore the possibility that the extensive law and policy reforms introduced in 2013 had become better embedded over time.[218]

[217] Christopher J Cowton, 'The Use of Secondary Data in Business Ethics Research' (1998) 17 Journal of Business Ethics 423, 424.

[218] For a discussion on the advantages of collecting data across different time periods *see* Natasha Semmens, 'Methodological Approaches to Criminological Research' in Pamela Davies, Peter Francis and Victor Jupp (eds), *Doing Criminological Research* (2nd edn, Sage Publications 2011) 61.

The following section describes my attempt to secure these judgments from Oxford and while in Delhi.

1.1.1 Seeking district court judgments on the internet

Judgments are public documents in India.[219] My experiences in the field showed that the truth of this claim is often belied in practice. In the past, I had been able easily to retrieve both High Court and Supreme Court judgments through paid (for instance, Manupatra[220]) or free (for instance, IndianKanoon[221]) databases. These databases allow for easy, user-friendly retrieval of appellate court judgements according to date, citation, case name, judge name, court name or relevant legal provision. They list judgments that have subsequently cited or overruled a decision. Against this background, I was unprepared for the conspicuous lack of electronic documentation in district courts.[222]

Originally, I intended to rely on the Delhi District Courts website.[223] This website allows retrieval of judgments by case number, judge name or date, and also has the option to conduct a free text search.[224] I was not looking for a particular decision and

---

[219] Oxford Pro Bono Publico, *Public Access to Court Documents* (Oxford Human Rights Hub, 2015) 58-64.

[220] 'Manupatra' <www.manupatrafast.com/> accessed 19 December 2016.

[221] 'IndianKanoon' <indiankanoon.org/> accessed 19 December 2016.

[222] Shalini Seetharam and Sumathi Chandrashekaran, *eCourts in India - From Policy Reform to Implementation* (Vidhi Centre for Legal Policy, 2016) 1. *See also* Sudhir Krishnaswamy, Sindhu K Sivakumar and Shishir Bail, 'Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches' (2014) 2 Journal of National Law University, Delhi 1, 6, 13.

[223] 'Delhi District Courts' <delhicourts.nic.in/> accessed 19 December 2016.

[224] A free text search allows you to enter a key word and retrieve all judgments and sentencing orders that mention that key word.

did not have ready details for the judgments I sought. Thus, searching by case number or date was not an option. Since all rape cases are now tried in fast-track courts,[225] I could have relied on searching by judge name, had I known the names of all the judges presiding over fast track courts in Delhi. However, this information is inconsistently available across the websites of the various Delhi district courts. Furthermore, district court judges are regularly transferred from one courtroom to another.[226] Conducting a judge-based search would have required a complete list of all the judges who had presided over fast track courts in the preceding three years.[227] Hence, my plan was to conduct a free text search, downloading all judgments and orders that mentioned 'rape', and then discarding the irrelevant files.

In November 2015, I found out that the free text search function had collapsed.[228] I was hopeful that it would be fixed over time, but when this had not happened for six

[225] Specialised 'fast track' courts can be set up for any category of cases. In the current context, the idea is to expedite trials and establish courts that have the infrastructure to conduct sexual assault trials consistent with appellate court guidelines (for instance, using screens to separate the victim from the accused). Fast track courts to try sexual assault cases were set up in Delhi in December 2012, though a notification of the Registrar General of the High Court of Delhi, upon recommendation of the Delhi government. In this thesis, unless otherwise indicated, the term 'fast track court' should be read as indicating a court in which rape cases are tried. *See* 'Five Special Fast-track Courts for Sexual Assault Cases' (*DNA*, 19 December 2012) <www.dnaindia.com/india/report-five-special-fast-track-courts-for-sexual-assault-cases-1779429> accessed 19 December 2016.

[226] The posting of district court judges is done by the Lieutenant Governor of Delhi, in consultation with the Delhi High Court: Constitution of India 1950, Art 233; Krishnaswamy, Sivakumar and Bail (n 222) 5.

[227] Towards the end of my fieldwork I was informed that contacting the Judicial Branch (an office within the district court administration) could have yielded a list of the relevant names, but I was already confident by this time that many judgments are not uploaded on the website. I also did not have the time to engage with the bureaucracy of six different court complexes in the few weeks that remained at my disposal.

[228] The collapse and revival of this function has also been recorded in Rukmini Shrinivasan, 'Rape Statistics: A Number Crunching Story' (*The Hindu*, 18 August 2014) <www.thehindu.com/opinion/blogs/blog-datadelve/article6327818.ece> accessed 3 November 2016.

months, I decided to work towards securing the relevant judgments after reaching Delhi. I considered four main routes: approaching the administrative staff, seeking technical support in court, asserting my right to information, and requesting help from judges.

1.1.2 Continuing the search for judgments in situ

First, I contacted several members of court staff — in particular, the *ahlmads* (record-keepers) of fast track courts and administrators in some 'Record Rooms' where files of concluded district court cases are housed. It was common to be directed from one office to another, or to be told that it was impossible to collect the data I wanted within legal constraints. Enquiries to the court staff led nowhere, so I decided to focuss on getting the free text search device fixed.

Most personnel in the Computer Office and Website Office of the Delhi District Courts refused to believe that the search function had not been working for several months. A well-meaning staff member suggested that I try 'Google' or 'IndianKanoon' and I had to explain why this research method would lack academic rigour. On one occasion I was given the commitment that the search function would be fixed in the following 48 hours but this did not happen.

Court staff members were unfamiliar with academic researchers trying to collect comprehensive data. The court machinery was heavily bureaucratised, making it much easier to refer me on to another office rather than engage effectively with my

inquiry. The court atmosphere itself was daunting and male-dominated,[229] and it was sometimes difficult to ensure that I was taken seriously as a young, female researcher.[230]

I later heard informally from some Additional Sessions Judges (hereafter 'ASJs') that they had been advised by District and Sessions Judges (hereafter 'DSJs') to refrain from uploading rape-related judgments onto the website.[231] I cross-checked this by searching for judgments from each judge whom I knew had served as a fast-track judge within the relevant timeframe. Many such searches did not return any results. I therefore proceeded to think of alternate ways to secure the data.

I considered asking for the judgements under the Right to Information Act 2005 (hereafter 'RTI Act'). This statute recognises the right of Indian citizens to approach any public authority to obtain documents and records.[232] When initial attempts made to approach the relevant officer were met with little support, I abandoned this route

[229] While women have been known to practice law even before 1923, their right to do so was statutorily entrenched in the Legal Practitioners (Women) Act 1923: Samuel Schmitthener, 'A Sketch of the Development of the Legal Profession in India' (1969) 3 Law and Society Review 337, 360. However, even by generous estimates, only about 10% of India's legal professionals are women: Swethaa Ballakrishnen, '"Why is Gender a Form of Diversity?": Rising Advantages for Women in Global Indian Law Firms ' (2013) 20 Indiana Journal of Global Legal Studies 1261, 1264. For insights into how other identity attributes, such as caste, have historically influenced the composition of the legal profession, *see* Charles Morrison, 'Social Organization at the District Courts: Colleague Relationships among Indian Lawyers' (1969) 3 Law and Society Review 251, 253.

[230] As Nicole Beaudry poignantly asks, '…is gender a matter that can ever be left aside?': Nicole Beaudry, 'The Challenges of Human Relations in Ethnographic Enquiry - Examples from Arctic and Subarctic Fieldwork' in Gregory F Barz and Timothy J Coole (eds), *Shadows in the Field: New Perspectives for Fieldwork in Ethnomusicology* (Oxford University Press) 82.

[231] The District and Sessions Judge is the senior-most judicial officer for each district. The Additional Sessions Judges fall immediately below them in the judicial hierarchy in respect of criminal matters.

[232] Right to Information Act 2005, ss 2(f), 2(h)(a), 6.

for two reasons. First, the costs of obtaining information through this route were prohibitively high.[233] Secondly, the Indian judiciary has been reluctant to allow RTI applications addressed to itself.[234] While the RTI Act is progressive legislation,[235] applications are often met with rejections, delays or poor quality responses.[236] It would have been inefficient to dedicate time, money and energy towards lengthy RTI litigation,[237] which could also be deemed confrontational by those within the system upon whose help I was reliant.

The judgments were ultimately secured with the help of two supportive High Court judges. For one court complex, reliance was placed on a District and Sessions Judge to whom these High Court judges introduced me. For the remaining courts complexes, soft copies of the judgments were relayed to me directly by one of the High Court judges.

---

[233] At the time, Rule 10 of the Delhi High Court (Right to Information) Rules 2006 fixed the cost of information at 5 rupees per page, which would have added up to £6000 - £7000 for the data set I was considering.

[234] Shahla Tabassum and T Sadashivam, 'Right to Information Act in India: An Overview' (2015) 6 Journal of the Knowledge Economy 665, 678.

[235] Divakara Babu Chennupati, Rajasekhara Mouly Potluri and VS Mangnale, 'India's Right to Information Act, 2005: A Catalyst for Good Governance ' (2013) 55 International Journal of Law and Management 295, 300.

[236] Sakshi, 'The Lack of Real Data Stands in the Way of Tackling Punjab's Drug Problem' (*The Wire*, 15 July 2016) <http://thewire.in/51368/data-drug-usage-punjab/> accessed 19 December 2016; Cf. OP Kejriwal's warning to rights-bearers, to refrain from making frivolous RTI applications for the 'sake of harassment' of officials or departments: OP Kejriwal, 'Loopholes and Road Ahead' (2006) 41 Economic and Political Weekly 940, 940.

[237] For an overview of the factors associated with pendency of cases in the Indian legal system see Krishnaswamy, Sivakumar and Bail (n 222).

Overall, the process of collecting judgments was arduous. Since I had the support of senior judges, my contacts at the district court were reluctant to admit that they were unable or unwilling to help me. They frequently preferred avoidance, deflection or evasion.[238] While this may have made sense given the strongly entrenched hierarchies in the court system, it took up valuable research time. It took six months of active pursuit, unreturned phone calls and red-tape to secure the judgments, which should have been public documents to begin with.[239]

At a practical level, the judgments were hard to organise and analyse. They often included long excerpts from old appellate court judgments or made lengthy, unjustified and legally irrelevant sociological or philosophical observations.[240] Nonetheless, these decisions provided key interpretive insights into the reasoning of judges.

---

[238] As Elin Sæther records, this can be a cause of tremendous insecurity for the researcher: Elin Sæther, 'Fieldwork as Coping and Learning' in Maria Heimer and Stig Thøgersen (eds), *Doing Fieldwork in China* (1st edn, NIAS Press 2006) 47.

[239] Chiara Letizia, while conducting research at a Nepali district court records that 'Attempting to get hold of the case papers in fact comprised a large part of my fieldwork in terms of energy, time, and diplomatic skills.': Chiara Letizia, 'The 'Secularism Case' - Prosecution of a Hindu Activist before a Quasi-judicial Authority in the Nepal Tarai' in Daniela Berti and Devika Bordia (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015) 149. *See* Section 1.2.2 below for observations on court hierarchies.

[240] This is a general problem faced by researchers seeking to rely on judgments: Alison Wakefield, 'Undertaking a Criminological Literature Review' in Pamela Davies, Peter Francis and Victor Jupp (eds), *Doing Criminological Research* (2nd edn, Sage Publications 2011) 69. *See also* Gautam Bhatia, 'The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed' (*Indian Constitutional Law and Philosophy*, 13 May 2016) <indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/> accessed 19 December 2016; Lawrence Liang, 'Jana Gana Mana and the Danger of Passing Sentiment as Law' (*The Wire*, 2016) <thewire.in/83606/jana-gana-mana-dangers-passing-sentiment-law/> accessed 19 December 2016.

Availability of district court judgments has improved vastly with the search engine made available as part of the 'e-courts' project.[241] Towards the end of my fieldwork, I was informed that judgments are no longer uploaded on to the Delhi District Court website, though the website itself did not clarify this until after the conclusion of my fieldwork.[242] However, since the district courts' e-courts websites only make judgments and orders available from varying dates within 2016, it is not possible to rely on this interface within the timeline of this thesis.[243]

While judgments are a rich data source, relying solely on judgments does not accommodate an understanding of the impact of social dynamics on the judicial process.[244] It is possible that the stated reasons do not provide a full account of the factors that led to the decision,[245] or that the researcher has a different interpretation of the text from the author of the judgment.[246] These factors led me to considering two other data sources: interviews and court observation. The use of data triangulation is

[241] 'E-Courts Mission Mode Project - District Courts of Delhi' <ecourts.gov.in/delhi> accessed 19 December 2016; Seetharam and Chandrashekaran (n 222).

[242] Phone conversation with district court judge, 12 September 2016. Now, the 'e-courts' website and the district court website contain links to each other.

[243] Further, while this website allows users to look up judgments based on the statutory provision, there remain inconsistencies in how the statutes are classified. For instance, searches using 'IPC', 'Indian Penal Code' and 'Indian Penal Code 1860' could all yield useful results, depending on the term that judges or their staff chose to use.

[244] Daniela Berti and Devika Bordia, 'Introduction' in Daniela Berti and Devika Bordia (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015) 1.

[245] Cowton (n 217) 424.

[246] Wakefield (n 240) 69.

not prompted by a desire only to validate the initial findings. Rather, it is used to add 'rigor, breadth complexity, richness, and depth' to the inquiry.[247]

1.2 Interviews

Interviews are a useful way of understanding the interviewees' perspectives.[248] I therefore planned to conduct interviews with five groups of people: lawyers (prosecutors, defence counsels, victims' counsels, lawyers from the Delhi Commission for Women (hereafter 'DCW'), lawyers working for the New Delhi District Legal Services Authority (hereafter 'DLSA')), judges, victims, police officers and members of organisations that provide victim-support services.[249]

I intended to conduct semi-structured, face-to-face interviews with all the interviewees. Adopting a semi-structured format enables a 'discussion steered by [the researcher's] questions and prompts, but [with] the substantive content largely determined by the respondent.'[250] Conducting face-to-face interviews allows the researcher to establish a rapport with the interviewee and observe their non-verbal

[247] Norman K Denzin, 'Triangulation 2.0' (2012) 6 Journal of Mixed Methods Research 80, 82.

[248] Shulamit Reinharz and Susan E Chase, 'Interviewing Women' in James Holstein and Jaber F Gubrium (eds), *Inside Interviewing - New Lenses, New Concerns* (1st edn, Sage Publications 2003) 222.

[249] The Delhi Commission for Women is a statutory body set up to investigate laws relating to women. For a detailed account of the role played by its lawyers, *see* Section 5.2.2 of Chapter Four. The DLSA is a statutory body that has been constituted under the Legal Services Authorities Act 1987. It falls under the administrative control of the Delhi High Court. The DLSA provides free legal representation to disadvantages parties. DLSA lawyers may have experience representing either rape victims or rape defendants.

[250] Pamela Davies, 'Doing Interviews in Prison' in Pamela Davies, Peter Francis and Victor Jupp (eds), *Doing Criminological Research* (2nd edn, Sage Publications 2011) 166.

communication and tone.[251] Almost all the interviews were conducted in this format, except those with judges.[252] In two cases, audio calls were used, and in one case the respondent emailed me his responses.[253] These exceptions were made where the participant expressed a preference against a face to face interview or was not physically present in Delhi. Interviews were 39 minutes long on average.[254] The following table summarises the number of people interviewed in each category:

Table 3.1: Summary of interviewees by category

Category of interviewees	**Number of people interviewed**
Lawyers	18
Prosecutors	8
DCW Lawyers	5
Judges	9
Victims	6
Family Members of Victim[255]	2
Members of NGOs and Women's Collectives	13
Total	61

Defendants were not interviewed since their perspectives were frequently relayed by defence counsels. At the same time, I considered it imperative to interview victims

[251] Brian L Withrow, *Research Methods in Crime and Justice* (1st edn, Routledge 2014) 238; Patrick Dilley, 'Conducting Successful Interviews: Tips for Intrepid Research' (2000) 39 Theory Into Practice 131, 134.

[252] Judges were administered a survey (**Appendix 3**) with the assistance of the High Court. The reasons for this are discussed under Section 1.2.2 of this chapter.

[253] Telephone and Skype™ interviews have been recognised before as a productive research method in criminological research: Judith E Sturges and Kathleen J Hanrahan, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 Qualitative Research 107; Jessica R Sullivan, 'Skype: An Appropriate Method of Data Collection for Qualitative Interviews?' (2012) 6 The Hilltop Review 54; Sally Seitz, 'Pixilated Partnerships, Overcoming Obstacles in Qualitative Interviews via Skype: A Research Note' (2016) 16 Qualitative Research 229.

[254] Computed based only on the twenty five audio-recorded interviews.

[255] This was done for disabled or child victims, since I did not have ethical clearance to speak to them directly.

because preliminary research had revealed 'hostile' victim-witness testimonies as a major contributing factor to acquittals in rape cases.[256] I was thus interested in hearing directly from victims about the unique pressures that led to victim-witness hostility.

The first part of this section describes how I understood my role as an interviewer. I then go on to describe the methodological challenges of securing access to each group.

1.2.1 The interviewer's task: How much is too much?

While traditionally, qualitative researchers have been encouraged to be 'neutral', feminist scholars have pointed out that this conflicts with the feminist orientation 'towards the validation of women's subjective experiences.'[257] Different challenges have been posed by scholars engaged in elite interviewing. For instance, Matthew Johnston describes his interviews of male security officers engaging in violence against institutionalised psychiatric patients as:

> a critical dialogue [that] can confront and contest masculine identities that render women, subordinated men, and disenfranchised people such as male and female psychiatric patients as targets for institutional violence and coercion.[258]

---

[256] *See* Chapter Four. *See* Section 4.1 of Chapter Seven for an analysis of the importance of the victim's testimony in rape cases.

[257] Ann Oakley, 'Interviewing Women - A Contradiction in Terms' in Helen Roberts (ed), *Doing Feminist Research* (1st edn, Routledge 1981); Timothy John Rapley, 'The Art(fulness) of Open-ended Interviewing: Some Considerations on Analysing Interviews' (2001) I Qualitative Research 303, 304.

[258] Matthew S Johnston, 'Men Can Change: Transformation, Agency, Ethics and Closure during Critical Dialogue in Interviews ' (2016) 16 Qualitative Research 131, 132.

Similarly, Brinkmann advocates using interviews to generate a 'knowledgeable citizenry capable of discussing matters of communal value.'[259] This would involve challenging the interviewees repeatedly to justify or modify their views, rather than simply trying to understand their opinions.[260] In spite of my leanings towards intersectional feminism,[261] I chose not to engage in either activism, or public philosophy. Even when faced with violent, misogynistic language, I did not rebut the views expresses by the interviewees. While I accept that 'there are no such things as non-leading questions', I understood my role as inviting participants 'only to talk about certain themes, rather than to specific opinions about these themes.'[262] On occasion I engaged with responses, but in non-argumentative ways, such as by seeking a clarification.[263] Further, while Johnston was able to use his shared professional background and male privilege to challenge misogyny, as a female researcher, I experienced the articulation of these views as acts of speech-violence.[264] In any case, I did not want to be typecast as an overtly sensitive feminist 'out to prove

[259] Svend Brinkmann, 'Varieties of Interviewing: Epistemic and Doxastic' [2007] Tidsskrift for Kvalitativ Metodeudvikling 30, 37.

[260] Ibid.

[261] *See* Section 2 of Chapter Two.

[262] Svend Brinkmann, 'Unstructured and Semi-Structured Interviewing ' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (1st edn, Oxford University Press 2014) 285.

[263] Like Klatch, '[w]hile I would push to clarify ideas and beliefs, I did not assert my own opinions, judgments or values …': Rebecca Klatch, *Women of the New Right* (1st edn, Temple University Press 1987) 17.

[264] Judith Butler, 'Burning Act: Injurious Speech ' (1996) 3 The University of Chicago Law School Roundtable 199, 202; Anna McFarlane, 'Spells and Hate Speech: Linguistic Violence and Vulnerability in the Harry Potter Series' (2012) 34 Reason Papers 145.

an agenda'.[265] My impassivity was also prompted by a concern for my physical safety. Finally, Johnston himself acknowledges that such an approach might be perceived by some participants as imposition, intimidation or manipulation.[266]

My attitude to other interviewees, such as members of NGOs, was somewhat of a contrast. For example, while interviewing a *dalit* activist who was being targeted by the State for her work, I freely expressed solidarity. Perhaps the most difficult interviews to navigate were those conducted with victims in 'promise to marry' cases.[267] It was common for them to say that their life had been 'ruined' on account of the premarital sexual activity. While I was in no position to judge their subjective experience of violation, their narratives drew from and fed into a damaging broader context that stigmatises premarital sex. Ultimately I reminded myself that I did not have to agree with their normative assumptions in order to be able to sympathise with them. My primary duty remained to listen with curiosity and without judgment. The following subsections describe the steps I undertook to secure each group of interviews.

[265] Terry Arendell, 'Reflections on the Researcher-Researched Relationship: A Woman Interviewing Men' (1997) 20 Qualitative Sociology 341, 364.

[266] Johnston (n 258) 139, 146.

[267] *See* Chapter Five.

1.2.2 Elite interviewing: Judges, lawyers and the police

A. Lawyers

Lawyers who had served as defence counsels and/or victims' counsels were the most accessible participants. I drew mainly on my social and professional networks to set up these interviews, as in India, like in many other jurisdictions, access is often about whom you know, rather than what you know. I combined this with 'cold-calling' and using 'snowballing'[268] once I had conducted the first few interviews. While I was at pains to explain my requirements of confidentiality and anonymity, most lawyers were surprised and a little disappointed that I was going to be uniformly anonymising their identity. Some were offended at the suggestion that they would be afraid to identify themselves. Where I could, I emailed an information sheet in advance of conducting the interview. Where I could not, I took one along with me, and talked the lawyers through the important details. Most expressed little enthusiasm for learning about the intricacies of my study.

In contrast, prosecutors were much more cautious. In approaching them, four leads were important. First, I was introduced to a Chief Prosecutor[269] through a district court judge I knew. Second, an acquaintance introduced me to a senior prosecutor associated with the DCW. Both these prosecutors allowed me to mention their names

[268] Snowballing refers to the process by which one research participant is asked to suggest other potential interviewees: Semmens (n 218) 72.

[269] The prosecution service in each court complex is headed by a Chief Prosecutor. Other prosecutors in the complex are referred to as 'Additional Public Prosecutors.'

while trying to contact others, which proved to be extremely helpful.[270] Third, through a lawyer I interviewed, I was able to contact an Additional Public Prosecutor (hereafter 'APP') who was enthusiastic about my project. He was particularly warm to me once he found out that I had institutional links with one of his academic mentors. He said that he was keen to encourage academics to see how things were 'on the ground.' At a later point he admitted that he was sometimes perturbed by the imperfect system he was part of and was committed to improving it. He supported me not just in terms of facilitating interviews, but also by securing permission for me to attend *in camera* proceedings in his court.[271] Finally, at the recommendation of an Additional Public Prosecutor, I approached the Delhi Government's Home Department for permission to interview prosecutors. Many prosecutors were willing to participate in my study even without such permission, but I did not want to run the risk of violating any institutional guidelines I was not aware of. Further, the recommendation to seek this permission had come through the Directorate of Prosecution and their support was crucial for my study. I did as they said in the hope of building a sustained relationship with them. Fortunately, my permission came through, and my links with the Directorate and the Home Department proved invaluable in arranging for permission to attend *in camera* proceedings in at least three

[270] Amanda Anthony and William Danaher recount the advantages of using this networking technique: Amanda Koontz Anthony and William F Danaher, 'Rules of the Road: Doing Fieldwork and Negotiating Interactions with Hesitant Public Figures ' (2016) 16 Qualitative Research 392, 400.

[271] For an account of how I gained access to *in camera* proceedings *see* Section 1.3 of this chapter.

court complexes. In most cases, once prosecutors from a fast track court became willing to interact with me, the DCW lawyers assisting them were also forthcoming.

While conducting the interviews, I went prepared with an interview schedule that had been approved by the Central University Research Ethics Committee at the University of Oxford (**Appendix 2**).[272] However, I found that practitioners had no patience for the more abstract questions I asked ('How would you describe your duties as a lawyer?').[273] Over time, I adapted the format so that I started each interview by asking for their general impressions of factors influencing conviction rates in rape cases and referred to my questionnaire for prompts to ensure that all the issues relevant to my thesis had been covered in the interview.

While most lawyers had no objection to their interviews being recorded, prosecutors felt differently. Even the most forthcoming prosecutor would become tight-lipped at the mention of recording, no matter how many times I reinforced my guarantees of anonymity. They would conflate my role with that of a journalist or an activist,[274] and consequently self-censor. Eventually, I stopped suggesting that I record the interviews, relying instead on notes made during and after the interview.

---

[272] Approval was granted on 19.2.2016.

[273] Dilley observes that the interview schedule might have to be revised following the first few interviews: Dilley (n 251), 133-134.

[274] To quote the experience of Mihael Petkov and Lambros Kaoullas, '[t]he elite respondents resisted the interviews because they perceived the researcher as associated with an unverifiable, unknown hostile actor' (citations omitted): Mihail Plamenov Petkov and Lambros George Kaoullas, 'Overcoming Respondent Resistance at Elite Interviews Using an Intermediary ' (2015) 16 Qualitative Research 411, 412. On the need for researchers to distinguish themselves from reporters, *see* Anthony and Danaher (n 271) 403.

I was aware of gendered stereotyping throughout my time in the field and on occasion experienced sexual harassment. Examples of 'everyday sexism' included well-meaning male lawyers telling me to 'cover up', and being asked by middle-aged people if I was married. One female notary who attested some applications I filed in court told me to study as much as I wanted before getting married because after that I would have to 'settle down.'

At other times, it was harder to articulate what had caused me unease. During one interview, I asked an APP what evidence he relied on to conclude that a case was false. He asked me to suppose that he and I had sex, and that I later made a rape allegation against him. He asked if it would not be relevant in those circumstances that *I* had approached *him* for the meeting, rather than the other way around.[275] On another occasion, I asked my interviewee about the conviction of film-maker Mahmood Farooqui for the rape of a Fulbright Scholar during her fieldwork.[276] 'She was a PhD student seeking help, just like you', the APP replied. I could not articulate my unease in these situations at the time, but I later recognised what I had found disturbing — the constant foregrounding of my identity as a young woman and my perceived vulnerability to sexual violence while alone in the chamber of a young, male lawyer, usually with other male lawyers on the other side of the door. These incidents left me

[275] *See also* Pratiksha Baxi's experience in this regard: 'A senior white academic said to me, "it is not important to ask why men rape women, rather the more important question is: why I wont [sic] rape you?" This is the modality of sexist speech, which personalises a philosophical question about why someone may or may not break a rule.': Pratiksha Baxi, 'Impractical Topics, Practical Fields Notes on Researching Sexual Violence in India' (2016) LI Economic and Political Weekly 80, 86.

[276] *State v Mahmood Farooqui* (n 148).

feeling that my gender influenced the distribution of power in many interviewer-interviewee interactions.

There were other more blatant forms of harassment. While trying to establish contact with victims, I went to meet a government official from a city neighbouring Delhi. The meeting got off to an encouraging start, but we soon started talking about his interest in spirituality. He proceeded to declare that, because of his spiritual awareness, the minute he had looked into my eyes he had known about his deep connection with me. He went on to clarify that connections themselves could be of many kinds: emotional, physical or sexual. I did not walk out, raise an alarm, or subsequently complain about him. I did follow up with the NGOs he put me in touch with. Before I left, he gave me his personal mobile number, saying there was no need to use his office number thereafter. I did not contact him again or pick up his call when he tried to contact me a few nights later.

Having occupied institutional spaces across four different continents, I would have been stunned if I had not encountered sexism or harassment in the Delhi district courts. Yet, as a researcher my ability to react was severely compromised. Data in the field were already inaccessible and I did not want to stand out as a 'trouble-maker' for fear of being refused further access. My experiences reinforced that while it remains imperative to decolonise social science research,[277] it is also important to challenge the

[277] In this context, to 'decolonise' would mean to dismantle the 'paternal relations between researchers and community people. This paternalism is seen even in the professional language that social scientists have been known to use, such as "informants" and "human subjects." It is also seen in the assumption that, while neighborhoods are supposed to be completely open to researchers to "collect data" from informants, researchers have no obligation to give community people empowered access to the

problematic assumption that 'researchers always have more power than those being researched.'[278]

Significantly, I had spent a considerable amount of time guarding against the risk of 'secondary trauma' experienced by researchers who are repeatedly exposed to 'personal narratives of a sensitive or distressing nature.'[279] While in the field, I was instead heartened by the resilience and openness of the victims I spoke to. It was the constant exposure to rape myths, the persistent downplaying of patriarchy, and the misogynistic dismissal of women as a class that took the heaviest toll on me. I frequently encountered such attitudes in the professional interviews, as further analysed in Chapter Four.

While the gendered nature of my work made it a 'highly emotional endeavour',[280] I was simultaneously aware of the tremendous privilege I enjoy in other respects.[281] The frequent references to the assumed perversity of 'Muslim' sexual practices (such as polygamy), and the 'popular Hindu iconography, such as calendars and stickers of

---

resources of academic institutions…': John H Stanfield II, 'Slipping Through the Front Door: Relevant Social Scientific Evaluation in the People of Color Century' (1999) 20 The American Journal of Evaluation 415, 418.

[278] Katariina Mäkinen, 'Uneasy Laughter: Encountering the Anti-immigration Debate' (2016) 16 Qualitative Research 541, 550.

[279] Nikki Kiyimba and Michelle O'Reilly, 'The Risk of Secondary Traumatic Stress in the Qualitative Transcription Process: A Research Note ' (2016) 16 Qualitative Research 468, 468.

[280] Sharyn Roach Anleu and others, 'Observing Judicial Work and Emotions: Using Two Researchers' (2016) 16 Qualitative Research 375, 383.

[281] On the importance of reflexivity generally, *see* Aswathy P Viswambharan and Kumar Ravi Priya, 'Documentary Analysis as a Qualitative Methodology to Explore Disaster Mental Health: Insights from Analysing a Documentary on Communal Riots' (2016) 16 Qualitative Research 43, 55; Mäkinen (n 278) 547.

Hindu gods, on the desks of judges and personnel',[282] led me to believe that my research was accepted in some part because I am a Hindu researcher. A few times, state officials warmed to me because they assumed from my last name that we belonged to the same 'community', a euphemism for caste.[283] My north Indian upbringing meant that I was almost never at a linguistic disadvantage,[284] and could politely disagree with the racism of court personnel who spoke of the 'inherently cunning nature' of south Indian people. My training as a lawyer was my biggest asset, since I could easily grasp institutional talk and use technical language to establish familiarity.[285] Notwithstanding the gendered assumptions and sexism, it was impossible to ignore the ways in which my inquiry was facilitated by the social location of my middle class, heterosexual, non-disabled, educated, caste Hindu self.

---

[282] This was also observed by Nicolas Jaoul in his ethnography of a district court in Kanpur, India: Nicolas Jaoul, 'A Strong Law for the Weak - Dalit Activism in a District Court of Uttar Pradesh' in Daniela Berti and Devika Bordia (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015) 188-189. Rahela Khorakiwala documents other examples of judicial iconography in India, which glorify Hindu, and often casteist symbols in the High Court of Rajasthan: Rahela Khorakiwala, 'Judicial Iconography in India' (2014) 1 Asian Journal of Legal Education 89, 96.

[283] Zoé E Headley, ''The Devil's Court!' - The Trial of 'Katta Panchayat' in Tamil Nadu' in Daniela Berti and Devika Bordia (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015) 238.

[284] 'Knowing the language opens hearts and doors…': HGGM Driessen and WHM Jansen, 'The Hard Work of Small Talk in Ethnographic Fieldwork' (2013) 69 Journal of Anthropological Research 249, 257; Peter Wasamba and Jennifer Muchiri, 'Reflections of Two African Researchers on Oral Testimony Fieldwork in South Korea ' (2015) 8 The Nairobi Journal of Literature 51, 61.

[285] Lisa Morriss, 'Dirty Secrets and being 'Strange': Using Ethnomethodology to Move beyond Familiarity' (2016) 16 Qualitative Research 526, 530. At the same time, I had to be careful that I gave adequate hearing to discourses and narratives I was unfamiliar with, in respect of other interviewees: Elena Ponzoni, 'Windows of Understanding: Broadening Access to Knowledge Production through Participatory Action Research' (2016) 16 Qualitative Research 557, 571.

B. Judges

Many ASJs indicated that I was not allowed to interview them without the High Court's permission. I was not sure of the legal basis for this advice,[286] but to be cautious, I sought permission from the High Court. After a series of meetings over three and a half months, I was granted permission to administer a survey to fast track court judges through the High Court. Responses by nine different ASJs were recorded and sent to me in June 2017.

The biggest hurdle I encountered was the inaccessibility of relevant authorities. I was trapped in a vicious circle where it was impossible for me to enter the High Court without an invitation from the Registrar General, but it was impossible to secure such an invitation without meeting him to discuss my project first. When I finally met him, it was through the intervention of a Supreme Court judge I approached at an academic conference, without any prior introduction.[287] Every conversation reinforced the difficulty of conducting empirical work as an outsider to the 'right' networks.

C. Police

My application to interview police officers was rejected by the Commissioner of Police, Delhi. Even so, I interacted with many police officers over the two or three

[286] Perhaps this is included under Article 235 of the Constitution of India 1950 that grants the High Court 'control over subordinate courts.' Jaoul notes similar resistance from district court judges in Kanpur: Jaoul (n 283) 193.

[287] I initially had some misgivings about approaching this judge, but I was also aware of how often 'good data collection can stem from spontaneous and chaotic routes to rapport.': Peter Magolda, 'Being at the Wrong Place, Wrong Time: Rethinking Trust in Qualitative Inquiry' (2000) 39 Theory Into Practice 138, 145.

weeks that I tried to contact victims through the police.[288] I do not draw on these informal interactions in the body of the thesis, but they provide valuable contextual data for this study.

D. General observations

Two themes stood out from my experiences across courts: the pervasiveness of strong bureaucratic hierarchies, and the inaccessibility of court data and proceedings not just to academic researchers, but also to the citizenry at large. The near complete control that High Courts exercise over district courts is reflected in the unfortunate Constitutional reference to the latter as 'subordinate' courts.[289] In this regard, Aparna Chandra describes the 'protocol duty' placed on District and Sessions Judges, which requires them to receive and accompany any High Court judges passing through their jurisdiction. She understands this and similar practices as reflective of a 'deep feudal culture within the judiciary' stemming from the colonial period when trial court judges tended to be Indian, while the appellate judiciary was mostly European.[290] Much of this control has been entrenched in Chapter VI of the Constitution, which

[288] *See* Section 1.2.3 of this chapter.

[289] 'Panel Discussion on Appointments to the Lower and Higher Judiciary' (*Campaign for Judicial Accountability and Reforms and Vidhi Centre for Legal Policy*, 9 September 2016) <vidhilegalpolicy.in/events-updates/2016/9/9/video-panel-discussion-on-appointments-to-the-lower-and-higher-judiciary> accessed 19 December 2016, 1:49:38 to 2:00:40. Daniela Berti also mentions the 'superior position from which High Court judges address both members of the lower judiciary and the police.': Daniela Berti, 'Binding Fictions - Contradicting Facts and Judicial Constraints in a Narcotics Case in Himachal Pradesh' in Daniela Berti and Devika Bordia (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015) 96.

[290] 'Panel Discussion on Appointments to the Lower and Higher Judiciary' (n 290).

deals *inter alia* with the High Court's power to appoint and transfer district court judges.[291]

I constantly felt the potency of these judicial hierarchies in the field. At every stage, I was only as important as the last 'senior' who had supported me. The only way of getting the support of district court judges was through a High Court judge's reference; the only way of setting up meetings at the High Court was through a Supreme Court judge's reference. It was impossible to make the argument that the study should be considered solely on its merits.

Hierarchies manifested themselves in other ways as well. Most obviously, those in positions of authority felt entitled to take my time for granted.[292] My longest wait lasted two full working days, when I shadowed a prosecutor without a break, only to be rewarded with under twenty minutes of his time. At other times, the performance of hierarchy was simply for the benefit of those witnessing it. This included everyday court protocols, such as everyone rising before the judge entered and exited. Other manifestations were subtler. For instance, where the court staff wanted to establish that I was welcome in court, they did so by offering me a seat — which were almost always in short supply in court – often by dislocating lawyers who were more than twice my age. As a young, non-disabled person, I found this embarrassing and would insist that I had no problem standing, but the point was never to cater to my comfort;

[291] Ibid.

[292] This was a source of some anxiety for me. To borrow from Beaudry, 'I spent some apparently empty days restlessly fretting over wasted time because my days in the community were limited.': Beaudry (n 230) 71.

the point was to establish who controlled what went on in court. This attitude was also reflected in how the court staff dealt with the parties, and with each other, such as the personal assistant of a judge telling a cleaner curtly to 'remember that you are only a Class IV employee.'

Judges, too, were not exempt. A judicial officer I interacted with freely admitted he had joined the judiciary to enjoy the 'clout.' He added that he had summoned a prosecutor to his chambers for my benefit, and 'to put things in perspective, this is a man who must be at least my father's age.' These performances made me deeply uneasy, since 'the act of maintaining a particular hierarchical order in court is a symbol of a particular image of justice.'[293] With taxpayers' money being used to maintain them, I expected the judges to serve, and not to rule, but this ideal was not apparent in the everyday interactions of the court.[294]

It was also evident from how courts are structured, that some people were more important than others. In most complexes, there were separate entrances for lawyers and litigants.[295] The seating inside the courtrooms was often reserved for lawyers.

---

[293] Khorakiwala (n 283) 100.

[294] While the degree to which judicial hierarchies pervaded every aspect of the functioning of the court was remarkable, it is notable that the performance of authority in court can be one factor (though not the only one) linked to judicial legitimacy: Sharyn Roach Anleu and Kathy Mack, 'Performing Authority: Communicating Judicial Decisions in Lower Criminal Courts' (2015) 51 Journal of Sociology 1052, 1053.

[295] It could be argued that separate entrances allow lawyers and litigants to move 'unmolested, unwatched by others who may occasion them harm, contaminate their minds, or embarrass their performance.': Paul Rock, 'Witnesses and Space in a Crown Court' (1991) 31 British Journal of Criminology 266, 275. This does not seem to be a compelling reason, since litigants can often be as much of a threat to each other as they can be to lawyers, and *vice versa*. Further, the segregation does not continue uniformly across the court space. In the court hallways and corridors, lawyers and litigants can intermix freely. Finally, the fact of separate entrances must be viewed in light of the distinct

Typically, there were fewer bathrooms for women or non-lawyers; there were no gender-neutral bathrooms. Court infrastructure was markedly better in district courts located in more exclusive areas (such as Saket). In the absence of active efforts to decolonise the physical space of the courtroom, it is unlikely that those from political minorities will be able to claim these spaces as their own.[296]

Finally, the bureaucracy created an officious maze within which it was easy to get lost. Each time an application was made to someone within the High Court, subsequent meetings would reveal that it had never been relayed to the addressee. Owing to a lack of coordination among the various administrative offices in the High Court, the same documents often had to be furnished multiple times. Requests for meetings were variously sidestepped or ignored. In some cases, these were techniques used by gatekeepers to block access. Every time I was asked to 'call back' multiple times within the same week, it came to signify to me that my application was stuck in the system, and I would have to find other ways to push it through.

The second theme that ran through my efforts to secure elite interviews was the relative inaccessibility of public institutions. This includes the dearth of publicly available data that I note above. It also includes the barriers faced by those seeking to attend court proceedings. While the district courts are generally more accessible than

privileges (such as reserved seating) that are afforded to lawyers. Viewed together, these indicate that lawyers are the more *valued* members of the legal system.

[296] Similarly, Khorakiwala observes in respect of the securitised space of the Supreme Court: 'The question always remains whether this is how the judiciary chooses to depict itself and therefore maintains this distinction to legitimize its authority as, "…justice without force is impotent" …': Khorakiwala (n 283) 98.

appellate courts, at least one district court complex had instituted an 'entry pass' system.[297] Apart from enrolled advocates, only litigants, sureties and witnesses were allowed entry to this court, though women, children, elderly persons or differently abled persons were allowed one accompanying attendant.[298] All entrants had to fill out a written form before they were issued a pass. Almost every day that I went to this court, I assisted people without literacy skills by completing their forms. Even then, it was hard to assist them if they did not know technical details, such as their case number. There was often a gulf between their legal category and how they perceived their role in the case. For instance, the form requires you to specify your role at trial, *i.e.*, whether you are a litigant, witness or surety. However, when I asked the applicant what their role at trial was, they would say 'mother of the accused', or whatever categorisation seemed most sensible from their perspective. There were some 'touts' filling in forms for fees and other people relied on their lawyers, but the majority of the people were systemically disadvantaged by the process. Given the large volume of people attending court every day, it is likely that this system has only a marginal effect on security within the complex. Even if there is a reassurance function being performed by this measure, there is a need to re-evaluate the costs it imposes on those it is meant to protect. Securitisation of court complexes influenced

[297] Nirnimesh Kumar, 'Karkardooma Courts Tighten Security, Restrict Entry' (*The Hindu*, 8 January 2016) <www.thehindu.com/news/cities/Delhi/Karkardooma-courts-tighten-security-restrict-entry/article13988356.ece> accessed 19 December 2016.

[298] Ibid. There seems no obvious reason to assume women, as a class of people, would be unable to navigate the court complex without a support person.

the culture of the court in other ways too; for example, frequent bag checking, scanning and frisking — or at least the presence of the infrastructure to carry this out.

Appellate courts are even harder to access, and entry passes are issued to litigants only when their applications are counter-signed by an advocate (High Court) or an advocate-on-record (Supreme Court). All applications must be accompanied by a valid photo identity card. As regards the High Court, Mittal, J, in a dissenting opinion, has recognised the need for this policy to be reviewed. In her words:

> 22. ..this city would have a large population which is adversely placed economically who do not have any kind of official documents of identification. Such persons would include the migrant population; labour in the huge unorganized industrial sector; the homeless; the aged; destitute; deserted women; orphaned/abandoned children; the disabled etc. It is common knowledge that securing any official identification documents itself may require a dwelling, if not permanency of abode…
> …
> 28. …Could such a regime be legally permitted to violate the open court principle by reducing court proceedings to "in camera" proceedings where access is restricted to a privileged few?[299]

Since the majority disagreed with Mittal, J, Delhi 'lost out on what might have been a landmark precedent.'[300] There is a pressing need to make the current system more open to academic and public scrutiny.[301]

---

[299] *Sajid Ali v State* 2013 VII AD (Delhi) 670.

[300] Shamnad Basheer, 'Judging Judges by the Length of their Judgments is a Bad Idea' (*The Wire*, 16 June 2016) <thewire.in/43085/judging-judges-by-the-length-of-their-judgment-is-a-bad-idea/> accessed 19 December 2016.

[301] Gautam Bhatia suggests live-streaming as an alternative to enhance access. Gautam Bhatia, 'ICLP Turns Three :: Thoughts on Legal Scholarship and Access to Courts' (*Indian Constitutional Law and Philosophy*, 2 August 2016) <indconlawphil.wordpress.com/2016/08/02/iclp-turns-three-thoughts-on-legal-scholarship-and-access-to-courts/> accessed 19 December 2016.

1.2.3 Access to victims and members of NGOs and women's collectives

I first sought to approach victims through the lawyers interviewed. Most of them were hesitant to ask past clients for interviews on account of the risk of retraumatisation. The few who did ask were turned away. I was able to speak to one disabled rape victim's family through this route.

My next attempt was at securing interviews through state institutions and intergovernmental organisations that focuss on women's rights, women's collectives and NGOs.[302] I also approached these organisations with a view to interviewing victim support personnel. I contacted 30 entities across Delhi either through common contacts, or through listed correspondence details. I was able to interview 13 people across eight organisations, including counsellors who work directly with victims, and those who head programmes to support rape victims. I treated the latter as 'elite interviews' but where someone superior in the organisational hierarchy had introduced me to a counsellor, I focussed on ensuring that I had obtained the interviewee's informed consent, for example, by getting them to read and sign detailed consent forms. On one occasion, the head of the programme assisting rape victims announced she would sit in on my interview with a counsellor. Her presence inhibited the counsellor, who often looked towards the project manager to confirm

[302] NGOs have also acted as gatekeepers for other scholars carrying out research into women's rights: Ragnhild Lund, Smita Mishra Panda and Manju Prava Dhal, 'Narrating Spaces of Inclusion and Exclusion in Research Collaboration – Researcher-Gatekeeper Dialogue' (2016) 16 Qualitative Research 280.

that her responses were non-controversial, disrupting the extent to which I was able to establish rapport with her.[303]

The organisations that I approached were generally not helpful when it came to setting up interviews with victims. In some cases, this was because they did not provide support services to adult rape victims. Others cited confidentiality concerns, or concern for the well-being of victims.[304] I offered to leave copies of my information sheet and contact details with them to relay to the victims, but they were unenthusiastic about this option. My experience tallied with that of Mary Bosworth et al, who observe the following in context of their research on trafficked women:

> …we faced skepticism…from the voluntary sector. Perhaps most confounding of all, those with whom politically we felt most aligned were wary. Feminist activist research, in this context, had little purchase. Rather, case workers and advocates were clearly anxious that we would revictimize the women they were assisting…[305]

They suggest that '…these qualms would have been easier to overcome had we been able to persuade the gatekeepers of the utility of academic research.'[306] This finding was reflected in my research, particularly for organisations that have internal research wings. For these organisations, to acknowledge that an external academic

---

[303] As observed elsewhere, '[i]nvolving hierarchical superiors in an interview with their subordinates would diminish the rapport with the researcher…': Petkov and Kaoullas (n 275) 426.

[304] Jane Morgan and Lucia Zedner faced similar issues in trying to research child victims: Jane Morgan and Lucia Zedner, 'Researching Child Victims - Some Methodological Difficulties' (1993) 2 International Review of Victimology 295, 299.

[305] Mary Bosworth, Carolyn Hoyle and Michelle Madden Dempsey, 'Researching Trafficked Women: On Institutional Resistance and the Limits to Feminist Reflexivity' (2011) 17 Qualitative Inquiry 769, 771.

[306] Ibid.

may be able to contribute anything to their knowledge or understanding could lead to perceptions of failure to achieve their own research goals.

Through this channel, I interviewed two victims and the family of a child victim. One of the NGOs was keen to enter into a broader research collaboration with me and suggested signing a Memorandum of Understanding (MoU) to facilitate this. I was concerned that this proposal could conflict with my course requirements, restrict my future independent publications and constrain my study through the broad exclusivity clause they had suggested. I therefore decided to abandon this lead.

The third chosen course of action was to seek introductions to victims through prosecutors. I was able to interview two victims by this route, but this strategy was problematic. On one hand, in spite of explicit clarifications, victims often assumed that I was part of the prosecution team and were noticeably reticent when asked about their views on the prosecutor or the DCW lawyer. Secondly, for the most part, victims wanted to confine their interactions with me to the court premises. I was obliged to respect their wishes but doing so ran the risk of causing them distress during their legal proceedings. Furthermore, the court environment was not conducive to a free, frank exchange of views. Many of those who were discussed during the interview, including the defendant, the police, the lawyers and the judge, were present in close physical proximity and so the interviewee risked being overheard.

I interviewed two more victims through court visits. I solicited an interview with one of them because she was friendly towards me during her interaction with the

DCW lawyer. Another approached me of her own accord and volunteered for an interview.

For some time, with the support of a Deputy Commissioner of Police (DCP), I relied on the police to help me contact victims. After trawling through several police records, I was able to get contact details for a few victims. However, many had moved since the conclusion of the case. Even where the contact details were correct, members of their family still acted as gatekeepers. On one occasion, a police officer commended my study to the mother of a disabled victim. However, when I contacted her on the phone, she shouted at me for being insolent and said that she was appalled that I had approached her through the police. She said she never wanted me to contact her again and that she was going to use all her resources to ensure that stringent action was taken against the concerned investigating officers. I hastily apologised and clarified that I was an independent researcher and had no affiliation to the police. I added that it was experiences such as hers I wanted to learn more about, so I could write and disseminate accurate information about the legal system. She had not expected an apology. She finally said that she was at work, but that she would get home and call me. She never called back. This experience, coupled with the multiple negative stories I had heard about the police through other victims and contacts, convinced me that it was not helpful to approach victims through the police.

There were many occasions on which victims agreed to an interview but later avoided me. When I sensed this was happening, I stopped contacting them. I would have liked to hear the perspectives of more victims, but I was also cognisant that

talking to me could occasion further trauma or invite reprisals from their family or from the defendant. For the interviews that I conducted, I knew that a single meeting was insufficient to establish a meaningful relationship,[307] but the victims who agreed to be interviewed were keen to have their voices heard and spoke at length about their experiences. I also got some insights into their views through my interviews with victim-support personnel.

1.3 Court observation

The importance of observational research has been highlighted in studies on rape cases, as well as in literature on legal systems more generally.[308] Formal documents that describe legal proceedings are seldom the 'flat neutral rendering of the process' that they claim to be.[309] Thus, I decided to attend court proceedings in rape cases. This was aimed at enabling analysis of:

> …the underlying tension in institutional contexts between legal practitioners such as police officers, lawyers, and judges who orient their claims towards neutralism, objectivity, and equality and a set of everyday interactions and decisions where cultural, social, economic, and political factors play a major role.[310]

---

[307] Alison Liebling, 'Doing Research in Prison: Breaking the Silence?' (1999) 3 Theoretical Criminology 147, 155.

[308] Anleu and others (n 281) 376; Baxi, 'Impractical Topics, Practical Fields Notes on Researching Sexual Violence in India' (n 276) 81; John M Conley and William M O'Barr, *Just Words - Law, Language and Power* (2nd edn, University of Chicago Press 2005) 15-38; Andrew E Taslitz, *Rape and the Culture of the Courtroom* (1st edn, New York University Press 1999); Gregory M Matoesian, 'Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial' (1995) 29 Law and Society Review 669; Kim Lane Scheppele, 'Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth ' (1992) 37 New York Law School Law Review 123.

[309] Véronique Bouillier, 'From a Comparative Perspective - Criminal Cases involving South Asian People at French Assize Courts' in Daniela Berti and Devika Bordia (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015) 297.

[310] Berti and Bordia (n 245) 1.

The term 'court observation' is insufficient to capture the full breadth of the experience of immersion in the field. The process is better captured by Alison Liebling's description:

> We see, observe, but inwardly (subjectively) digest scene and encounters; our inner lives interplaying with the lives of others. We watch, hear, take notes, drink tea, chat, experience periods of engagement, distraction, warmth, sadness or fear; we are entertained, frustrated, fascinated and puzzled — we are no more 'passive' agents in our research than our research 'partners' are.[311]

The first barrier encountered in trying to carry out observational research was that rape trials in India are mandatorily conducted *in camera*, though the presiding judge may rule otherwise.[312] Permission to attend these proceedings was easier to secure when sought on my behalf by the prosecutor, as was done in three courts. In a fourth court, the District and Sessions Judge who had been introduced to me by a High Court judge facilitated my access to *in camera* proceedings. In the next court complex, the relevant Additional Sessions Judge granted me permission to attend the proceedings, as long as I filed an individual application for each proceeding I attended.

The judges in most of these courts took an active interest in my thesis and asked constantly for 'instant feedback' on research I was still in the process of conducting.[313] For judges and prosecutors alike, it became a project to convince me that adverse press reports about conviction rates were a media conspiracy. I gave neutral responses where I could, though this was sometimes difficult since I had disclosed having

[311] Liebling (n 308) 161.

[312] CrPC, s 327.

[313] Liebling (n 308) 156.

conducted previous research on the topic. The frequent conversations indicated that their behaviour was modified, at least in some slight degree, by my presence, so I strove to make myself as unobtrusive as possible. [314]

I was denied permission to attend the victim's testimony in one court, though I was able to attend case proceedings apart from this. In all, I attended at least one fast-track court in each of Delhi's six court complexes. The following gives a summary of the time spent in each court:

Court complex	**Number of days spent on court observation**
Tis Hazari	10
Dwarka	10
Rohini	9
Karkardooma	7
Patiala House Court	7
Saket	8

Surprisingly, all the Additional Sessions Judges I met were under the impression that it is only the victims' testimony that is meant to be conducted *in camera,* rather than the proceedings as a whole. However, the law requires that 'the inquiry into and trial of rape' shall be conducted *in camera*. Allowing the bulk of the proceedings to be carried out in public means that the promise of anonymity and privacy granted to the victim is greatly diminished. It is a practice that is *prima facie* in violation of the statutory provision and merits reconsideration.[315]

[314] 'The 'observer's paradox' describes how the object of investigation is transformed in the process of being observed...': Spencer Hazel, 'The Paradox from Within: Research Participants doing-being-observed ' (2016) 16 Qualitative Research 446, 447.

[315] Similar observations have been made in respect of the statutory protections for the privacy of child victims of sexual abuse under the Protection of Children from Sexual Offences Act 2012. To quote a DCW lawyer, 'Everybody knows she is a victim as everybody knows this court hall is for POCSO/fast-

2. DATA ANALYSIS

The data analysis was carried out in three stages: preparation, identification of themes and analysis. Each of these will be discussed in turn.

First, notes from court observations were typed out and printed.[316] All recorded interviews were transcribed and printed. Where audio-recording of interviews had not been permitted, notes made during or after the interview were typed out. Transcription was carried out using Express Scribe Transcription Software, which is a digital transcription audio player controlled with a foot pedal. Speech recognition software was not used because most interviewees switched freely between Hindi and English, and participants spoke with varying local accents, making it difficult to rely on automatic transcription features.[317] Interviews conducted in Hindi were transcribed in the Roman alphabet, and I translated only the parts excerpted in this thesis, using them as direct quotes.[318] Non-automatic transcription resulted in a high

track. There is no protection of identity. They call names out loudly while calling for cases. There are three[,] four[,]five court halls nearby and they are all waiting together. [There is] no secrecy at all.': Centre for Child and the Law, *Report of Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (National Law School of India, University, Bangalore, 2016) 32.

316 Typing out notes is also a way to 'reduce' the data into a format that is easier to draw conclusion from: Matthew Miles and Michael Huberman, 'Drawing Valid Meaning from Qualitative Data: Toward a Shared Craft' (1984) [13] 5 Educational Researcher 20, 23.

317 Similar difficulties have been faced by other researchers, such as: Lynne MacLean, Mechthild Meyer and Alma Estable, 'Improving Accuracy of Transcripts in Qualitative Research' (14) 1 Qualitative Health Research 113, 115.

318 While translating, I remained with the context and 'flavour' of the interviews, as much as the literal words, as suggested in Bogusia Temple and Alys Young, 'Qualitative Research and Translation Dilemmas' (2004) 4 Qualitative Research 161, 171. For a description of issues that arise in translating data across languages, *see* Béla Filep, 'Interview and Translation Strategies: Coping with Multilingual Settings and Data' (2009) 4 Social Geography 59.

degree of familiarity with the fieldwork materials at an initial stage, and provided a strong foundation for the identification of themes during the research process.[319] As a second step, relevant themes were identified through reading the printed notes, judgments in rape cases from January to June 2014[320] and relevant secondary literature.[321]

Once these themes had been identified, in the third stage, data from interviews and court observations were coded by hand after multiple readings. In order to analyse the judgments, six tables (**Appendix 4**) were designed as analytical devices to summarise each case, and generate data.[322] The categories reflected in these tables were meant to capture all available information pertinent to the themes identified, systematically and consistently across the dataset.[323] While this is not common in qualitative research,[324] Jennifer Mason describes it as a useful tool for reading legal

[319] Similarly Nelofar Halai carried out part of the transcription herself and thus 'came into close contact with my data and got to know [them] thoroughly.': Nelofar Halai, 'Making Use of Bilingual Interview Data: Some Experiences from the Field' (2007) 12 The Qualitative Report 344, 349.

[320] This refers to the judgments extracted and read for my M Phil thesis: Arushi Garg, 'Attrition in Rape Cases in Delhi' (M Phil thesis, Faculty of Law, University of Oxford 2016).

[321] It is common to identify themes through 'reading and re-reading the interview transcripts.': Marie Crowe, Maree Inder and Richard Porter, 'Conducting Qualitative Research in Mental Health: Thematic and Content Analyses' (2015) 49 Australian and New Zealand Journal of Psychiatry 616, 618; Roel Popping, 'Analyzing Open-ended Questions by Means of Text Analysis Procedures' (2015) 128 Bulletin de Me´thodologie Sociologique 23, 28. Vicki Lens has discussed the use of thematic analysis for field notes based on ethnographic court observation: Vicki Lens, 'Engaging Parents in Family Court: Lessons from an Observational Study of Child Protection Cases' (2017) 17 Journal of Social Work 129, 134.

[322] '…it usually makes sense to begin analysis on a relatively small part of your data. Then, having generated a set of categories, you can test out emerging hypotheses by steadily expanding your data corpus.': David Silverman, *Doing Qualitative Research* (1st edn, Sage Publications 2000) 179.

[323] Jennifer Mason, *Qualitative Researching* (2nd edn, Sage Publications 2002) 150-151.

[324] Silverman suggests that this may result in uncategorised data being overlooked: Silverman (n 322) 179.

documents, since these are 'texts with a standardized layout.'[325] The use of residual categories (such as 'Other Causes for Conviction/Acquittal') ensured that distinctive facts about the case were noted, even if they fell outside the categories used.[326]

Cases were read using an interpretive approach. The attempt was to analyse not just the stated reasoning, but to read 'through or beyond the data' to gauge what was implied, assumed or left unsaid.[327] The information thus collected enabled reflection on the themes identified. Conclusions were derived from this thematic analysis.[328]

In conclusion, this chapter provided a critical reflection on the use of the following methodological undertakings: collecting relevant judgments for analysis, interviewing lawyers, judges, victims and members of NGOs or women's collectives, and conducting court observation. It set out the challenges faced in collecting judgments at the district court level, an enterprise rendered possible only with the intervention of appellate court judges. It elaborated upon the obstacles faced by student researchers with limited time and budgets while attempting to retrieve judgments with the help of court staff or through statutory mechanisms. It reviewed the bureaucratic approvals secured to interview relevant stakeholders and called

[325] Mason (n 323) 151. This loosely describes the trial court judgments, all of which summarise facts, evidence and arguments from both sides, and then present a reasoned verdict.

[326] 'A good coding scheme would reflect a search for 'uncategorised activities' so that they could be accounted for…': Silverman (n 322) 147.

[327] For example, courts repeatedly state that minor inconsistencies in a victim's account are insufficient to discredit her. However, what was regarded as more relevant was the actual treatment of minor inconsistencies by these courts: *See* Section 4.4 of Chapter Seven.

[328] I used multiple 'conclusion-drawing tactics' including 'noting patterns' and 'seeing plausibility' of different explanations: Miles and Huberman (n 316) 27.

attention to the inaccessibility of 'at risk' populations. It described the securitisation of courtrooms and emphasised the power relations, which mediate not just the researcher's experience, but also the conduct of everyday business in court. Finally, it elaborates upon the process of data analysis. The eclectic mix of data sources discussed here informs the analysis presented in the following chapters.

CHAPTER FOUR: JUSTICE AS A PROCESS – THE HIDDEN LINK BETWEEN 'HOSTILE' WITNESSES AND HOSTILE INSTITUTIONS

1. INTRODUCTION

What parties experience outside the court has a strong bearing on the legal process. In criminal cases, the victim's social, economic and political status requires special consideration since the victim is often a key prosecution witness. The victim's refusal to support the prosecution is likely to lead to an acquittal. This is especially true of rape cases where corroborating evidence is rare. It is uncommon for there to be eyewitnesses and forensic evidence may be lost on account of delayed reporting. Consequently, the victim's testimony is a crucial piece of evidence in a rape trial – more so, given that her non-consent is the gravamen of the offence of rape. In a significant proportion of the judgments studied for this thesis, the victim-witness turned 'hostile' to the prosecution at trial, *i.e.*, she made a statement that was wholly or substantially contrary to her initial complaint.[329] All these cases resulted in acquittals. The aim of this chapter is to identify factors associated with victim-witness hostility in rape cases. This analysis is based on Delhi trial court judgments over

[329] The term 'hostile' seems pejorative. It ignores systemic factors pushing the witness to testify in a particular way and appears to pin blame on them for the prosecution's failure. As this chapter will demonstrate, this underlying idea is entirely misconceived. However, the word hostile and its variations are used because these terms are adopted in the judgments and official proceedings.

twelve months (n=254), 61 interviews with lawyers, judges, victims and victim-support personnel, and court observation in six trial courts in Delhi.

This chapter starts by introducing the legal category of the hostile witness. It goes on to assess the two key factors underpinning victim-witness hostility in rape cases: the persistence of informal dispute resolution in India's legally pluralistic society, and the re-traumatisation of the victim through the legal process. It concludes that the prevalence of hostile victim-witnesses in the legal system is best explained by the largely overlooked link between criminal justice and social justice.

2. WHAT IS A 'HOSTILE' WITNESS?

The term 'hostile witness' is borrowed from English law. The idea that neither party can cross-examine her own witness is fundamental to the adversarial system since adversarialism relies on a clear separation between two well defined sides, the prosecution and the defence.[330] However, under English law, a departure from this rule is allowed when there is a hostile witness who demonstrates an unwillingness to tell the truth.[331] It is this unwillingness that distinguishes the hostile witness from a merely unfavourable witness.[332] In India, the term 'hostile witness' was deliberately left out of the statutory framework so as not to import what seemed to be a nebulous

[330] Mike Newark, 'The Hostile Witness and the Adversary System' [1986] Criminal Law Review 441, 442.

[331] Ibid 447.

[332] Ibid 447.

distinction between hostile and other unfavourable witnesses.[333] Instead, the court was granted a broad discretion to permit a party to cross-examine her own witness.[334] This discretion can be exercised 'to extract the truth and to do justice.'[335] In such a situation, the party whose witness it is, is permitted to rely on any part of the evidence of the witness.[336] In practice, the term 'hostile witness' continues to be used in the Indian legal system when the testimony of the witness materially contradicts statements that have been made by her before the trial.

The rape victim is likely to have made four categories of statements before the trial. First, the complaint regarding a cognisable offence[337] is made to the police under Section 154 of the CrPC. This is commonly referred to as the 'First Information Report' or the FIR. Such statements can be freely used to corroborate the statement of the person lodging the FIR, or to cross-examine her.[338] Secondly, during investigation, statements may be made to record the examination conducted by police officers under Section 161 of the CrPC. These statements are inadmissible at trial except to cross-examine a prosecution witness.[339] Thirdly, statements during the investigation can also be made under Section 164 of the CrPC to a Magistrate who is authorised to

[333] *Satpal v Delhi* (1976) SCC (Cri) 160 [37].

[334] IEA, s 154.

[335] *Satpal v Delhi* (n 333) [37].

[336] IEA, s 154(2); Vathek, 'Hostile Witness- India' (2011) 15 Evidence and Procedure 176.

[337] A cognisable offence is any offence in which the police may arrest without a warrant: s 2(c) CrPC. Rape is a cognisable offence, as specified in the First Schedule of the CrPC. *See also* Kejriwal.

[338] IEA, s 145.

[339] CrPC, s 162.

record them on oath (hereafter 'the Section 164 statement'). These statements are automatically forwarded by the Magistrate to the judge trying the case.[340] A statement made to the Magistrate under Section 164 can be used to corroborate or cross-examine the witness' statement.[341] The evidentiary restrictions recounted herein apply only to the lawyers, and the judge is empowered to 'ask any question he pleases' during the trial.[342] Finally, the rape victim may also have made statements to the counsellor engaged for her by the police, or the doctor carrying out her medico-legal examination.[343] There are no specific restrictions on adducing these statements to examine or cross-examine the victim. Since the term 'hostile witness' lacks precise legal content in India, it is used in this thesis where the victim relays to a judicial officer, either under Section 164 or at trial, that she was not raped. The following section discusses the incidence of victim-witness hostility in the judgments analysed for this thesis.

3. OFF THE RECORD: THE LIMITS OF UNDERSTANDING VICTIM-WITNESS HOSTILITY THROUGH JUDGMENTS

As discussed above, the total population of Delhi trial court judgments in rape cases over twelve months was analysed for this thesis. This included judgments passed in the first six months of 2014 and 2016 (n=254). In 160 of the 254 cases (63.0%) the

[340] CrPC, s 164(6).

[341] CrPC, ss 157 and 145.

[342] IEA, s 165.

[343] For an overview of the role played by such counsellors and doctors, *see* Section 5 of this chapter.

acquittal resulted from the fact that the victim-witness turned hostile to the prosecution or became untraceable and her testimony could not be recorded, or both. None of the cases involving a hostile or untraceable victim-witness yielded a conviction.

Some of the cases involving a hostile victim-witness were 'promise to marry' cases, where the victim had been deceived into having sex with the defendant based on an insincere promise of marriage (n=55). The unique factors associated with victim-witness hostility in those cases have been separately discussed in Chapter Five. In the remaining 96 cases, the victim testified that she had filed the original rape complaint for a range of reasons, shown in Table 4.1.

Table 4.1: Initial reasons for the rape complaint according to the testimony of the hostile victim-witness

Reason given	**Number of cases**[344]
Misguidance, pressure or deception by the police	27
Familial misguidance or pressure	17
Misguidance, pressure or deception by a third party (who is not a member of the police or family)	19
Rape complaint filed as a means to resolve another dispute with the accused	19
Confusion	1
Anger	1
Not clear	18

Interviews and court observation revealed that the formally recorded reasons do not generally capture the range of factors impelling the victim's decision to turn

[344] The total exceeds 96 because in some cases multiple factors were at play.

hostile. The following vignette describes one court proceeding where the victim turned hostile. She clearly articulated her reasons for doing so in an informal way to both the judge and the prosecutor. None of these reasons were included in the formal record of proceedings.[345]

Vignette 4.1

When the victim-witness turned hostile, the judge got angry and asked how many years the victim-witness should spend in jail for filing a false complaint. The victim-witness seemed to panic and said that the incident had indeed happened, but she felt too ashamed to relate it in front of the men present in the room. The judge reminded her that they had already ensured that her testimony was recorded *in camera,* and the only person she really needed to address was the prosecutor, who was a woman. The recording of the testimony proceeded, including the account of the rape. Once the matter was adjourned, the victim-witness approached the prosecutor privately. She admitted that she did not wish to proceed with the case because she had entered into a settlement with the defendant. The judge overheard her and was immediately incensed. He asked if she thought the criminal justice system was her personal car, which she could start and stop at will. He warned her that he was going to make sure he prosecuted the case till the end, because *she* may have reached a decision, but the *court's* decision remained to be made. The victim-witness protested, saying she needed the settlement money to raise her children, but the judge was adamant, asking why she could not afford to raise her children when she was a working woman. The victim-witness responded saying that she had no stable source of income. She was a daily wage earner and there was no guarantee of whether she would secure employment on any given day.

After the judge left, the victim-witness returned to the prosecutor and repeated that she wanted to take the case back. The prosecutor initially gave evasive replies, saying only the judge could help her. Finally, she told the victim-witness to address her queries to the defence counsel. The victim-witness added that she was under huge pressure from her landlord to take back the case, but the prosecutor did not react. After the victim-witness left, the prosecutor was asked what would happen in the case. She said there would probably be an acquittal but none of the background conversations regarding the settlement would form part of the record.

[345] As is the case with the other boxed vignettes, these proceedings were observed and later recorded as fieldnotes from memory. Simultaneous short-hand notes were scribbled contemporaneously. For a full account of research methods, *see* Chapter Three.

Drawing on the interviews and court observation conducted for this thesis, the following sections discuss two prominent factors associated with victim-witness hostility in rape cases. It is likely that similar reasons were in operation even where the victim was untraceable – generally because she had relocated. Two main factors are identified. First, legal pluralism facilitates a non-judicial resolution or termination of the rape case, with the victim-witness testifying in favour of the defendant. Secondly, victim-witness hostility may be a response to the secondary victimisation faced by her in the criminal justice system. The following sections discuss each of these issues in turn. While these have been analysed as distinct factors, they often operate simultaneously, each compounding the effects of the other.

4. USING LEGAL PLURALISM TO UNDERSTAND VICTIM-WITNESS HOSTILITY

This section argues that victim-witness hostility in rape cases is partially explicable by reference to the legally pluralistic nature of Indian society. Following an overview of the theoretical framework used for this analysis, it assesses the importance of legal pluralism in understanding the data presented in this thesis.

4.1 Theoretical framework

The analysis conducted in this section draws on studies of legal pluralism. Legal pluralism describes the coexistence of multiple legal and non-legal normative orders in a society.[346] To borrow Sally Moore's terminology, in a legally pluralistic society,

[346] For an overview, *see* Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law and Society Review 869. For an illustration of this principle in a different Indian legal context, *see* Maarten Bavinck, '"A Matter of

state and non-state orders exist as intersecting and mutually constitutive 'semi-autonomous fields.'[347] Each of these has:

> rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.[348]

Thus, formal complaints are often made as a tactic to exert pressure on the opposing party. These complaints are used to coerce them to agree to an informal settlement in the social process of dispute resolution. In turn, the progress of the criminal case is likely to be influenced by transactions between the parties that are carried out outside the court.[349] These transactions can be fundamentally shaped by how much political and socio-economic power is exerted by one party over the other. The ultimate outcome of the case is then less reflective of guilt or innocence, than of how successfully the more powerful party was able to pressurise or induce the victim to turn hostile. It is entirely possible for parties to go forum-shopping, and to switch frequently between legal and non-legal avenues, depending on which route is working in their favour.[350] While legal pluralism of this kind has been used to

---

Maintaining Peace" State Accommodation to Subordinate Legal Systems: The Case of Fisheries along the Coromandel Coast of Tamil Nadu, India' (1998) 30 The Journal of Legal Pluralism and Unofficial Law 151.

[347] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 Law and Society Review 719.

[348] Ibid 20.

[349] Brian Tamanaha provides a similar account of law in the context of postcolonial societies more generally: Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review 375, 385.

[350] Merry (n 346) 882.

understand many jurisdictions, it is particularly pronounced in postcolonial societies such as India. The introduction of European court systems under colonial rule often involved their crude imposition over a complex set of indigenous dispute resolution mechanisms.[351] Courts generally lacked primacy as sites of conflict management and continued to exist in parallel with non-state normative orders.[352] This legal pluralism persists in India today.

The converse of legal pluralism has been described by John Griffiths as legal centralism. [353] Legal centralism presumes that the formal legal system is the only or dominant form of normative ordering prevalent in society.[354] As demonstrated below, legal centralism fails to account for the pervasive victim-witness hostility in rape cases. The victim-witness' decision to turn hostile at trial is embedded in her experiences outside of court, including whether she is being intimidated or threatened by the defendant. Accordingly, her decisions regarding the trial are influenced by her experiences in an unequal, social, non-legal normative order.

Scholarship on legal pluralism sometimes uses the term to encompass the coexistence of various legal fora. That is not the sense in which this term is used here. As stated above, in this chapter, legal pluralism connotes the simultaneous presence of state and *non*-state normative orders. As a corollary, references to legal pluralism

---

[351] Ibid.

[352] Ibid 880.

[353] John Griffiths, 'What is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1.

[354] Ibid.

exclude plea-bargaining and compounding of offences. Plea bargaining is a distinct process initiated by the application of the defendant before the court.[355] If the application is allowed, a 'mutually satisfactory disposition' of the case can be worked out by the police, prosecutor, accused and victim.[356] This procedure is not available for rape cases.[357] 'Compounding' is a legal process through which the victim and the accused can reach an agreement to dispose of certain criminal cases.[358] Again, rape is a non-compoundable offence.

Drawing from this framework, it is suggested that the conduct of criminal proceedings is closely tied to the experiences of the parties outside court. These experiences are affected by existent social stratifications, such as those along lines of caste, class, disability and gender. They may result in the victim-witness' decision to turn hostile to the prosecution in court, leading to an acquittal. These experiences include two prominent situations, each of which will be discussed in turn: facing threats or intimidation from the defendant or the victim's family, and entering into settlements with the defendant on account of social marginalisation.

[355] CrPC, s 265B.

[356] Ibid s 265C.

[357] Ibid s 265A(1).

[358] Ibid s 320.

4.2 Victim-witness hostility as a product of intimidation: Stealing the dispute, version 2.0

Media attention has frequently focussed on the issue of witness intimidation in several high-profile cases. These include the rape cases against self-proclaimed 'godman' Asaram Bapu, where nine prosecution witnesses were attacked, three of whom died.[359] However, witness intimidation is common even in routine cases, including rape cases.[360] It is especially common where the defendant is in a dominant position over the victim, drawing on his caste, wealth or other social status. While the threats to the victim-witness are usually issued by the defendant and/or his associates, she may also be at risk from her family. This familial pressure can be understood as one way the rape case is 'stolen' from the victim.

Nils Christie has described conflicts as property, which are then 'stolen' by professional and legal representatives, such as lawyers.[361] With respect to the victim's position specifically, Christie argues:

> she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double

[359] Akanksha Jain, 'Asaram Bapu Gets Life Term in the 2013 Rape Case' (*Live Law*, 2018) <www.livelaw.in/breaking-asaram-bapu-gets-life-term-2013-rape-case/> accessed 16 July 2018. A similar example is the *Best Bakery* case, in which 14 people were allegedly burned alive by the defendant during communal riots in Gujarat in 2002. In this case, 37 of the 73 prosecution witnesses turned hostile and a retrial was ultimately ordered on an appeal filed by prosecution witness Zahira Sheikh. At different points, she claimed to be intimidated by activist Teesta Setalvad (supporting the prosecution), as well as the defendants. Sheikh was ultimately convicted for perjury, while the main litigation resulted in nine convictions and eight acquittals: Christophe Jaffrelot, 'Gujarat 2002: What Justice for the Victims? The Supreme Court, the SIT, the Police and the State Judiciary' (2012) 47 Economic and Political Weekly 77.

[360] Daniela Berti, 'Local Powers and Judicial Constraints in a Case of Rape in India' (2015) 60 Diogenes 97, 111.

[361] Nils Christie, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1, 3-4.

> loser; first, vis-a-vis the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.[362]

Thus, the victim is reduced to merely a witness for the prosecution. She typically loses a large measure of control over the dispute, leading to her disengagement and alienation from the proceedings.[363] This happens even though it is the parties to the dispute who suffer the gravest impact resulting from the dispute, and the 'state' remains an abstract entity that does not have a direct interest in the disputes.[364] This loss of control can have more serious repercussions for rape victims, who are already recovering from a disturbing incident that deprived them of control over vital aspects of their (sexual) autonomy.[365]

The rape victim in India has her dispute stolen not just by the state's lawyer, but also by the male members in her family. The male members of the family are regarded as the protectors of women's honour, so the commission of the rape is primarily understood as an insult to their masculinity.[366] The dispute is therefore thought to belong to them, even though it is the woman's sexual rights that are at stake. In

---

[362] Ibid 3.

[363] Abraham S Goldstein, 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 Mississippi Law Journal 515, 519.

[364] Christie, 'Conflicts as Property' (n 361) 7-8.

[365] Shana L Maier, '"I have heard horrible stories . . ." Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System' (2008) 14 Violence Against Women 786, 797-800.

[366] Mrinalini Sinha, 'Gendered Nationalism - From Women to Gender and Back Again?' in Leela Fernandes (ed), *Routledge Handbook of Gender in South Asia* (1st edn, Routledge 2014), 20.

keeping with this paradigm, key decisions about the rape are made following negotiations between two mostly male parties – male members of the victim's family and the defendant –who will try to resolve or settle the dispute in the way that benefits them the most. The filing of an official complaint is one pressure tactic available to the victim's family to secure a better 'deal.' This process can culminate in a settlement, whereby the victim's family accepts a financial consideration from the defendant, in exchange for a guarantee that the victim will not support the prosecution at trial. In other cases, the complaint itself may have been filed by the victim but is then appropriated halfway through by her family or husband. This analysis shows that, rather than being understood as an offence against women's sexual autonomy and bodily integrity, rape is still regarded as a crime against womanly and communal honour in public imagination. The strategies involved in the family's appropriation of the victim's dispute were vividly revealed in the following proceedings:

Vignette 4.2

The victim-witness had married someone since initially filing the complaint and had moved to another city across the country where she lived with her husband and young child. Over the course of several adjournments, she relayed to the prosecutor that her husband had been approached with the offer of a monetary settlement by the accused. He was keen to accept the sum offered by the accused and was exerting pressure on her to turn hostile. She was apprehensive about resisting him, since this could have adverse consequences for her marriage and child. The prosecutor was sympathetic and assured her that her testimony would be recorded *in camera;* her husband would not know what the content of her testimony was. The victim supported the prosecution in her chief examination and her testimony was consistent with all her pre-trial statements.

At the conclusion of her chief examination, the defence counsel sought an adjournment because the forensic report had not been received, but the judge refused to adjourn the matter on this basis. However, he relented since there was not enough time left to carry out a full cross-examination. The victim-witness seemed nervous about this. She protested saying that she had to fly back home the next day and could

not afford to return to court the next day. The judge assured her that he would prioritise her matter over all others and ensure that her cross-examination was conducted in a timely way. During the cross-examination on the next day, the victim-witness supported the defendant and denied any wrong-doing by him. When cross-examined by the prosecutor, she refused to admit that she had changed her testimony to save her marriage. After her deposition was over, the prosecutor observed that this would probably not have happened if they had had enough time to complete the cross-examination the previous day. The short delay of half a day may have proved fatal to the case, by giving the defence counsel enough time to relay the victim's testimony to the husband.

Sensitivity to the victim's constraints varied across the professionals interviewed. Most did not appreciate the difficult choices victims were faced with. Where the victim-witness turned hostile, they treated the initial allegation as false.[367] When pressed, a few of these interviewees admitted that witness hostility may result from familial pressure but were reluctant to accept this was the case for the matters they were handling. A few participants agreed that family pressure could often be determinative of the trajectory of a case but said there was nothing they could do to change the victim-witness' mind if her decision was already made. Most often, they suggested this was because they only met the victim-witness a handful of times as part of their duties. This was inadequate to counter the full weight of the constant pressure that was likely being exerted on her by her family. One prosecutor was asked what she did when victim-witnesses informally admitted that they intended to turn hostile to the prosecution at trial. She responded as follows:

> Yes, definitely, I was able to counsel [victims who stated they would turn hostile to the prosecution]…[but] if someone has prepared their mind and they

[367] Similar observations were made by Neetika Vishwanath in her ethnographic study of rape trials in Lucknow: Neetika Vishwanath, 'The Shifting Shape of the Rape Discourse' (2018) 25 Indian Journal of Gender Studies 1, 4.

> were tutored by the [defence] counsels and so many persons before meeting me…it's very difficult for the prosecutor or any other person to change [their] mind at that particular stage. If they say that 'I am not going to support the prosecution', it means that's final.

These patterns of familial control can also apply in the reverse – in what are popularly known as 'love' cases, it is the positive exercise of sexual autonomy that is sought to be punished.[368] Sexual agency by the woman is regarded as a social transgression in these cases. If the sexual relationship she enters into is with someone from another caste or religion, the transgression is thought to be even greater. When such a woman first goes 'missing' – or runs away with her lover – a case for kidnapping is often filed by her family, with the accused as the prime suspect. On one hand, this ensures familial control of the woman's sexual choices. On the other hand, it results in the perpetuation of the established order of heteronormative, intra-caste, intracommunal conjugality.[369] Once she is 'recovered', false rape allegations may be added to the complaint, with the woman being coerced by her family into supporting them, often with the complicity of the police. The admission that she was raped might be stigmatic but is still regarded as less serious than the possibility that she voluntarily had sex with someone outside of an acceptable marriage. Ultimately, when it is time for her to testify against the accused in court, she may refuse to do this for any number of reasons – she might still be in love with him, she may have been married off

[368] For a detailed account of such cases, *see* Chapter Six. *Also see* Pratiksha Baxi, 'Justice is a Secret: Compromise in Rape Trials' (2010) 44 Contributions to Indian Sociology 207.

[369] For this account of marriage, *see* Perveez Mody, 'Love and the Law: Love-Marriage in Delhi' (2002) 36 Modern Asian Studies 223.

elsewhere, or the matter may have been settled outside of court. In some cases, she may support the prosecution at trial, but these cases are still likely to end in acquittals, as discussed in Chapter Six.

To conclude, the legally pluralistic nature of Indian society can involve the resolution of the rape case through non-judicial means. One way in which this happens is when the victim-witness faces pressures or threats outside the court, and consequently turns hostile at trial. Such intimidation can be imposed on her not just by the accused, but also by members of her own family. The next section examines a second way in which legal pluralism is salient for understanding victim-witness hostility in rape cases, *i.e.*, as an enabler for illegal, out-of-court agreements between the victim and the defendant.

4.3 Choosing 'injustice': The unsettling story of rape settlements in Delhi

Scholarship on the Indian legal system describes the frequent use of out-of-court settlements or compromise agreements to resolve the dispute between the victim and the defendant, even where related criminal proceedings are pending.[370] These agreements are often illegal, particularly where they involve serious crimes such as drug offences, cruelty, and murder.[371] They exert a significant influence on the

[370] Daniela Berti provides ethnographic accounts of cases involving abetment of suicide and drug offences, while Vineeta Palkar draws attention to cruelty trials where acquittals resulted from witness hostility: Daniela Berti, 'Hostile Witnesses, Judicial Interactions and Out-of-Court Narratives in a North Indian District Court' (2010) 44 Contributions to Indian Sociology 235; Vineeta Palkar, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 181.

[371] Ibid.

criminal proceedings, often resulting in key prosecution witnesses turning hostile. Such cases are likely to end in acquittals. These settlements, colloquially called '*samjhauta*', are also a common feature of rape trials in Delhi. While it is the legally pluralistic character of Indian society that enables the conclusion of such agreements, the victim-witness can have many reasons for entering into them. Prominent among these is the victim-witness' social marginalisation on account of intersecting systems of oppression.

Most professional interviewees did not appear to accept that genuine rape victims could choose to turn hostile. This belief rested on a hidden assumption that all women, under all circumstances, prioritise their rape prosecution over any other concerns they might have. This perspective conceives of justice in positivistic terms, equating it with a criminal conviction. The ideology of legal centralism was implicit in this thinking, since these interviewees ignored the multiplicity of non-legal systems that exist in parallel with the legal system, often influencing the shape of legal proceedings. But as Upendra Baxi has highlighted, the 'assumption that the state legal systems always exercise a hierarchical control over other forms of social ordering is misguided and misleading.'[372] For instance, where the defendant owes the victim a substantial debt, it could be vital for her to secure repayment of this debt. Where the defendant is trying to encroach on or appropriate the victim-witness' property, it might be more

[372] Upendra Baxi, 'Discipline, Repression and Legal Pluralism' in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism Proceedings of the Canberra Law Workshop VII* (1st edn, Law Department, Australian National University 1985) 52.

important for her to secure housing than to support the prosecution. Regaining access to these material resources is often a question of sustenance for these women. The deprivation of these resources is particularly burdensome for certain groups of women, such as working-class women, or disabled women who might need to pay for necessary assistance.[373] Often, the prospect of a rape prosecution will result in the accused offering them a larger sum of money than his original debt to the victim. Acceptance of this offer does not by itself indicate that the rape complaint was false. It could simply mean that the priorities of the victim-witness are different from those assumed by those who work within the criminal justice system.[374]

Similarly, if victim-witnesses have pending matrimonial disputes with a member of the defendant's family, it may be more important for them to exit the marriage with a good settlement and the proceedings in the rape case might give them the bargaining power to do that.[375] Where the marital home is a violent or hostile environment for the

[373] For instance, through their analysis of the sexual and reproductive rights of disabled women, Dean et. al highlight the greater economic costs of living with disability, the impact of which is often compounded by the fewer material resources available to these women: Laura Dean and others, ''You're disabled, why did you have sex in the first place?' An Intersectional Analysis of Experiences of Disabled Women with regard to their Sexual and Reproductive Health and Rights in Gujarat State, India' (2017) 10 Global Health Action 33, 33-34.

[374] Similarly, in their study of what Australian victims of domestic violence want in the aftermath of violence, Robyn Holder and Kathleen Daly found that these women have 'multiple justice goals' that unfold through the trial process: Robyn L Holder and Kathleen Daly, 'Sequencing Justice: A Longitudinal Study of Justice Goals of Domestic Violence Victims' (2018) 58 The British Journal of Criminology 787.

[375] In a similar vein, Geetanjali Gangoli and Martin Rew argue that 'perhaps unwittingly, domestic violence and dowry legislation may have empowered some young married women in the family, allowing them to exit unhappy marriages in a context where such exit may otherwise be difficult…': Geetanjali Gangoli and Martin Rew, 'Mothers-in-Law Against Daughters-in-Law: Domestic Violence and Legal Discourses Around Mother-in-Law Violence Against Daughters-in-Law in India' (2011) 34 Women's Studies International Forum 420, 427.

woman, agreeing to a settlement could quite literally be a matter of life or death.[376] If there is an ongoing custody dispute in relation to the victim-witness' children, the need to secure a good outcome in parallel matrimonial proceedings might be even more acute. In such circumstances, if the realisation of an appropriate settlement is contingent on the withdrawal of the woman's support for the rape prosecution, the refusal to testify will be based on a fact-sensitive balancing of all the disputes impacting on the woman.

This is in contrast with the logic of the criminal justice system, which assumes that the rape case is the most important one, since it is a criminal offence that is committed against the public interest and carries grave moral stigma. Extensive state support is provided for its prosecution and drastic consequences could attach to the outcome – up to death penalty for the defendant in some cases. Monetary, matrimonial and property disputes, in contrast, are usually private disputes between individuals. By their nature, they are afforded a lower status. But for many victims, this distinction is meaningless. For them, the rape is just one of the many wrongs committed against them in an ongoing relationship characterised by various forms of physical, emotional and/or economic domination. From their perspective, the 'resolution' of the rape case cannot automatically be regarded as more important than the resolution of any of the other disputes. The parallel dispute is then frequently a symptom of the victim's multi-dimensional exploitation. Yet, it is often regarded by practitioners as evidence

[376] Ibid 426.

of the victim's ulterior motives, leading to the presumption that the defendant has been framed. These stereotypes were frequently voiced by the practitioners I observed or interviewed. While they were directed against all women, their articulation reflected the interaction of gender with other variables. Working class women were accused of filing complaints only because they wanted to extort money from the defendant and they had no other sources of income; middle class women were accused of filing complaints against their colleagues in order to get promotions at work; women from Central Asia or Eastern Europe were assumed to be commercial sex workers who came to make easy money in India, by trapping Indian men in false rape cases. There was resistance to the idea that acceptance of a settlement did not necessarily indicate that the case was false. When pushed, an advocate from the Delhi Commission of Women asked in utter surprise why anyone would accept a settlement if the defendant was *really* her rapist. Other lawyers and NGO workers were similarly sceptical when interviewed, though later asked about research on what other reasons there could be for victims turning hostile.

There was some sympathy among the professional interviewees for victims who fit in with 'a notion of passive victimization' and testify in favour of the defendant because they are forced to do so, such as where the accused threatens them or their family with serious, violent consequences.[377] But the dichotomy between 'helpless

[377] Carolyn Hoyle et. al. similarly describe the political currency of accepting such a 'victim' label for women who are trafficked for commercial sex work, even though this may not accurately reflect their subjective experience: Carolyn Hoyle, Mary Bosworth and Michelle Dempsey, 'Labelling the Victims

victims' and 'active agents' might not be so stark. Analysing interviews with victims of domestic violence who choose not to support the prosecution, Carolyn Hoyle and Andrew Sanders seek to understand the victim's conduct in terms of 'bounded rationality.'[378] They observe that '[victims'] choices are reluctant choices, a product of the coerced circumstances of their relationship. But, given those circumstances, they are often rational.'[379] Rape victim-witnesses before the Delhi courts are similarly pushed to making difficult choices in a coercive context. Yet, the more autonomous the decision to turn hostile to the prosecution seemed, the greater was the belief among the professional interviewees that the case was false. If the choice to turn hostile was motivated by a desire for financial gain of some kind, this was taken as the clearest possible evidence that the complaint was false.

To summarise the argument advanced, this section uses legal pluralism to understand victim-witness hostility in rape cases. It argues that many rape victims turn hostile to the prosecution on account of their experiences outside of court. These experiences are deeply influenced by their experience of cumulative and intersectional discrimination, as women who might also be disadvantaged by caste, class, race, disability or other factors. These experiences include being threatened by the accused,

---

of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 Social and Legal Studies 313, 319.

[378] Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?' (2000) 40 British Journal of Criminology 14, 29. This study was carried out in areas falling under the jurisdiction of the Thames Valley Police in England.

[379] Ibid.

by their family or being induced to enter into an illegal settlement by the defendant. The choice to enter into such settlement agreements is often a considered decision that is made by the victim-witness in a coercive context, after weighing all the advantages and disadvantages of doing so. Sometimes, it may enable the victim to meet urgent pragmatic needs. These needs can be material, but are not necessarily so, such as where the victim accepts the settlement agreement to secure child custody, divorce or matrimonial arrangements. Professional interviewees usually do not approach settlements in this nuanced way. The next section discusses the second major factor associated with victim-witness hostility, which is secondary victimisation faced in the criminal justice system.

5. TRIALS AND TRIBULATIONS: VICTIM-WITNESS HOSTILITY AS AN OUTCOME OF SECONDARY VICTIMISATION

This section examines how some victim-witnesses turn hostile to end the criminal process because it is experienced by them as an arduous one. While this thesis focusses on rape trials, the Supreme Court has noted the link between witness hostility and poor trial conditions more generally as follows:

> … A witness in a criminal trial may come from a far-off place to find the case adjourned. [She] has to come to the Court many times and at what cost to [her] own-self and [her] family is not difficult to fathom…[She] is pushed out from the crowded courtroom by the peon … [she] has no place to sit and no place even to have a glass of water. And when [she] does appear in Court, [she] is subjected to unchecked and prolonged examination and cross-examination and finds [herself] in a hapless situation. For all these reasons and others[,] a person abhors becoming a witness. It is the administration of justice that suffers.[380]

[380] *Jagjit Singh v Punjab* (2000) 5 SCC 668 [37].

For rape victim-witnesses, the stresses associated with legal proceedings are often compounded on account of the nature of the offence. Scholarship on rape prosecutions uses the term 'secondary victimisation' to describe the way in which rape trauma is followed by victimisation of women within the legal system, such that 'for many women [reporting] replicated the violation felt in the rape itself.'[381] Following an overview of the procedures in rape cases, this section discusses key sources of the victim-witness' trauma and the inadequacy of support procedures for her.

The victim's first point of contact with the legal system is when she seeks to file the complaint with the police.[382] In recognition of the victim's need for support while engaging with the legal system, the Delhi High Court has ordered the setting up of a Rape Crisis Cell (hereafter 'RCC') within the Delhi Commission for Women (hereafter 'DCW'), which will coordinate the operation of a Crisis Intervention Centre (hereafter 'CIC').[383] The members of the CIC are appointed jointly by the Delhi Police and the DCW so that they can provide support services to the victim from whenever the incident is first reported in the police station.[384] When a rape victim approaches the police, a CIC counsellor is immediately called to the police station as a support-person

[381] Jan Jordan, 'Worlds Apart? Women, Rape and the Police Reporting Process' (2001) 41 British Journal of Criminology 679. *Also see* Section 1.2 of Chapter 2.

[382] CrPC, s 154(1).

[383] *Delhi Commission for Women v Delhi Police* 2009 SCC OnLine Del 1057; operationalised through Delhi Police, *Guidelines to be Followed by the Police while Investigating Cases of Rape Standing Order Number 303/2010* (2010) 1 (hereafter 'Delhi Police Guidelines').

[384] Delhi Police Guidelines (n 383) 3.

for the victim. CIC counsellors are usually members of an NGO that is working in collaboration with the DCW. Once this counsellor arrives, their usual practice is to interact with the victim to ascertain what happened and record their findings in a proforma, which forms part of the case file.[385] Thereafter, the complaint is recorded and the FIR is prepared on that basis.[386] The power to investigate a rape case rests with the 'officer in charge of a station', though he can delegate the investigation to his 'subordinate officers.'[387] Within 24 hours of having the FIR registered, the victim is to be sent for a medical examination by a registered medical practitioner who prepares her medico-legal certificate (MLC).[388] While the CrPC gives broad indications of the particulars to be recorded in the MLC, the Ministry of Health and Family Welfare has provided more detailed guidance on the specific details the MLC should contain.[389] These guidelines were issued following the Verma Committee Report, which highlighted the role that inadequate or inconsistent forensic evidence collection can play in depressing conviction rates in rape cases.[390]

---

[385] This proforma is available online: Delhi Commission for Women, 'CICs Performa [sic]' (*Government of National Capital Territory of Delhi*) <delhi.gov.in/wps/wcm/connect/lib_dcw/DCW/Home/Projects/CICs/CICs+Performa> accessed 19 June 2018.

[386] CrPC, 154(1).

[387] CrPC, ss 156(1), 157(1).

[388] CrPC, s 164A.

[389] Ministry of Health and Family Welfare, 'Guidelines and Protocols: Medico-Legal Care for Survivors/Victims of Sexual Violence' (*Government of India*, 19 March 2014) <mohfw.gov.in/sites/default/files/953522324.pdf> accessed 19 June 2018, 62 (hereafter 'Ministry of Health Guidelines').

[390] Ibid 4; Verma, Seth and Subramanium (n 52) 280.

Thereafter, the victim has her statement recorded by the judicial magistrate under Section 164 of the CrPC. At this point she may be accompanied by the CIC counsellor, and/or the investigating officer, who are then meant to introduce her to the DCW advocate for the first time. This meeting marks a shift in how her support network is configured, with her primary source of support thenceforth being the DCW advocate. Finally, regular court proceedings commence. The victim may be informed by the investigating officer about bail applications, framing of charges or other developments, but she is technically only required to come to court for her own testimony and cross-examination. Once her testimony is over, she need not be contacted again until the verdict is delivered.

This section unpacks the ways in which these procedures can alienate the victim. It focusses specifically on prejudicial attitudes of criminal justice professionals, the role played by support-persons and prosecutors, the fragmentation of victim support services and the limited success of procedural reform. It concludes that against this background, it is predictable that victims may choose to exit the legal system if participation in it entails facing prolonged harassment and victim-blaming by the professionals they interact with.

5.1 Rape victims and the culture of doubt

This section discusses the way in which criminal justice agents' attitudes to the victim-witness may be influenced by rape myths, leading to her alienation from the legal system. As discussed in Chapter Two, rape myths are 'descriptive or prescriptive

beliefs about rape, its causes, context, consequences, perpetrators, and victims that serve to deny, downplay, or justify male sexual violence against women.'[391] They are usually reflected in what is understood as the 'real' rape scenario, which is the typical rape scenario in public imagination.[392] These beliefs may extend to all women (such as the idea that when women are raped, they will try their best to physically resist the rapist) or they may link to specific victim-witness or defendant attributes. For example, a lawyer assisting disabled victim-witnesses spoke of the assumption that mentally disabled women alleging rape could not be trusted because they could never accurately understand or process their experience. Along similar lines, a CIC counsellor gave the example of a police officer who was difficult to work with most of the time but was uncharacteristically enthusiastic to pursue the complaint when it was filed against a Muslim man. This seems to draw upon stereotypes that Muslim men are sexually perverse, a view that was often voiced in informal conversations in court and in police stations, though less so in the formal interviews. In other words, police officers,[393] doctors,[394] and even support-persons tasked with assisting the victim-

[391] This definition is taken from Gerger and others (n 121) 423 citing a translation from Bohner (n 121) 14.

[392] Estrich (n 119). *Also see* Section 1.1 of Chapter Two.

[393] Abhishek Bhalla and G Vishnu, 'The Rapes Will Go On' Tehelka Magazine 9(15) <archive.tehelka.com/story_main52.asp?filename=Ne140412Coverstory.asp> accessed 11 July 2017. *See also* Elizabeth Stanko's argument in the English context that hostile police attitudes lead to depressed reporting rates: Elizabeth A Stanko, 'Hidden Violence Against Women' in Mike Maguire and John Pointing (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988) 45.

[394] Barn and Kumari (n 170) 447.

witness[395] seem to be influenced by a fixed understanding of what the attributes of an 'ideal' victim-witness and perpetrator would be.[396] Lawyers also used stereotypical reasoning to review cases. This was true not just of defence lawyers, but also prosecutors, DCW advocates and legal aid advocates. For instance, in the absence of any evidence to this effect, one legal aid lawyer stated that a major factor for acquittals in rape cases is that:

> The complaint has been filed in order to prosecute the accused falsely and around 80% of the prosecutions are false and fabricated basing its grounds on abysmal and concocted complaints.

The recurring suggestion was that if there were parallel matrimonial or property disputes between the victim-witness and the defendant, the case was probably false. One prosecutor suggested that if the victim-witness sought the DCW's support at any stage,[397] he was almost certain that the case was false since women who were misusing the system knew how to do so through every channel. Similarly, one DCW lawyer said that she could tell from how the victim-witness smiled and behaved at the time of the Section 164 statement if the complaint was false. Another suggested that we needed to reconceptualise rape, bearing in mind the 'old model' where courts required forceful rape by stranger, causing injuries. She expressed disappointment

---

[395] In a similar vein, Vatuk recounts that efforts by NGO workers to settle matrimonial disputes may be premised on patriarchal ideologies: Sylvia Vatuk, 'The "Women's Court" in India: An Alternative Dispute Resolution Body for Women in Distress' (2016) 45 The Journal of Legal Pluralism and Unofficial Law 76, 92.

[396] Nils Christie uses this concept to understand the criminal justice system more generally: Christie, 'The Ideal Victim' (n 114).

[397] He was referring to the Commission itself over here, rather than the DCW lawyer who is present in court and often assists the prosecutor.

that in the current times, they only got cases where the woman got angry and filed a case against her partner.[398] Perhaps at one extreme, a prosecutor said that he could not understand how it was physically possible to have sex with a woman against her wishes – two people would need to hold her down while a third one committed the act. He concluded that rape complaints were mainly filed for money because of the availability of generous compensation to victims of this crime.

Rape myths also occasionally made it into the victim-witness' cross-examination during the trial. Chapter One discussed the introduction of rape shield legislation to counter the rape myth that sexually active women cannot be raped. It highlighted the scope and potential of Section 53A of the IEA, as introduced in the Criminal Law (Amendment) Act 2013. Under this provision:

> where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

This provision was imperfectly implemented in trial courts. For example, this was brought out in an interview with a victim-witness, who had been raped while involuntarily intoxicated in a hotel room. She described her cross-examination as follows:

Vignette 4.3
Priya[399] said that the defence counsel had been really nasty to her. She recalled that he had tried to cross-examine her repeatedly about her relationships with all the male persons in her life. She relayed that much to everyone's amusement, he had

[398] This was perhaps a reference to 'promise to marry' cases, as discussed in Chapter Five.

[399] All names have been changed for anonymity.

even tried to cast doubt on her male cousin's visits to her house. She was grateful that the prosecutor and DCW advocate always opposed the defence counsel when the latter pursued this line of questioning, with the arguments sometimes getting loud and aggressive. She was also thankful that the judge at the time, now transferred elsewhere, had created comfortable conditions for her to testify in. She rued that the new judge was only interested in understanding the defendant's perspective.

She understood the basic strategy of the defence lawyer to be to try and paint her as a 'call girl.' She said that her grandmother had also heard them trying to manipulate the evidence to this end: while waiting in the court gallery, her grandmother had heard the defence counsel exerting pressure on the hotel receptionist to say that Priya was a regular visitor at the hotel with various men. Priya was appalled that they would do this within the precincts of the court. She recounted that the defence counsel had also cropped some of her photos from a social networking website to make it seem like she had been in a consensual, intimate relationship with the defendant. She was particularly angry at his implication that if she had been a call girl, or the defendant's girlfriend, she would not have had the right to refuse sex.

After the cross-examination she had gone to the DCW counsel, seething with rage. The DCW advocate had calmed her down, reminding her that the whole aim of the defence counsel had been to agitate her. In court to resume her cross-examination at the time of the interview, Priya said that she was determined to ask the defence counsel if he thought call girls should be raped.

This vignette highlights the important role played by the prosecutor, judge and DCW advocate in preventing irrelevant or prejudicial cross-examination about the victim-witness' sexual history. If these officials are sceptical about the victim-witness' accounts or otherwise inattentive to what she is being asked, this may result in the rape shield being undermined. This may happen, for instance, where the judge is engaged in dictating another order parallel to the victim-witness' cross-examination, or the prosecutor has been told to get another witness' testimony simultaneously transcribed. These practices were commonly observed, presumably as a way of dealing with the burgeoning workload of many sessions courts. Further, this vignette brings out that even where the question is disallowed, this can still have damaging

repercussions for the victim-witness and the trial.[400] As was the case with Priya, it can leave the victim-witness flustered. This can make her testimony seem confused, which is likely to be regarded as an unsound basis for a conviction.[401] In addition, even disallowed questions may create the impression that the victim-witness has something to 'hide.'

The rape shield is also partly subverted by practitioners' limited understanding of its purview. Some practitioners have not paid specific attention to the text of Section 53A, overlooking its potentially radical scope, as brought out by the following vignette:

Vignette 4.4
In one promise to marry case,[402] the defence counsel asked the victim if she had ever had consensual sex with the defendant during her relationship with him. I was surprised that nobody mentioned that this question was potentially excluded by Section 53A of the IEA. The next day, the DCW lawyer was asked why this was the case. She responded saying that the defence counsel was allowed to ask questions of the kind mentioned. It was only when questions crossed a certain threshold and degrading words were used that the questions were barred. She said one example of a question that is barred would be where the defence counsel asked the victim whether 'precautions' were used during the incident. From the conversation that followed, it was clear that this was a reference to where the defendant had used condoms.

This vignette illustrates that whether or not lawyers object to the victim-witness' cross-examination can be influenced by their subjective moral paradigms. They may even try to bar the introduction of legally relevant evidence into the rape case, where

[400] For a detailed discussion around these themes, *see* Section 1.3.1 of Chapter Two.

[401] *See* Section 4.4 of Chapter Seven for a discussion on the quality of victim-witness testimony required to convict in a rape case, where there is no independent evidence.

[402] For a detailed account of promise to marry cases, *see* Chapter Five.

this offends their sense of propriety. This seemed to be the stance of the DCW lawyer who was unable to bring herself to even articulate the word 'condom' until pushed to do so. It is important for practitioners to grasp that the objective of introducing Section 53A into the IEA was to end the prejudicial treatment of women who frequently have consensual sex. In the absence of this understanding, it is likely that the enforcement of Section 53A will continue to be uneven.

The endorsement of rape myths leads not just to a negative interpersonal interaction with criminal justice functionaries, but also to unnecessary delays and prolonged harassment of the victim-witness in the pre-trial stages. For instance, if police officers do not believe the victim-witness, they might repeatedly defer the lodging of the FIR on flimsy legal pretexts, particularly if the woman is from a marginalised socio-economic community.[403] Some counsellors also mentioned medical professionals discouraging victim-witnesses from internal examinations where they felt the complaint was false, saying there was no point since the internal examination was unlikely to yield any important evidence. This refusal is often used against the victim at trial.[404]

[403] Similar experiences are reported in Jayshree Bajoria, *"Everyone blames me": Barriers to Justice and Support Services for Sexual Assault Survivors in India* (Human Rights Watch, 2017).

[404] *See* Section 4.3 of Chapter Seven.

Some participants indicated that such conduct may be a result of overburdened hospitals[405] and police forces[406] who are looking for ways to minimise their workload. Similarly, it was suggested that prosecutors[407] and legal aid lawyers[408] might appear unsympathetic to victim-witnesses since their workload did not leave space to establish a more supportive relationship. Others pointed to endemic corruption in the policing[409] and healthcare systems,[410] suggesting that adverse responses to victim-witnesses might be less reflective of sexist attitudes and more of the defendant's willingness to pay bribes. Certainly, some victim-witness interviewees alluded to the defendant daring them to file the complaint, assuring them that the case would never progress because his family was well connected. As with other social phenomena, it is unlikely that there is a satisfactory monocausal explanation for the victim-witness' treatment. However, these additional explanations do not capture the qualitative

[405] For instance, Ekta Sharma's study of doctors in Jaipur records excessive workload and inadequate resources as major contributors to stress levels of government doctors: Ekta Sharma, 'Role Stress Among Doctors' (2005) 7 Journal of Health Management 151, 155.

[406] For instance, D Selokar et. al, in their survey of 102 police persons from Wardha found that 'most of the participants (82.4%) were working hours more than eight hours daily. Although they were working in periodic shifts, almost all were working hours exceeding 12 hours daily. Long working hours appear to be an important factor leading to stress among police personnel.': D Selokar and others, 'Occupational Stress among Police Personnel of Wardha City, India' (2011) 4 Australas Medical Journal 114.

[407] The overburdening of prosecutors in India is discussed in Anupama Sharma, 'Public Prosecutors, Victims and the Expectation Gap: An Analysis of Indian Jurisdiction' (2017) 13 Socio-Legal Review 87, 96.

[408] Meghna Bhat and Aimee Wodda describe legal aid lawyers as 'overworked and underpaid' in Bhat and Wodda (n 131) 290.

[409] The prevalence of police corruption in India is discussed in Jon ST Quah, 'Curbing Corruption in India: An Impossible Dream?' (2008) 16 Asian Journal of Political Science 240, 252-254.

[410] Jeffrey Hammer et. al describe corruption in government hospitals in India as 'rampant.': Jeffrey Hammer, Yamini Aiyar and Salimah Samji, 'Understanding Government Failure in Public Health Services' (2007) 42 Economic and Political Weekly 4049, 4055.

experience of many victim-witnesses, who are often subject to explicit victim-blaming by the criminal justice practitioners. These observations are nonetheless a reminder that any assessment of rape prosecutions must be made against the general background of a criminal justice system that is deficient in many respects. Factors such as case pendency and institutional corruption are relevant for understanding prosecutions more generally and continue to exert significant force in rape cases.

CIC counsellors and DCW lawyers who were identified largely as victim-support personnel did not differ substantially in their thinking about rape. It was notable that the quality of support provided by CIC counsellors varied considerably depending on whether or not they thought the complaint was genuine – something they openly acknowledged. If they decided the case was false, many counsellors would restrict themselves to performing the bare essentials of their role, filling in the proforma, and then maintaining an arm's length relationship with the victim-witness. Many CIC counsellors would urge the victim-witnesses in these circumstances to tell them the 'truth' and one CIC counsellor said that the most satisfying part of her job was when she could save a falsely framed defendant through the 'counselling' provided by her at the police station. But as with other research participants, assessments of the genuineness of the complaint were mired in the sort of rape myths described above. In one interview, a CIC counsellor indicated that she relied on the doctor to tell her if the case was false. When asked how the doctor could say anything conclusive about non-consent from a medical examination, she insisted that they know. Her boss, who

was sitting in the same room said that doctors had their way of knowing and could tell from the 'shape' if there had been a rape.

DCW lawyers also freely drew on cultural myths about rape, such as the idea that most women who complain about rape are lying. One of them said that her key role, as she had picked up from her training, was to encourage women to testify 'truthfully.' This understanding of their role could be damaging for the victim-witness, as exemplified below:

Vignette 4.5
In one case proceeding observed, the initial interaction between the victim-witness and the DCW lawyer was unremarkable. However, post-lunch, the DCW lawyer said that she had been approached by the defence counsel who had told her what had actually happened. The DCW lawyer insisted that there had been no rape, and the victim-witness was wearing markers of marriage[411] only to create a positive impression on the judge when she was not actually married. She then approached the victim-witness to unearth the 'truth.' The victim-witness repeated the factual account that she had given in the morning. The DCW lawyer insisted that she tell the truth. The exchange continued in this vein for some time. Finally, the DCW lawyer accepted the victim-witness' account. After the interaction had concluded, the DCW lawyer was asked if it was possible that the defence counsel was biased and was only trying to secure a favourable outcome for the defendant. The DCW lawyer seemed unimpressed with this suggestion. For a different reason, she later confessed that she had not acted wisely: she recounted the story of a victim-witness who had recorded a DCW lawyer being rude to her on the phone and complained to the DCW with the recording. She did not want to end up in that situation.

The constant doubting of the victim-witness' version by persons appointed to be her support-persons can be particularly distressing.[412] In addition, the support-

[411] She was wearing vermilion in her neck and a black and gold necklace referred to as the *mangalsutra*, both of which signify a caste Hindu marriage.

[412] In a different jurisdiction, Jean Rath describes that the role of a Rape Crisis Centre's counsellor is to create an 'accepting and empathetic environment.': Jean Rath, 'Training to be a Volunteer Rape Crisis Counsellor: A Qualitative Study of Women's Experiences' (2008) 36 British Journal of Guidance and Counselling 19, 20.

persons' focuss on defining the 'truth' raises an institutional issue. Support-persons have been incorporated into the system to bolster the victim. It is not their role to judge the veracity of the complaint. By its nature, theirs is a partisan role; their only obligation is towards the victim.[413] There are other agencies to ensure that the defendant is not being framed, including the investigating agency, the prosecution, the defence counsel and the judge. Support-persons, on the other hand, are appointed to ensure the victim's well-being and interests are safeguarded. Given their structural location, it is imperative for them to act on the assumption that the case is genuine. This becomes even more urgent since their inferences about the veracity of the complaint also seemed motivated by ill-founded scepticism against rape victim-witnesses.

Allied to this is the issue of whether the DCW lawyers should be considered to be support-persons at all and if so, what support they are required to provide. Building on this discussion, the next section analyses the inadequacy of the role currently being played by the CIC counsellor, DCW lawyer and the prosecutor.

5.2 The division of labour in the legal system

This section critiques the role played by three functionaries in the legal system: the CIC counsellor, the DCW lawyer and the prosecutor. It concludes that these three

[413] Similarly, Anna T emphasises the importance of rape crisis counsellors believing women in her discussion on the Rape Crisis Centre in Birmingham, England: Anna T, 'Feminist Responses to Sexual Abuse: The Work of the Birmingham Rape Crisis Centre' in Mike Maguire and John Pointing (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988) 62.

officers have great potential to mitigate the victim-witness' trauma, but this potential will likely remain unrealised. This is not just because of the prejudicial attitudes that may be harboured by them (as discussed above), but also on account of how their roles are currently defined. Each criminal justice agent will be discussed in turn.

5.2.1 A CIC counsellor by any other name…would not be a counsellor

At the heart of the CIC counsellors' role is the idea of 'counselling', but the meaning of this word is elusive. Neither the court order that first devised this scheme, nor the implementing order issued by the Delhi Police define what counselling is.[414] It is now used as a catch-all phrase to include any support the victim-witness might need. To some extent, this might seem necessary because the support needed by victim-witnesses can vary greatly depending on their circumstances. But it can also mean that this convenient label is used to mask the gaps that persist in the actual provision of victim support. For instance, most of the counsellors in the study had a background in social work studies and were ill-equipped to deal with rape trauma. None of them had any training in psychology or psychiatry though a few of them mentioned that they had been given training modules as part of their preparation for the post. Given that they are the main contact-person for the victim-witness within the legal system, this lack of expertise compromised their ability to provide counselling (in the form of mental health services) to the victim-witness. Their main role seemed to be to ensure that the victim-witness was treated respectfully in the police station and hospital, and

[414] *Delhi Commission for Women v Delhi Police* (n 383); Delhi Police Guidelines (n 383) 1.

was introduced to the DCW advocate when she went to record her Section 164 statement. They also talked in private with the victim-witness at the police station and recorded the particulars of the case in a proforma, once they had ascertained what happened in the case. Some CIC counsellors indicated that they followed up with the investigating officer when asked about specific issues, such as compensation or bail, but it was not clear if they thought this was part of their formal role. In any case, assistance over a longer period of time was rare for two reasons. First, the victim-witness might not be aware of her rights in relation to these ancillary matters. Secondly, the workload on counsellors is so high that they are often unable to continue communications with the victim-witness beyond the first meeting. This large workload was a serious issue for many counsellors, who reinforced that they would have liked to provide greater support to the victim-witnesses.

A broader understanding of 'counselling' that goes beyond psychiatric or psychological help can be beneficial for victim-witnesses, especially where it is not possible to deliver professional assistance.[415] Non-professional assistance can be uniquely powerful because it draws on the 'good neighbour' principle, according to which you do not need training to have empathy for a victim.[416] In some cases, grassroots volunteers working in the area can acquire more knowledge about rape

[415] Mike Maguire and Claire Corbett, *The Effects of Crime and the Work of Victim Support Schemes* (1st edn, Gower 1987) 204, 205.

[416] Claire Corbett and Mike Maguire, 'The Value and Limitations of Victim Support Schemes' in Mike Maguire and John Pointing (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988) 35; RI Mawby, 'Victim Support in England and Wales: The end of an era?' (2016) 22 International Review of Victimology 203, 208.

than is available to mental health professionals.[417] Further, being labelled a 'psychiatric victim' may lead some women to feel stigmatised.[418] In any case, arrangements for professional therapy can also be exploitative or damaging for patients.[419] However, the provision of beneficial non-specialist counselling requires the provision of high quality, broad ranging services, which is not influenced by rape myths.[420] These counsellors must be supervised and supported by others within the organisation.[421] In such systems, it is also advisable to have professional help as a 'back up' for serious cases.[422] To give one example, analogous service providers in England meet each rape victim-witness between 10 and 20 times in addition to numerous telephone conversations with her.[423] They link her to an average of five specialist agencies and provide a broad range of services including: accompanying them to visit special clinics or general practitioners, assisting with shopping and household jobs, providing support and advice to family and partners, helping with compensation forms, liaising

[417] This observation is made by Frederika Schmitt and Patricia Martin while recounting the history of Rape Crisis Centres in California: Frederika E Schmitt and Patricia Yancey Martin, 'Unobtrusive Mobilization by an Institutionalised Rape Crisis Center: "All We Do Comes from Victims"' (1999) 13 Gender and Society 364, 367.

[418] Gillian Mezey, 'Reactions to Rape: Effects, Counselling and the Role of Health Professionals' in Mike Maguire and John Pointing (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988) 71.

[419] For instance, for an account of the abuse of power by mental health professionals in England and Wales, *see* Angela Hetherington, 'Exploitation in Therapy and Counselling: A Breach of Professional Standards' (2000) 28 British Journal of Guidance and Counselling 11.

[420] Maguire and Corbett (n 415) 204, 205; Claire Corbett and Kathy Hobdell, 'Volunteer-based Services to Rape Victims: Some Recent Developments' in Mike Maguire and John Pointing (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988) 56 – 58.

[421] Maguire and Corbett (n 415) 206, 207.

[422] Ibid 204, 206; Corbett and Hobdell (n 420) 55, 58.

[423] Maguire and Corbett (n 415) 190.

between the victim and the police, facilitating relocation where required, contacting charities for monetary help and accompanying the victim-witness to court.[424] CIC counsellors currently do not have the resources to provide such large scale services and are not trained to reject stereotypical thinking in the discharge of their duties.

The role of the counsellor needs to be clarified. If they are not expected to provide mental health services, provisions should be made by them to connect the victim-witness to specialists. If they are supposed to conduct psychiatric or psychological counselling, then persons with adequate training need to be recruited. In any case, there is need for support services in order to facilitate the long-term rehabilitation of victims through providing multifaceted services over a longer period of time. If this is a role the counsellor is meant to be playing, it should be formally recognised, and adequate resources should be diverted towards this objective. While it is tempting to think that some (deficient) help is better than no help at all, scholarship on this topic suggests that providing poor support services can be counterproductive for the victim-witness.[425]

The following section underscores that that similar confusion surrounds the duties of the DCW lawyer, resulting in insufficient support to the victim-witnesses. This uncertainty also allows prosecutors to unjustifiably distance themselves from the

[424] Ibid 191 – 192.

[425] Ibid 205 – 207.

victim, by assuming that all victim-centric liaisons are the responsibility of the DCW lawyer.

5.2.2 Opaqueness in the role of DCW lawyers: What support? For whom?

Most prosecutors justified their hands-off approach towards the victim-witness based on the fact that the DCW lawyer was there to provide the victim-witness with moral, emotional and legal support through a difficult, adversarial trial process. The fact that the CIC counsellors usually stop being involved in the case once they have introduced the victim to the DCW lawyer also indicates that the latter is expected to absorb some aspects of the CIC counsellor's role. Yet, the formal guidance indicates that the DCW lawyer is only meant to provide 'legal services' to the victim-witness, and to 'assist the prosecutor in the trial, oppose the bail application of the accused, facilitate recording of statement under section 164 of the code of criminal procedure.'[426] Another government document, without specifically focussing on DCW advocates, states that the RCC was set up with the following objective:

> The prime responsibility of this Cell is to aid and assist the rape victims and their families in order to overcome the trauma caused by the assault by providing immediate relief, emotional counseling, assistance in filing of FIR etc and follow up. Free legal service is provided to the victim of sexual assault from the time the complaint is lodged in the police station. Besides, the cell would

[426] DCW Introduction to the RCC (n 140). This also seems to be the thrust of appellate court rulings on the point: *Delhi Domestic Working Women's Forum v Union Of India and Others* 1995 SCC (1) 14 [15]; *Delhi Commission for Women v Delhi Police* (n 383) [1].

> also act as the co-coordinating agency for the services like, medical, mental health, shelter, financial assistance to the victims with a network of NGOs.[427]

However, it does not seem as if it is the DCW lawyer who is tasked with all of these functions. A separate guidance document indicates that advocates attached to the RCC are meant to 'oppose the bail applications of the accused and also assist the Public Prosecutors in the preparation of charge sheet and arguments etc.'[428] In the absence of clarity regarding what the exact function of the DCW lawyer is, it is difficult to assess if they are fulfilling their role effectively.[429] This confusion also pervaded the DCW lawyers' own understanding of their role, which varied depending on the interviewee. When asked what their role in the system was, their answers included: supporting the prosecutor, ensuring that the victim-witness speaks the truth, providing moral support to the victim-witness, helping her claim travel expenses or compensation, preparing the victim-witness for chief and cross-examination without coaching her. Most victim-witnesses did not seem clear about who the DCW lawyer was either, or why she was there. The following vignette illustrates how the presence of the DCW lawyer can be considered harmful by the victim-witness in some cases:

Vignette 4.6
The DCW lawyer had been absent for many days together. On the day she showed up, the victim-witness was being cross-examined by the prosecutor after having turned hostile to the prosecution. The judge was inquiring into why there had been

[427] Delhi Commission for Women, 'Rape Crisis Cell' (*Government of National Capital Territory of Delhi*) <www.delhi.gov.in/wps/wcm/connect/ae6d4b0042cfe91e99b8d98b484d6033/Rape+Crisis+Cell.pdf?MOD=AJPERES&CACHEID=ae6d4b0042cfe91e99b8d98b484d6033> accessed 19 June 2018.

[428] Ibid.

[429] Similarly, Partners for Law in Development found that the 'scheme of the Delhi Commission of Women to provide the services of empanelled advocates to rape victims… lacks a specific role, motivation or direction. It is not monitored and is not working as intended.': PLD Report (n 129).

blood stains on the victim-witness' clothes if the accused had not assaulted her. Mid-way through the exchange, the victim-witness stopped to say that she was feeling upset because the DCW lawyer was standing next to the prosecutor and laughing. There was an awkward pause in court since neither the judge, nor the prosecutor had been paying much attention to the DCW lawyer, who was usually absent. The judge requested the DCW lawyer to go to the end of the room and sit down, so as to not distract the victim-witness. The DCW lawyer later revealed in her interview that she was usually unable to come to that court, because she was attached to four different courtrooms.

As reflected in this example, DCW lawyers usually did not establish a good rapport with the victim-witnesses. They often met the victim-witnesses in court just before their testimony and were unable to win their trust in such a short span of time. Partly on account of such failures, many victim-witnesses end up hiring expensive private lawyers. The next section draws out how ambiguity in the role of the DCW lawyer gives prosecutors a ready excuse to dissociate themselves from the victim-witness.

5.2.3 The missing link between prosecutors and victims

The victim-witness almost never interacts directly with the prosecutor who handles key aspects of the case. The prosecutor's main interlocutor remains the police, who may have unfounded suspicions of the victim-witness' account, which are then relayed to the prosecutor. This approach can compound the victim-witness' sense of isolation, particularly if they have no other source of legal support. Both analytical and pragmatic reasons were given by professional interviewees for the lack of prosecutor/victim-witness interaction: first, the prosecutor represents the state rather than the victim-witness, so there is no reason to facilitate her interaction with the

victim; second, the prosecutor is already under too much work pressure to burden her with the additional task of looking after the victim-witness' welfare.[430] One prosecutor indicated in an interview that he was afraid of interacting with victim-witnesses because they might file a false complaint against him if he discharged his duties in a way they disapproved of.

These reasons are outweighed by the fact that the prosecutor plays a pivotal role in deciding the course of the case. It is the prosecutor who argues about which charges to frame, and whether the accused should be granted bail. She records the chief testimony of the victim-witness and raises necessary objections when the victim-witness is being cross-examined. The prosecutor cross-examines the defence witnesses and the transcription of court recordings is often left to her, with little or no oversight by the judge. This transcription forms part of the case record and is used by the judge in determining the verdict. The case record is vital in the process of adjudication, especially because the judge before whom testimony is recorded may have been transferred to another court before the matter is reserved for judgment. In that case, the adjudicating judge will only have the court record to fall back on.

Securing and understanding information about their case remains of great concern to most victim-witnesses.[431] Victim-witnesses are often left without any understanding

---

[430] These factors are discussed by Stacy Caplow while still arguing for a more victim-centric prosecutorial role in the US: Stacy Caplow, 'What If There Is No Client: Prosecutors as Counselors of Crime Victims' (1998) 5 Clinical Law Review 1, 8 – 10.

[431] Joanna Shapland and Matthew Hall, 'Victims at Court: Necessary Accessories or Principal Players at Center Stage?' in Anthony Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the Stage* (2nd edn, Routledge 2011) 168.

of why legal decisions were taken or what they mean, leading to their estrangement from the process.[432] Since the victim-witness is the most important prosecution witness in any rape case, engaging the victim should be regarded as a part of the prosecutor's role.[433] For similar reasons, as the Glidewell Report in England and Wales endorsed, even if the prosecution represents the public interests, its concern for the defendants' rights must be matched by equivalent protection of the victim-witness' interests.[434] This is important because rape victim-witnesses might be at particular risk of trauma during the legal proceedings. Their testimony is also crucial for the prosecution to succeed during the trial due to the absence of readily available corroborating evidence in many rape cases. If they are alienated from the prosecution, they may become hostile witnesses, leading to acquittals.[435]

However, the introduction of the DCW lawyer in court has meant that prosecutors have no impetus to engage with the victim-witness, since they can simply redirect the victim-witness to the DCW lawyer. It is notable that there is typically one DCW advocate attached to each fast track court, though at times they have to deal with

---

[432] In contrast, the Crown Prosecution Service in England and Wales is under a duty to communicate certain decisions, such as reducing or modifying a charge, to the victim. For an overview of relevant measures, *see* John Spencer, 'The Victim and the Prosecutor' in Anthony Bottoms and Julian V Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (2nd edn, Routledge 2011) 155.

[433] U Vindhya describes victim-witness hostility in domestic violence cases as a failure of the prosecution: U Vindhya, '"Dowry Deaths" in Andhra Pradesh, India: Response of the Criminal Justice System' (2000) 6 Violence Against Women 1085, 1101.

[434] Iain Glidewell, Geoffrey Dear and Robert McFarland, *The Review of the Crown Prosecution Service* (Cm 3960, 1998) 113.

[435] For a similar discussion in context of the USA, *see* Angela J Davis, *Arbitrary Justice: The Power of the American Prosecutor* (1st edn, Oxford University Press 2009) 69.

multiple courts. This means that each DCW lawyer will be handling *at least* the same number of cases as the prosecutor at any given time, though their responsibilities are narrower and more victim-centric. Even if the DCW lawyers had the capacity to effectively liaise with all the victim-witnesses, there would still be a strong case for victim-prosecutor interaction, since decision-making power vests in the prosecutor and not the DCW lawyer.

In sum, this section has critiqued the role played by three functionaries within the legal system: the CIC counsellor, the DCW lawyer and the prosecutor. It has suggested that clarifying and developing the duties of these professionals can play a strong role in mitigating the victim-witness' stress and ensuring her engagement with the criminal justice system. The next section discusses another source of distress for the victim-witness – the dispersed nature of the support-oriented agencies she has to interact with. It argues that in spite of the setting up of one stop centres, fragmentation of services continues to compound the victim-witness' anxieties.

5.3 One stop centres and the fragmentation of support services

During interviews, victim-witnesses were commonly asked about logistical aspects of their experience with the legal system, including how they commuted to court. One 24-year-old interviewee admitted that she had become much more independent in navigating Delhi following the institution of the rape case. While she had more or less stayed within her locality for most of her life, supporting the legal proceedings required spatial mobility and being comfortable with multiple forms of public

transport. Other victims made similar observations about how they had learnt to navigate through different spaces and processes that they had initially found alienating. At the time, it seemed counter-intuitive that the difficult process of supporting a rape prosecution had led to anything positive for the victim-witnesses, such as greater independence. In retrospect, these observations seem unsurprising. Supporting the rape case requires the victim-witness to face a steep learning curve, liaising with authorities that are spread across police stations, hospitals and courts. Within courts, their presence might be required in different offices depending on whether they are there to access compensation, record their Section 164 statement or testify. A rape victim-witness' interactions with the system can therefore be arduous, and the support services instituted can be too fragmented to mitigate the stress entailed. The operation of one stop centres (hereafter 'OSCs') is meant to counter this, by integrating multiple institutions, including those that provide support services, under one roof.[436] Currently, these centres are based in either courts or hospitals in Delhi.

[436] Similar centres have been set up to assist victims of sexual and gender-based violence in other jurisdictions. For examples from South Africa and England, *see* Lisa Vetten, 'Unintended Complicities: Preventing Violence Against Women in South Africa' (2016) 24 Gender and Development 291, 292; Marianne Hester and Nicole Westmarland, *Tackling Domestic Violence: Effective Interventions and Approaches* (Home Office Research Study 290, Development and Statistics Directorate, 2005) 62. The centralisation of services in other spheres has also been attempted. For example, 'one stop shops' in England and Wales centralise and communicate information about an ongoing case to the victim: Carolyn Hoyle and others, *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects: A Report for the Home Office Research Development and Statistics Directorate* (Department of Law University of Bristol, 1998) 13. Other 'one stop shops' in a variety of jurisdictions – such as the USA, Canada and England and Wales – attempt to mitigate the adverse impacts of the criminal justice system on women offenders by centralising the services required by them: Prison Reform Trust, *International Good Practice: Alternatives to Imprisonment for Women Offenders* (2013) 19 – 23; Polly Radcliffe, Gillian Hunter and Rosa

One OSC[437] has been set up in Patiala House Court Complex with a view to providing 'medical, legal, psychological and counselling support under one roof to fight against any forms of violence against women.'[438] The OSC is meant to be housed in the office of the New Delhi District Legal Services Authority (hereafter 'DLSA'),[439] though at the time of the study, it was situated in a small office in a block opposite the DLSA office. The office was inhabited solely by a receptionist who redirected queries to the lawyers on call in the main DLSA office. From those inquiries, it emerged that the DLSA OSC is meant to relay the victim-witness' medical and legal options, including her rights relating to compensation. However, this overlaps considerably with the DCW advocate's role. The reason for this duplicity is unclear. In any event, victim-witnesses are unlikely to realise that the DLSA OSC exists, unless they find themselves in the relevant court complex for some reason.[440]

There could be two potential explanations for understanding the overlap between the what the DLSA OSC and the DCW lawyer do, as indicated by the DLSA lawyers on call. First, the DLSA lawyers never comment directly on the facts of the case, and

---

Vass, *The Development and Impact of Community Services for Women Offenders: An Evaluation* (The Institute for Criminal Policy Research, School of Law, Birkbeck College, 2013) 10.

[437] Since there are also OSCs based in hospitals across Delhi, as discussed in the following section, I will use 'DLSA OSC' to refer to the One Stop Centre in the Patiala House Court Complex. I will use 'OSC' to refer only to One Stop Centres housed in hospitals.

[438] New Delhi District Legal Services Authority, 'Comprehensive Standard Operating Procedure (SOP) for "One Stop Centres in Delhi"' (*New Delhi District Legal Services Authority*) <dslsa.org/ndd/?page_id=65> accessed 19 June 2018.

[439] Ibid.

[440] It seems that the working of the OSCs will ultimately be integrated with other helplines, but presumably, those helplines will also continue to refer victims to the CIC counsellors and RCC lawyers, through the DCW: ibid.

only provide general advice on the entitlements of the rape victim-witness. The DCW lawyer's guidance can be more specifically tailored, and she is permitted to discuss the victim-witness' testimony as long as this is done within the framework of the law, without coaching the witness. This division of labour is likely to be confusing for victim-witnesses who look collectively at all their concerns relating to the legal proceedings, without necessarily bifurcating them into 'legal' and 'factual.' In fact, victim-witnesses currently have multiple sources of 'legal' support available to them: the DLSA OSC, the DCW (through the DCW lawyer or otherwise), the prosecutor, the investigating officer, any lawyer employed by the NGO supporting her (whether through the CIC counsellor or otherwise). They are usually unaware of whom to approach at any given time. If they face continued deflection and redirection, this can push them towards entering into a potentially exploitative arrangement with an expensive private lawyer.

Secondly, DCW lawyers are usually attached to a particular courtroom or courtrooms and are overburdened since they have to handle all the cases that are argued in their courts. The DLSA lawyers can therefore act as healthy complements in providing legal advice to the victim-witness. Yet, it does not seem logical to assume that the DLSA OSC will be any less burdened, particularly since it is likely to handle the same set of cases – except that instead of being spread across personnel in several courtrooms, this burden will now be handled by a single DLSA office, with only a few lawyers on call at any given point during the day.

Another category of OSCs has been set up in hospitals across Delhi, to implement the recommendations of the Usha Mehra Commission.[441] The Mehra Commission recommended setting up OSCs in designated private and public hospitals, which would have ready access to a police officer, counsellor, medical expert, nurse, lawyer (through the State Legal Services Authority), judicial magistrate and forensic evidence collection facilities, including Sexual Assault Forensic Evidence kits (hereafter 'SAFE' kits).[442] It suggested that the 'results' of the medical examination in a rape case would be prepared on an urgent basis, and shared privately with the victim-witness.[443] The recording of the judicial magistrate's statement would be done at the OSC itself.[444] In line with these recommendations, the stated aim of the OSC scheme is to 'facilitate access to an integrated range of services including medical aid, police assistance, legal aid/case management, psychosocial counselling, and temporary support services to women affected by violence'[445] Elaborate infrastructure is envisaged: the OSC are preferably to be located across a carpeted area of five rooms and have a separate entrance, which is prominently marked.[446]

---

[441] Usha Mehra, *Report of Justice Usha Mehra* (Ministry of Home Affairs, New Delhi, 2013).

[442] Ibid 73-77.

[443] Ibid 78.

[444] Ibid 79.

[445] Ministry of Women and Child Development, 'One Stop Centre Scheme' (*Government of India*) <wcd.nic.in/sites/default/files/OSC_S.pdf> accessed 20 June 2018 para 2.4 (hereafter 'OSC Scheme Document').

[446] Ibid para 4.1.

At the time fieldwork was undertaken, five OSCs had been opened in hospitals across Delhi.[447] Three of them were visited for this research, though access to the OSC and the associated medical staff was only obtained in two. It did not seem that the OSCs were in use, except for when a victim-witness was accompanied by the police or CIC counsellor. This was unsurprising, because victim-witnesses of unreported crimes are unlikely to be aware of the facility or have any information about how to find it. Not many people within the hospitals seemed aware about the OSCs, even where they had been set up. Despite having a background understanding about the scheme, it took several trips to the reception, trauma centre, gynaecology ward and compounder's office before access to the OSCs could be secured, if at all.[448] Government hospitals are built across large areas of land, and it can be difficult to navigate through them without an understanding of how they are built or designed. If signage is concentrated in a small part of the hospital, in the immediate vicinity of the OSC, it would not be accessible to victim-witnesses trying to find it without the support of the police or counsellors. Where the signage is solely in English, this presents an additional hurdle to those who are not literate in that language and in fact,

[447] This included OSCs set up in the Sanjay Gandhi Memorial Hospital, Dr Baba Saheb Ambedkar Hospital, Deen Dayal Upadhyay Hospital, Lok Nayak Jai Prakash Narayan Hospital and Guru Teg Bahadur Hospital.

[448] This corresponds to Jasmine George's experience in trying to investigate the running of the OSCs in Delhi: Jasmine Lovely George, 'Investigation: Where are the 'One Stop Centers' for Rape Survivors Promised by the Nirbhaya Fund?' The Ladies Finger <theladiesfinger.com/investigation-where-are-the-one-stop-centers-for-rape-victims-under-the-nirbhaya-fund/> accessed 29 January 2016.

is contrary to the scheme document.[449] The inaccessibility of these facilities will likely be made worse if the OSC starts requiring a Unique Identification number from rape victim-witnesses, as the scheme document indicates it might.[450] As with other facilities, the OSCs seemed more extensive on paper than they were in practice. Usually, they are just two rooms that have been set aside in the hospital, designed to be less austere than the surrounding hospital's environment. There may be toys and other distractions for victim-witnesses of child sex abuse.

For both categories of OSCs, the title 'One Stop Centre' was a bit of a misnomer. In the DLSA OSC, despite its stated aim of facilitating 'medical, legal, psychological and counselling support', in practice, only legal advice on these various forms of support was given. In other OSCs too, in contrast with what the official scheme document requires, there were no facilities for psychosocial counselling in the OSC, nor was there a judicial magistrate at hand to record the victim-witness' Section 164 statement. Theoretically, the victim-witness could avail herself of free psychiatric services at the hospital,[451] but the hospital staff seemed to associate 'counselling' only with the DCW counsellor. The staff understood their role primarily as providing emergency medical care in case of injuries and otherwise recording case details according to the mandated proforma, using SAFE kits.[452] There also seemed to be no provision for any kind of

[449] The OSC scheme document requires that the signage relating to the OSC should be in written in English, Hindi and the local language: OSC Scheme Document (n 445) para 13.1.

[450] ibid para 5.3.

[451] CrPC, s 357C read with Ministry of Health Guidelines (n 389) 4.

[452] Ministry of Health Guidelines (n 389) 60.

temporary or long-term rehabilitation. This may be something the CIC counsellor is meant to deal with, but as highlighted above, their formal role remains unclear and most of them are unable or unwilling to provide sustained assistance to victim-witnesses. Therefore, the main advantage of the OSCs is not that they aggregate support services and other facilities, but that they provide a more private space for the medical examination within the hospital than was earlier available. As they currently function, the OSCs do not provide centralised services to the rape victim-witness. Fragmentation of services continues to be a prominent factor alienating the victim-witness from the legal services. The inability to access these services smoothly could contribute to the victim-witness' decision to turn hostile at trial.

So far, this section has discussed three aspects of the secondary victimisation faced by rape victim-witnesses in the legal process. These include: the pervasiveness of rape myths in the criminal justice system; the inadequate and often confusing role played by the CIC counsellor, DCW lawyer and prosecutor; and the fragmentation of services available to the rape victim-witness. These factors compound the victim-witness' rape trauma and can result in her decision to turn hostile to the prosecution. The following section discusses statutory reform that has been introduced to mitigate the secondary victimisation following the rape complaint. It examines reasons for the failure of these reforms to effectively address the issue of victim-witness hostility.

5.4 The limits of statutory reforms

As reflected in the above discussion, filing and pursuing a rape complaint remains a fraught process for the rape victim-witness. A complete list of all procedural reforms that have been introduced to counter this can be found in **Appendix 5**. Through select illustrations, this section argues that these modifications are inconsistently implemented, if at all. Even when implemented, they are often inadequate to achieve their underlying goals and do not operate as intended. Cumulatively, these deficiencies translate into a negative experience for the victim-witness, pushing her to settle the case outside court.

There has been some progress following recent amendments, especially through the Criminal Law (Amendment) Act 2013. For instance, as discussed in Chapter One, in case the relevant police officers fail to lodge the FIR, the victim-witness can seek the intervention of the Superintendent of Police (SP)[453] and initiate criminal proceedings against the relevant police officer.[454] It is not uncommon for victim-witnesses to seek the intervention of senior police officers or the DCW if they are unsuccessful in lodging the FIR. Further, the criminalisation of police conduct has strong symbolic value, even though it is questionable if a police complaint will be the preferred route for those aggrieved by police action. However, many professional interviewees indicated that criminalising police failure to record an FIR in a rape case has eased the

[453] CrPC, s 154(3).

[454] IPC, s 166A(c) as introduced through the Criminal Law (Amendment) Act 2013.

process of filing these complaints. Currently, the only way for the police to request a termination of proceedings in a rape case is by filing a cancellation report, releasing the defendant from custody if he has been detained, and then relaying to the Magistrate that she should not take cognisance of the case.[455] If the Magistrate disagrees with the police assessment, she may order that the case be taken forward anyway.[456] Some participants opposed this removal of police discretion, highlighting the importance of allowing the police to filter out false, frivolous or incorrect complaints. However, in a police culture saturated with rape myths, there is potential for the abuse of such discretion. Until the underlying issues of corruption and rape myth acceptance within the police force are dealt with, a stringent requirement to record the FIR is, as a defence counsel put it, a 'necessary evil.' It may result in increased acquittal rates at later stages in the proceedings, as other judicial mechanisms sift out the weak cases, but will ensure that an investigatory and judicial enquiry is carried out before the case is dismissed.

Examples of other procedural innovations include the requirement that the FIR must be lodged by a woman police officer, to remove the embarrassment of sharing intimate details with male officers in the first instance. This measure can be beneficial even though women officers may also have internalised misogynistic values or may adopt them as part of the institutional culture of the police.[457] Since misogyny is not

[455] CrPC, ss 169, 190.

[456] CrPC, s 190(1)(c) read with *Abhinandan Jha v Dinesh Mishra* (n 30).

[457] Similarly, women police officers in the USA sometimes cope with a male-dominated institutional culture by acting like 'one of the boys' as discussed in Tara O'Connor Shelley, Melissa Schaefer

monolithic, the response of women officers may still be influenced by their differences with the victim-witness, such as those along lines of caste. In addition, such a system may risk segregating women police officers such that their expertise is restricted to dealing with gender-based offences, prejudicing their chances for promotion.[458] Even so, being able to interact with another woman may enable the victim-witness to share private details about the incident. Further, research indicates that for countries with low levels of female representation in the workforce, encouraging participation of women officers for specific offences may be an effective stepping stone to achieving gender equality in policing.[459] As a matter of practice, depending on the capacity of the police station, women police officers may or may not be available to record the complaint.[460] In any case, lack of privacy at the police station can defeat the purpose of this reform. Male officers unrelated to the investigation often remain in the vicinity, gratuitously asking the victim-witness for details of the rape, resulting in her continued harassment.[461]

Morabito and Jennifer Tobin-Gurley, 'Gendered Institutions and Gender Roles: Understanding the Experiences of Women in Policing' (2011) 24 Criminal Justice Studies 351, 361-362.

[458] For a similar argument in the context of the USA, *see* ibid 357-358.

[459] Tim Prenzler and Georgina Sinclair, 'The Status of Women Police Officers: An International Review' (2013) 41 International Journal of Law, Crime and Justice 115, 117.

[460] Women constitute about 5.17% of the police force in India: ibid 126. This is so even though since 1997, 33% of new recruits to the police are required to be women: Mangai Natarajan, 'Police Culture and the Integration of Women Officers in India' (2014) 16 International Journal of Police Science and Management 124, 126.

[461] For similar observations in the USA, *see* Kurt Weis and Sandra S Borges, 'Victimology and Rape: The Case of the Legitimate Victim' (1973) 8 Issues Criminology 71, 103.

Along similar lines, the trial process has itself been reformed to make it easier for the victim-witness to testify. Trials are meant to be carried out *in camera,* paying due attention to the victim-witness' state of mind, such as by allowing her to testify through a live link, or to take breaks while testifying.[462] These measures are sometimes undermined in their implementation.[463] To illustrate, in recognition of the stigma a rape victim-witness might face, the rape trial is not a public process. Yet, the victim-witness is freely and publicly identified by the *naib*[464] while she is waiting in the court's corridor for her turn to testify, often with the defendant and his associates in close vicinity.[465] Theoretically, an *in camera* trial should afford the opportunity to record details of her rape privately and without inhibition. But a large group of people continues to stay in the courtroom through the testimony, including the judge, clerks, stenographers, the *naib,* the prosecutor, defence counsels, the DCW lawyer and any private lawyer the victim-witness may have hired. Most of these participants are men. Other people may walk in and out, such as the *ahlmad*[466] and private lawyers who want the judge to urgently consider a matter. In fact, where the defendant has the requisite economic resources, he will often be represented by a large group of four to six lawyers. In a perverse inversion of the 'equality of arms' that most fair trial guarantees

[462] CrPC, ss 273, 327(2); *Sakshi v Union of India* (2004) 5 SCC 518 [32] – [34].

[463] For an overview, *see* PLD Report (n 129) 26-47.

[464] Police officer attached to the court.

[465] In the English context, Claire Corbett and Kathy Hobdell point out that it can be damaging for the victim to share the waiting area with the defendant: Corbett and Hobdell (n 420) 54.

[466] Record-keeper for the court.

are based on, it is the prosecution that is comparatively under-resourced in these instances. Some judges are strict in these circumstances and request that only one or two members of the defence team be allowed to stay in court. Others are less particular.

Finally, it seemed at least some reforms were not being implemented at all. For instance, all disabled rape victim-witnesses are entitled to lodge the FIR at whatever place is convenient to them, and have the process videographed.[467] This can be of particular importance for those victim-witnesses who have communication difficulties, and who express themselves mainly through gestures and require 'alternative and augmentative modes of communication.'[468] While some cases in this study involved disabled victim-witnesses, there were none in which the police statement had been videographed. On occasion, there was a CD attached to the file, but this seemed to be the case even for non-disabled victim-witnesses. It later transpired that this was just a digital record of the paper file that was in court, perhaps to assist broader efforts to digitise court records.[469] A lawyer who specifically supports disabled victim-witnesses in the legal system corroborated that reforms aimed at

[467] CrPC, s 154(1).

[468] Amita Dhanda, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 Sur Revista Internacional de Direitos Humanos 42, 49. The extent to which this will be useful will depend on the nature of the victim's disability. However, Section 154(1) of the CrPC mandates video-recording of the statement for all victims who are 'temporarily or permanently mentally or physically disabled.' Till the police lack the expertise to assess which victims might find this measure helpful, the range of victims covered under this provision is arguably justified.

[469] Raj Kumar Bhardwaj describes the shift to a 'greater incorporation of information and communication technology' in Raj Kumar Bhardwaj, 'The Indian Judicial System: Transition from Print to Digital' (2013) 13 Legal Information Management 203.

disabled women often remain unimplemented, prejudicing chances of conviction at a later stage.

To address the issue of witness hostility, some lawyers interviewed strongly believed that those who gave false statements on oath should be prosecuted. The usefulness of such a measure is doubtful, unless the underlying reasons for the problem, as described above, are tackled first. A prosecution for perjury or related offences is not sensible given that victim-witnesses often make conflicting statements regardless of the authenticity of their accounts.[470] At any rate, the applicability of this measure to the context of sexual violence might be uniquely problematic. These offences are already marked by under-reporting, and the threat of such prosecutions might have a further chilling effect on complaints.[471]

To summarise, this chapter identifies that victim-witness hostility is one of the main factors associated with acquittals in rape prosecutions in Delhi. It then discusses two key themes connected to victim-witness hostility. First, drawing from scholarship on legal pluralism, it suggests that the victim's support to the defendant during her testimony is connected to her experiences outside the court. These experiences include threats posed by the defendant, the 'theft' of her dispute by her family and the

[470] A similar argument is made in respect of retracted statements in domestic violence cases in England over here: Susan S M Edwards, 'The Crime of Retracting a Truthful Statement R v A [2012] EWCA Crim 434' (2012) 24 Denning Law Journal 141, 141 discussing *R v A* [2012] EWCA Crim 434.

[471] Kevin Fleming, 'When Speech Isn't Free: Legal Barriers and Consequences of Reporting Sexual Violence' (Departmental Honors Projects Paper 21, Hamline University 2014) 21-25.

settlements she enters into with the defendant. All of these experiences are influenced by the cumulative and intersectional discrimination she might face based on her gender, class, caste, disability and other parameters. Secondly, the victim-witness might turn hostile to the prosecution in response to the secondary victimisation she faces in the legal system. This secondary victimisation can stem from the prejudicial attitudes of criminal justice agents, the frequent ambiguity surrounding their roles and the fragmentation of legal services. Statutory reforms are unable to tackle secondary victimisation on account of inadequate implementation. The following section argues that addressing the issue of witness hostility requires a more ambitious approach than piecemeal procedural modifications. It suggests that we need to move beyond focussing on sexual violence in the criminal justice system and turn to broader social justice concerns to deal with the root causes of witness hostility.

6. WHOSE CRIMINAL JUSTICE SYSTEM IS IT ANYWAY?

The introduction of support-measures for rape victim-witnesses in the legal system has not been an unremitting success. As this chapter has drawn out, in spite of the extensive reforms, the rape victim-witness' experience in the criminal justice system remains a difficult one. For instance, consider the account provided by one victim-witness of her interactions with the police:

Vignette 4.7
Following the defendants' attempt to rape her, Salma approached the police to complain about the incident. It took her about a week to get the complaint registered, because there was always something missing: she had only made a phone call and not

physically appeared at the police station;[472] she had not brought along her medical report;[473] the complaint was not in writing;[474] the Station House Officer was unavailable.[475] Ultimately, the FIR was lodged after the DCW intervened and got in touch with the Station House Officer. Yet, this was just the beginning. On several subsequent occasions, the Investigation Officer in her case suggested that she work out a compromise settlement with the accused persons – they could take further action if something happened the next time.[476] In the meantime, the accused persons assaulted her husband,[477] framed him in another criminal case,[478] caused extensive property damage to her godown,[479] continued to sexually harass her in public,[480] and started being sexually aggressive towards her 10 year old daughter.[481] They threatened that the next time would not be an attempt, they would rape her. Salma was frustrated with the lack of police protection. She had already been paying the police bribes (*hafta*[482]) so that she could run her godown without disruption from them. However,

[472] When a rape victim seeks to inform the police about the offence, there is no requirement for her to appear at the police station. This information – also known as the First Information Report or FIR – is to be recorded at the victim's residence or at any convenient place of her choice: CrPC, s 154(1).

[473] A medical report is not required to file a complaint in a rape case. In fact, the CrPC requires that the police must send her to a registered medical practitioner within 24 hours of filing the FIR: ibid s 164A(1).

[474] It is the police's responsibility to have the oral complaint reduced to writing. In rape cases, this process must also be videographed: ibid S154(1).

[475] Section 154(1) of the CrPC allows the Station House Officer to delegate the function of recording the FIR, since this can also be done 'under his direction.' In any case, if the Station House Officer is absent, his duties can be performed by the senior most police officer present in the police station who is next in rank to the Station House Officer: ibid s 2(o).

[476] Rape is not a 'compoundable' offence, i.e., rape cases cannot be settled outside of court: ibid s 320.

[477] Threatening someone to make them give false evidence, causing someone simple or grievous hurt, assault, use of force and criminal intimidation are all punishable offences under the IPC: IPC, ss 195A, 323, 325, 352, 506. Obstructing the administration of justice also amounts to criminal contempt of court as per s 2(c) of the Contempt of Courts Act 1971. The rape victim herself could also be prosecuted for accepting a gift in order to screen the offender: IPC, s 213.

[478] Giving false information to a police officer with the intent of causing them to use their lawful power to cause injury or annoyance to another person is an offence punishable by six months of imprisonment and/or a fine of up to one thousand rupees: IPC, s 182.

[479] A godown is a storage place for goods. Salma used it to sustain her 'kabaadi' business, where she collected discarded scrap paper or metal to resell later at low costs. She also lived with her husband and two children in the same place. Note that the destruction of property is punishable as 'mischief': ibid s 425.

[480] Sexual harassment is a punishable offence: ibid s 354A.

[481] Sexual harassment of children (persons under 18 years of age) is punishable under Section 12 of the Protection of Children from Sexual Offences Act 2012, read with Section 2(1)(d).

[482] The word *hafta* literally means 'week.' The colloquial usage refers to 'periodic protection payments by small businesspersons to police.': Beatrice Jauregui, 'Provisional Agency in India: Jugaad and Legitimation of Corruption' (2014) 41 American Ethnologist 76, 79.

she was aware that the accused persons were paying higher sums of money to the police to protect their illegal gambling centre and illicit drugs transactions. She knew she did not have comparable economic resources to 'buy' full police protection. She relocated to another residence and started exercising strict control over her children's movements. She had finally made contact with an NGO that was part of the CIC scheme after she proactively reached out to the DCW for help. Nine months after the incident, Salma did not know whether the chargesheet had been filed in her case (or indeed, what a chargesheet is).[483] She had been called to court several times but had never met the public prosecutor or any lawyer associated with the DCW.

What prevented Salma's unhindered participation in the system was only partially traceable to the legal system. Part of what obstructed her was her particular background as a working-class woman who lacked the social capital and economic resources to navigate a corrupt system. She did not enjoy the goodwill of the police because she could not afford to pay them hefty bribes. She needed support through the legal proceedings, but she also needed to continue working, and so that both she and her family could live a full life without constantly fearing the defendants or their associates. Since this support was not forthcoming, she resisted the defendants' intimidation in the ways accessible to her. She controlled her children's movements, started wearing the *burqa*[484] so that she could conceal her face while moving about and spent precious resources relocating to a new residence. The social inequalities she experienced made her experience in the criminal justice system that much more difficult.

[483] A 'chargesheet' is the popular term for the police report that is filed with the Magistrate empowered to take cognisance of the offence at the conclusion of the investigation under S 173 of the CrPC.

[484] A garment worn by some Muslim women in India, which covers their body and face.

This vignette is an illustration, which highlights the artificiality of driving a sharp wedge between criminal justice and social justice. This is because participation in the criminal justice system is heavily influenced by the inequality of resources enjoyed by the legal parties outside the criminal justice system. This is particularly true for postcolonial societies such as India, which are characterised by a thriving legal pluralism. Since social and legal dispute redressal mechanisms co-exist and influence each other, social inequalities are a particularly salient factor determining the course of legal proceedings. Within the legal system itself, the hurdles for members of marginalised groups can be insurmountable. This is because the starting point of the legal system is an assumption of equality between participants.[485] It assumes that participants have specific attributes. Default participants are non-disabled and non-impoverished. They can comply with the relevant legal formalities, and absorb the material costs of commutes, delayed compensation and frequent adjournments. They have not been alienated by the system on account of their gender, caste, religion or ethnicity. They are willing and able to avail themselves of the rights theoretically guaranteed to them and will choose the progress of the legal case over all other considerations and alternatives, especially where the alternative modes of settlement are illegal. Yet, this default participant is a construct of the system. Those who do not conform to this construction find themselves pushed out of the system and towards witness hostility. This inaccessibility of the criminal justice system can be

[485] This is described just as a starting point because concessions may subsequently be introduced, such as the procedural modifications discussed above, or the provision of legal aid.

compounded for rape victim-witnesses who have to deal with particular forms of alienation arising from a high acceptance of rape myths by criminal justice agents and support-persons.

Reforms intended to ensure fairer prosecution of rape cases have side-lined the connections between criminal and social justice. They have taken the form of much-needed but largely unambitious procedural modifications. Even these modifications assume the best intentions of the persons running the justice system. They do not adequately engage with critical scholarship that highlights the chequered or oppressive histories of the law in its interaction with marginalised groups. Deconstructing whose claims the criminal justice system is designed to process is imperative if we are to redesign institutions equipped to handle claims from all women, in all their heterogeneity.

Enabling the legal system to handle intersectional claims of violence must involve a recognition of the strong and inevitable link between criminal justice and social justice. These ideas may be distinct, but they are overlapping, interlinked and incapable of being compartmentalised. Ensuring fairer prosecutions in rape cases is therefore impossible without a broader social agenda to dismantle intersecting power structures that continue to operate outside and within the legal system.

CHAPTER FIVE: CONSENT, CONJUGALITY AND CRIME – RAPE BASED ON A 'FALSE' PROMISE TO MARRY

> Lawyer 1: I've handled a lot of cases of peculiar rape in India which is called as promise to marriage…somehow, in some part of mindset of people you still have that concept that I am supposed to offer my body to anybody only after, you see, I have [had vermilion put] on my head or a garland around my lousy neck[486] or something of that sort. So therefore, this promise to marriage thing comes into play. This is very much [distinctive] only to Indian society.
>
> Lawyer 2: A thing again you have to understand, an Indian woman…how illiterate they are. Sex is a very big thing for them. Still now. It's big thing for me as well…I might be talking …as a very liberated, and knowledgeable woman. But if I need to do it, I'll think twice. I'm sure for you also. I'm sure nobody can just go and sleep [with someone]. 'I need to have [sex], satisfy myself...' So for illiterate [women], sex is…something synonymous [with] marriage. Yeah? It is connected to marriage, for if I am sleeping with you, you have to [be] my husband. Only my husband can do it.

A kind of mythology has come to surround the 'peculiar' rape cases referred to in the above extracts from my interviews with lawyers. Rape laws are designed to punish the accused where he made a 'false'[487] promise to marry the victim in order to have sex with her. Unsurprisingly, 'men's rights activists' describe these cases as 'relationships gone sour' or 'false rape cases.'[488] Yet, some feminist lawyers and

[486] Customs associated with Hindu weddings.

[487] While caselaw from Indian courts repeatedly uses the phrase 'false promise of marriage', a promise, as an undertaking for the future, cannot be true or false. Only a factual assertion can be true or false. The phrase 'false promise' is used in the caselaw – and consequently in this thesis – to mean an insincere or deceptive promise. I am grateful to Professor Laura Hoyano for this insight.

[488] Geeta Pandey, 'Deepika Bhardwaj: The Woman who Fights for Men's Rights' (*BBC*, 20 January 2017) <www.bbc.co.uk/news/world-asia-india-38647822> accessed 18 April 2017.

activists have also challenged the idea that such conduct should be punishable as rape.[489] Is the defendant in such cases a rapist, or is he just a 'rogue'?[490]

This chapter provides a socio-legal analysis of rape prosecutions where the victim's sexual consent was based on a false promise to marry (hereafter 'promise to marry' cases). It begins by scrutinising the legal framework governing promise to marry cases. Drawing upon the interviews and court observation conducted for this thesis, it then critically discusses the operation of this law in the 84 promise to marry cases that were decided in Delhi between January and June, in 2014 and 2016. It identifies three main factors influencing the verdict in these cases – victim-witness hostility to the prosecution; the use of stereotypical judicial reasoning; and the unique nature of sexual consent in these cases, which is treated in a reductive manner during the investigation and trial. Further, it engages with the idea that promise to marry cases are an 'abuse' of rape laws by middle-class women. It then explores the perspectives of practitioners on the legitimacy of these prosecutions. Finally, it critiques the role of promise to marry cases in presuming, universalising and naturalising the idea that women's sexuality is only legitimate when articulated within a heteronormative, intra-communal marriage. Based on this discussion, it concludes that the use of criminal law is inappropriate in promise to marry cases.

---

[489] Aarefa Johari, 'Can Sex after a False Promise of Marriage be called Rape?' (*Scroll*, 18 April 2014) <scroll.in/article/661695/can-sex-after-a-false-promise-of-marriage-be-called-rape> accessed 18 April 2017.

[490] Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' (2014) 7 Criminal Law Review 492.

This contribution is timely. There is a burgeoning body of literature that asks the normative question of how sexual consent ought to relate to deception, but it uses a philosophical or doctrinal lens, rather than viewing the law in context.[491] Further, most of the existent work is anchored in jurisdictions outside South Asia. This is important, since the types of deceptions that are prosecuted are closely linked to social norms that define the limits of acceptable sex – a theme drawn out later in this chapter. Within South Asia, scholarship on this topic has called for greater clarity in dealing with cases of sexual deceit.[492] Other writers have focussed on the theoretical underpinnings of prosecutions and verdicts in these cases. For instance, Monica Sakhrani has suggested that judicial reasoning in promise to marry cases is heavily steeped in social norms about sexual morality.[493] Similarly, Dina Siddiqui, writing about analogous cases in Bangladesh, has suggested that rape complaints in these cases are filed for strategic reasons since 'it is less dishonourable to claim to be a victim of rape than to admit to consensual sex.'[494] Finally, Neetika Vishwanath has

[491] For example, Alex Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' (2016) 80 The Journal of Criminal Law 28; Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] Criminal Law Review 207; Jonathan Herring, 'Rape and the Definition of Consent' (2014) 24 National Law School of India Review 62; Laird (n 490); Rebecca Williams, 'Deception, Mistake and Vitiation of the Victim's Consent' (2008) 124 Law Quarterly Review 132; Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 Journal of Criminal Law 412; Hyman Gross, 'Rape, Moralism, and Human Rights' [2007] Criminal Law Review 220; Jonathan Herring, 'Human Rights and Rape: A Reply to Hyman Gross' [2007] Criminal Law Review 228; Jonathan Herring, 'Mistaken Sex' [2005] Criminal Law Review 511.

[492] Bronitt and Misra (n 55) 47.

[493] Monica Sakhrani, 'Reading Rape Post Mathura' (2016) 23 Indian Journal of Gender Studies 260, 272.

[494] Dina Siddiqi, 'Blurred Boundaries: Sexuality and Seduction Narratives in Selected 'Forced Marriage' Cases from Bangladesh' in Manisha Gupte, Ramesh Awasthi and Shradda Chickerur (eds), *Honour and Women's Rights: South Asian Perspectives* (1st edn, Masum Press 2012) 170.

demonstrated how the criminalization of promises of marriage is used to propagate regressive ideas of women's autonomy, reflecting 'the premium placed on a woman's chastity in Indian society'.[495] Taking its cue from the literature, this article provides a socio-legal exposition of the development of Indian criminal law in promise to marry cases.

1. THE LEGAL FRAMEWORK

As discussed in Chapter One, rape under Section 375 of the IPC covers incidents where the defendant engages in specified sexual activity with the victim 'without her consent.' Further, Section 90 provides a negative definition of consent and states that for the purposes of the IPC, consent is 'no consent if … given by a person under … a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such ... misconception.'[496] This section first provides an analytical account of the inconsistent High Court judgments on this issue until it was discussed in the Supreme Court ruling of *Uday*.[497] It then goes on to review more recent Supreme Court judgments in promise to marry cases.

1.1 High Court decisions in 'promise to marry' rape cases

Until 2003, there was conflicting High Court jurisprudence on whether prosecutions in promise to marry cases could lead to convictions for rape. There were three broad

[495] Vishwanath (n 367) 19.

[496] IPC, s 90. The word 'fact' includes 'mental conditions.': IEA, s 3.

[497] *Uday v Karnataka* (2003) 4 SCC 46.

categories of judgments: first, where Sections 375 and 90 were read together in order to recognise 'promise to marry' cases as rape; second, where Sections 375 and 90 were read together, but 'promise to marry' cases were not understood as rape; third, where decisions in 'promise to marry' cases were made solely under Section 375 with no discussion on whether or not Section 90 was applicable. This segment will discuss each of these positions in turn.

1.1.1 Intention of the accused as 'fact'

In *Jayanti Rani Panda*, a Division Bench of the Calcutta High Court held open the possibility that rape based on a false promise to marry could amount to rape on a joint reading of Section 90 and Section 375.[498] According to this line of argument, if the victim consents to sexual intercourse based on a misconception regarding the defendant's intention to marry her, and the accused knows or has reason to believe this was the case, then his conduct amounts to rape.[499] Thus, the judgment implies that 'fact' under Section 90 includes the fact of the accused's intention. However, it was held that the argument could not be made in respect of the specific facts of the case. In this case, the promise was vague and for a 'future uncertain date', so it could not be said that the victim could have seriously thought the defendant intended to marry

[498] *Jayanti Rani Panda v West Bengal* 1984 Cri L J 1535 upheld in *Hari Majhi v West Bengal* 1990 Cri LJ 650 [9]; *Araj Sk v West Bengal* 2001 CriLJ 416 [12]; *Sukumar Ghose v West Bengal* 1985 (2) Crimes 377, LAWS(CAL)-1985-6-15 [2].

[499] *Jayanti Rani Panda v West Bengal* (n 498) [6] – [8].

her.[500] Another fact that impelled the Court towards this conclusion was that she had not informed her family about her relationship with the accused. In the Court's words:

> But one thing that strikes us is that if she had really been assured of marriage by the accused who was visiting her house and in whose promise she had faith, why should she keep it a secret from her parents if really she had belief in that promise…If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact.[501]

The presumption here, that a woman would notify her family about a self-arranged marriage, overlooks the context where marriages of choice are often punished through social, and sometimes violent, sanctions.[502] Further, the Court ruled that it could not be conclusively said that the defendant never intended to marry the victim from the 'very inception.'[503] However, as a matter of textual interpretation, there is no justification for requiring that the defendant *never* intended to marry the victim. For instance, suppose that the defendant's promise was originally sincere, but over time he realised he was no longer interested in keeping it. Following this realisation, if he was aware that the victim's consent to intercourse is based on the promise of marriage, and then went on to sustain a sexual relationship with her, he

---

[500] Ibid [7].

[501] Ibid.

[502] Uma Chakravarti, 'From Fathers to Husbands: Of Love, Death and Marriage in North India' in Lynn Welchman and Sara Hossain (eds), *'Honour': Crimes, Paradigms and Violence Against Women* (1st edn, Zed Books 2005); Aloysius Irudayam, Jayshree Mangubhai and Joel Lee, *Dalit Women Speak Out: Violence against Dalit Women in India (Overview Report of Study in Andhra Pradesh, Bihar, Tamil Nadu/Pondicherry and Uttar Pradesh)* (National Campaign on Dalit Human Rights, New Delhi, 2006) 13.

[503] *Jayanti Rani Panda v West Bengal* (n 498); similar reasoning was applied by the same High Court in *Abhoy Pradhan v West Bengal* 1999 Cri LJ 3534.

should still be liable for rape according to the text of Section 90. Finally, while the Court emphasised that the promise was not specific enough for the victim to have consented on that basis, this conclusion also stretches the words of Section 90, which does not require the defendant to affirmatively make a deceptive representation at all.[504] While the defendant must be aware of (or have reason to believe) at the time of intercourse that the consent is based on a misconception, he need not be the person responsible for having brought it about. To that extent, the Court in *Jayanti Rani Panda* read in two preconditions to the application of Section 90 without providing any legal justification for them: that the promise of marriage was false from the very inception, and that the misconception of fact was a consequence of a clearly worded misrepresentation from the accused. The above reasoning in *Jayanti Rani Panda* was upheld by the High Courts of Andhra Pradesh[505] and Karnataka.[506]

1.1.2 Exclusion of promise to marry cases from Section 90

A second strand of cases recognised the relevance of Section 90 for Section 375 but held that consent based on a false promise of marriage could never be understood as consent negated by a 'misconception of fact'. For instance, *Jayanti Rani Panda* was

[504] Alex Sharpe has challenged the view that the difference between 'active' and 'passive' deception is a meaningful one: Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' (n 491); *see also* Williams (n 491) 145.

[505] *Suram Kiran Kumar Reddy v AP* 2002 (2) ALD (Cri) 835 [6] quashing a charge against the accused, expressly relying on *Jayanti Rani Panda v West Bengal* (n 498).

[506] *Karnataka v Anthonidas* ILR 2000 Kar 266 [1] upheld in *Kumaresh Chikkappa Bagodi vs State* 2002 (3) Kar LJ 609 [12]. See also *Honayya v Karnataka* 2000 (5) Kar LJ 57.

erroneously construed by a Patna High Court judge of ruling out that possibility.[507] A single judge of the Jharkhand High Court similarly held:

> The man promised to marry her: she believed his promise, rightly or wrongly, foolishly or intelligently and based on such belief, she started having sexual intercourse with [him], by giving consent to the same and she being a willing party to this act, in such a situation, it cannot be said that such consent was given under any misconception of any fact...Rather, if one treats the issue from the moralistic point of view, one can say that the act of the woman in giving consent for sexual intercourse at a premarital stage…can be called an immoral and sinful act because under our social ethos, norms and values, an unmarried woman is not to have sexual intercourse with anyone…[508]

Both judgments indicated that the victim knew, or ought to have known that there was a chance that a promise of this nature would not be honoured.[509] The Jharkhand High Court's remarks on the permissible sexual conduct of women in 'our social ethos' is a strong indication of why the Court reached this conclusion – the acquittal of the defendant seems to be based upon an adverse moral judgement made of women who engage in pre-marital sexual relations, irrespective of whether a promise to marry has been made or not. In theory, one could argue for a restricted application of 'fact' under Section 90 based on purposive interpretation, suggesting that given the nature of the offence and the purpose of rape legislation, only certain kinds of misconceptions

---

[507] *Mir Wali Mohammad v Bihar* 1991 (1) BLJR 247 dealing with an appeal against a Magistrate's order to commit a case to a sessions court for a rape trial. In another case from the same High Court, the accused was found guilty, but the victim was under age and it is not clear from the judgment what role the promise of marriage played, if any: *Jaldhar Mandal v Bihar* 2001 (1) PLJR 598.

[508] This was an order dealing with a revision petition filed against a judgment acquitting the accused. The High Court indicated that it endorsed a slightly different 'point of view' from *Jayanti Rani Panda v West Bengal* (n 498): *Sarimoni Mahto v Amulya Mahto* 2002 Cri LJ 3271 [7], [9].

[509] A similar argument raised by Hyman Gross has been identified as victim-blaming by Jonathan Herring: Gross (n 491) 224-225; Herring, 'Human Rights and Rape: A Reply to Hyman Gross' (n 491) 231.

will vitiate sexual consent and inflict the harm of rape on the victim.[510] The judgments themselves are unclear about what the legal basis is for distinguishing this particular misconception (regarding the intention of the defendant to marry the victim) from other forms of misconception of fact that would fall within the ambit of Section 90.

1.1.3 Section 375 as a self-contained definition of rape

A third category of High Court judgments failed to recognise the role of Section 90 in determining liability in 'promise to marry' cases. Typically, the Courts based their discussion of consent solely on the facts and held that the sexual act was consensual, particularly where the victim understood the nature and implications of what she was doing.[511] This was the case even where 'had the accused not promised [the victim] to marry her, [the victim] would not have agreed to have sexual intercourse with him.'[512] At the time when these decisions were delivered, the only definition of 'consent'

---

[510] For instance, in England and Wales, under Section 76 of the Sexual Offences Act 2003, in line with the position in common law, there is a conclusive presumption that the victim did not consent and the accused had the relevant *mens rea* only in two cases of deception: where the defendant deceived the victim as to the nature or purpose of the act, or he induced sexual consent by impersonating another person known to the victim. However, there remains the possibility that other cases of deception can still be prosecuted as rape by relying on the general definition of consent under Section 74 of the Sexual Offences Act 2003 ('… a person consents if he agrees by choice, and has the freedom and capacity to make that choice'): *see* Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Criminal Law Review 328; Home Office, *Protecting the Public: Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences* (White Paper, Cm 5668, 2002) 16.

[511] *Sudhamay Nath v West Bengal* 1999 Cri LJ 4482 [10]. In *MC Prasannan v State* 1999 Cri LJ 998 [9] a Division Bench of the same High Court did not invoke Section 90, but held 'The victim categorically stated that the accused assured to marry her, she Indulged in committing sexual Intercourse and had the accused not promised to marry her, she would not have Indulged in committing sexual Intercourse with her by the accused. This evidence clearly goes to show that the victim willingly and with full consent had sexual Intercourse with the accused.' See also *Baldhari Odhar v Bihar* 2001 Cri LJ 883; *Thepar Singh v UP* 2002 Cri LJ 612 [7].

[512] *Lingam Govindarao v AP* 1998 (1) ALD 525 [4].

under the IPC was available under Section 90.[513] Given the centrality of consent to the crime of rape, to the extent that these judgments fail to consider Section 90, arguably they were made *per incuriam.*

1.2 The Supreme Court on Section 90: What's love got to do with it?

The possibility that the promise to marry cases could be brought within the domain of rape law was first entertained by the Supreme Court in the *Bodhisattwa Gautam* case.[514] In this case, the defendant was the victim's lecturer and had sex with her based on the assurance of marriage.[515] To further deceive her, he later also conducted a 'secret marriage' with her, by putting vermilion on the victim's forehead, a practice associated with married Hindu couples.[516] According to the victim's complaint, she regarded herself as his wife thereafter and when he had abandoned her, complained to the police about him.[517] The case is held out as a landmark decision for recognising the power of courts to award interim compensation in rape cases.[518] However, the victim did not claim to have been raped in her complaint, and no charge was framed under Section 376 of the IPC.[519] Further, while the Supreme Court understood this

[513] As noted in Section 3.3 of Chapter One, Section 375 of the IPC now defines consent in positive terms.

[514] *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490.

[515] Ibid [1].

[516] Ibid [1].

[517] Ibid [1].

[518] Gaur (n 69) 678; Usha Tandon, 'Constitutional Justice and Social Integration with Special Reference to Women: An Indian Experience' (2015) 5 Yonsei Law Journal 97, 108-109.

[519] *Bodhisattwa Gautam v Subhra Chakraborty* (n 514) [1].

primarily as a rape case,[520] it is not clear from the judgment if this was a reference to rape based on the assurance of marriage, prosecutable on a joint reading of Sections 375 and Section 90.

The first appeal against conviction in a promise to marry case was *Uday*.[521] The victim claimed to have given her consent to sexual intercourse with the defendant based on a promise of marriage.[522] They had sex about 15 to 20 times, and she became pregnant with the accused's child.[523] The defendant kept assuring her that he would marry her but postponed the ceremony based on one pretext or another.[524] In the eighth month of her pregnancy, the victim lodged a rape complaint against the defendant.[525] He was convicted in the trial court and on appeal, the conviction was upheld by the High Court, leading to the appeal before the Supreme Court.[526] Reviewing the High Court authorities before it, a Division Bench of the Supreme Court held:

> …the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether

---

[520] Ibid [10] - [20].

[521] *Uday v Karnataka* (n 497).

[522] Ibid [3].

[523] Ibid.

[524] Ibid [4].

[525] Ibid.

[526] Ibid [1].

> consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact.[527]

While the Court seemed to indicate that Section 90 was inapplicable ('A false promise is not a fact within the meaning of the Code'), it nonetheless justified its acquittal based on its reading of the definition of consent under Section 90. It was hesitant to lay down a general test but based on the following factors, it ruled that the intercourse was consensual: first, the victim was in love with the defendant and probably gave sexual consent on this basis;[528] second, the victim was from a lower caste than the defendant and must have known that as a result 'marriage was not possible';[529] third, the victim was a well-educated adult who had 'sufficient intelligence to understand the significance and moral quality of the act she was consenting to' and this was why she had concealed the sexual relationship from her family;[530] fourth, it could not be said that the defendant never intended to marry her;[531] fifth, it had not been proved that the defendant knew, or had reason to believe that her sexual consent was based on the promise to marry, rather than the fact that they were 'deeply in love.'[532]

The reasoning in *Uday* raises more questions than it answers. To begin with, *Uday* unhelpfully views the victim's love for the defendant and the promise of marriage as

---

[527] Ibid [22].

[528] Ibid [24], [26].

[529] She was of Gounder caste and he was a Daivanya Brahmin boy: ibid [2], [24].

[530] Ibid [24].

[531] Ibid [25].

[532] Ibid [26].

two mutually exclusive criteria for consent. As per *Uday*, if the consent was partly motivated by the victim's love for the defendant, it does not matter if it would nonetheless not have been given without the promise of marriage. Thus, according to the Supreme Court, a false promise to marry negates the consent only where it was the *sole* reason for the victim's consent. Section 90 only requires that the consent be given 'in consequence of' the misconception, not that it be given 'solely' in consequence of' the misconception. To require that the consent be based exclusively on the promise of marriage is not justified according to the text of Section 90 and was not justified by the Court according to any other principle of statutory interpretation. Indeed, victims are more likely to be convinced about an offer of marriage if they have an ongoing romantic relationship with the defendant.

Second, the Court's ruling is premised on the impossibility of inter-caste marriage.[533] It is not disputed that inter-caste marriages remain uncommon.[534] While the prohibition on caste exogamy has historically been used to maintain and reproduce the caste system, inter-caste marriage remains a legal – though socially subversive – form of marriage.[535] The victim in this case was aware that the marriage

[533] Ibid [24].

[534] Anupama Rao, 'Understanding Sirasgaon: Notes Towards Conceptualising the Role of Law, Caste and Gender in a Case of "Atrocity"' in Anupama Rao (ed), *Gender and Caste* (1st edn, Zed Books 2005) 292. In a survey conducted on youth attitudes across 19 states including respondents between 15 to 34 years of age, it was found that 'one-third of the Indian youth (36%) still considers inter-caste marriage to be completely wrong. About a quarter (23%) saw them as being partially right, and only one-third fully approved of them.': Lokniti, *Key Highlights from the CSDS- KAS Report 'Attitudes, Anxieties and Aspirations of India's Youth: Changing Patterns'* (Centre for the Study of Developing Societies and Konrad Adenauer Stiftung, 2017).

[535] Chakravarti (n 502) 309; Leela Dube, 'Caste and Women' in Anupama Rao (ed), *Gender and Caste* (1st edn, Zed Books 2005) 242.

might be opposed because she was from a different caste to the defendant, and pointed this out to him.[536] However, given that the defendant nevertheless assured her of marriage, this does not automatically lead to the conclusion that she either knew, or should have known that the marriage was 'not possible.'[537] To suggest this is to legitimise, naturalise and universalise the principle of caste endogamy.

Third, the Court relied on the fact that the victim understood the 'significance and moral quality' of her act, and therefore hid the sexual relationship from her family.[538] There is no reason that the victim should decide on the issue of intercourse without engaging in a conscious decision-making process which factors in the nature and significance of her acts.[539] In fact, only when such a decision-making exercise is carried out can it be said that the decision (to have sex) was a result of the misconception (regarding the accused's intention), as required by Section 90. Thus, a conscious decision-making process should not exclude the case from the ambit of Section 90; rather it should be viewed as a necessary pre-requisite to the application of Section 90.

---

[536] *Uday v Karnataka* (n 497) [24].

[537] Irudayam, Mangubhai and Lee (n 502) 4. In fact, since 26 January 2016, Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 recognises that an upper caste man may be specially situated to dominate the will of a woman from a Scheduled Caste or Tribe. Scheduled Castes and Tribes are notified by the Parliament under Articles 341 and 342 of the Constitution of India 1950. They are historically oppressed groups and the State is under a duty to protect them from 'social injustice and all forms of exploitation' under Article 46 of the Constitution.

[538] *Uday v Karnataka* (n 497) [24].

[539] This is how *Uday* was interpreted in subsequent cases such as *Deelip Singh v Bihar* (2005) 1 SCC 88 [31] – [33] and *Kaini Rajan v Kerala* (2013) 9 SCC 113 [14].

In addition, the Court continued its insistence on the promise to marriage being false from the very outset, as critiqued above.[540] The ruling in *Uday* was cited with approval by the Division Bench in *Deelip Singh*, where the Court reiterated that in theory, Section 90 could be invoked by a victim in a promise to marry case, and characterised *Uday* as an extension of *Jayanti Rani Panda.*[541] However, in this case the defendant was acquitted since the Court found that he had intended to marry the victim, but ultimately was unable to 'on account of the pressure exerted by his family elders.'[542]

The *Deepak Gulati* judgment added that the prosecution's case is weak where the defendant is still willing to marry the victim when proceedings are initiated against him.[543] Subsequently, in *Prashant Bharti* the Supreme Court quashed all proceedings against a defendant who was facing rape charges based on the complaint of a victim who was already married to someone else, saying that the victim's claim was 'per se false and as such, unacceptable.'[544] The age of the victim can also be taken by the Court as an indication of how worldly wise she is, and to what degree she could have been duped by the defendant's promise of marriage:

---

[540] *See* Section 1.1.1 of this chapter. Even where the Court accepts that the defendant's intention was never to marry the victim, it usually uses generic phrases such as 'apparent from the evidence on the record' to justify its assertion: *UP v Naushad* 2014 Cri LJ 540 [10] – [11].

[541] *Deelip Singh v Bihar* (n 539) [29].

[542] Ibid [36]. Notably, in a subsequent case with similar facts, the fact of family opposition was not accorded any significance by the Court: *Yedla Srinivasa Rao v AP* (2006) 11 SCC 615 [2], [6].

[543] *Deepak Gulati v Haryana* (2013) 7 SCC 675 [24].

[544] *Prashant Bharti v Delhi* (2013) 9 SCC 293 [16], [20].

> Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.[545]

In *Thimmappa Gowda*, one of the factors that led the Court to decide that sex was consensual, rather than based on the promise to marry was that there were multiple occasions on which sexual intercourse took place.[546] However, if there is a romantic relationship between the victim and the defendant, it is likely that there will be multiple sexual incidents.[547] Each of these can realistically be linked back to the promise of marriage. The Court's one-line analysis on the point did not engage with the unique nature of promise to marry cases in this respect. Perhaps the Court was motivated by its previous ruling in *Uday*, where it was held that if the victim based her consent on the twin motivations of love for the defendant and his promise of marriage, Section 90 would anyway not apply. Ultimately, the Supreme Court has upheld *Jayanti Rani Panda* but has supplemented it over the years with guidance on testing the sincerity of the promise of marriage, the weight attached by the victim to the promise, and the defendant's understanding of the victim's consent.

---

[545] *Tilak Raj v HP* (2016) 4 SCC 140 [20].

[546] The other factors were that there was an 18 month delay in the filing of the complaint and the victim was 18 years old at the time of the incidents: *KP Thimmappa Gowda v Karnataka* AIR 2011 SC 2564 [13].

[547] John Stannard, 'The Emotional Dynamics of Consent' (2015) 79 Journal of Criminal Law 422, 433.

2. APPLYING THE LAW IN DELHI DISTRICT COURTS: 'REAL RAPE' IN THE CONTEXT OF PROMISE TO MARRY CASES

In light of the interviews and court observation conducted, this section examines the application of the law in promise to marry cases in Delhi district courts. Using the total population of judgments in promise to marry cases delivered between January and June in 2014 and 2016, it will explain the factors associated with acquittals in promise to marry cases. These include the high proportion of cases in which the victim-witness turns hostile to the prosecution,[548] the prevalence of a stereotypical narrative around what a 'real' promise to marry case is; and complications around how the victim is cross-examined on the issue of consent.[549]

2.1 Proportion of 'promise to marry' cases

Of the 254 cases in the dataset, 84 (or 33.1%) were promise to marry cases. Of these, only three resulted in a conviction (3.6%). In 48 out of the 84 cases (57.1%) there was an allegation of rape in addition to the allegation of rape based on the promise to marry – for instance, that the first time the defendant committed rape was by using force, or intoxicants. Often, the reason these incidents, which preceded rape based on promise to marry, were not reported was because the defendant subsequently promised to marry the victim. These cases nonetheless usually still led to acquittals once the promise to marry allegations were not found to be credible, for the reasons

[548] *See* Section 2 of Chapter Four, which analyses the concept of a hostile witness in the Indian context.

[549] *See* Section 1.1 of Chapter Two, which reviews the literature on 'real rape.'

discussed below. The credibility of the victim was thus usually assessed in a holistic way rather than on the issue of each allegation separately.

The actual proportion of promise to marry cases in the data set presented a stark contrast to the estimates made by most members of the bar – including prosecutors, as well as advocates empanelled with the DCW or the DLSA. Many of these professionals thought that the proportion of rape cases involving a promise to marry typically ranged between 90% and 99%. Even where interviewees did not suggest a figure, they claimed that the system is 'clogged' by these cases or that promise to marry cases were 'most of the cases' they encountered. Estimates made by victim-support personnel were more modest, with one CIC counsellor[550] suggesting that about 30% of the rape cases in Delhi are promise to marry cases – very close to the actual proportion. The head of one NGO that provides support to rape victims asserted that they were not common. However, most lawyers and victim-support workers alike considered that they were a distinct, problematic category of cases.

2.2 Relationship between the victim and the defendant

In the cases studied, the victim and the defendant had met in a variety of ways: they were introduced to each other through common friends (15) or family (8); they met at the workplace (14), including as colleagues (5), or while in an employer-employee relationship (4); they lived in the same locality (12); they were related to each other

[550] These are counsellors appointed by the DCW to assist every rape victim who files a complaint before the police, as discussed in Section 5 of Chapter Four.

(7);[551] one had purchased goods or services from the other (5); they met at the victim's place of education (4), including while in a teacher-student relationship (2); through a social networking website (4); or in other ways (9). In 12 cases, the way in which the relationship between the victim and the defendant began was not clear.[552] While in some cases the victim and defendant were living with each other, in others they were in non-cohabiting, intimate relationships.

Fifteen of these relationships began after the victim had clearly indicated that she was not interested in a relationship with the defendant.[553] This might happen for a range of reasons. In one case, the defendant told her that he loved her and 'if she will not accept his friendship he will commit suicide.'[554] In another case, the defendant repeatedly visited the victim's residence while drunk and stated that he liked her, while threatening that he would keep visiting her house until she agreed to be his friend.[555] Two victims who were interviewed for this study indicated they repeatedly refused offers of friendship from the defendant because they were only interested in relationships that would culminate in marriage and they were explicit about this from the outset. For both, this made the refusal of marriage at a later stage even more

[551] These family relationships were distant enough that the victim and defendant were still legally allowed to marry each other. There are also some laws under which marriage to members within the family is expressly permitted. One example is Section 5(iv) of the Hindu Marriage Act 1955.

[552] The total number of cases exceeds 84 because in many cases, multiple categories of introductions were applicable.

[553] Notably, '[a]ny man who follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman' commits the offence of stalking under Section 354D of the IPC.

[554] *State v Mandeep* SC Number 1811/2016 (Special Fast Track Court, Karkardooma Courts) [1].

[555] *State v Kamal Chaurasi* SC Number 129/13 (Special Fast Track Court (West), Tis Hazari Courts) [55].

egregious. One victim recounted that the defendant had sworn that he would 'live and die' only with her, and she was the only one he could ever marry. Half a year later, he abruptly ended the relationship, saying he was engaged to someone else. The victim felt particularly violated because she had repeatedly rebuffed his advances until he had vowed that he wanted to marry her.

2.3 Reasons for acquittal

This section identifies and discusses three factors responsible for a high acquittal rate in promise to marry cases: the victim-witness' refusal to support the prosecution; the stereotypical narrative of what a 'real' promise to marry case should look like; and the inability of the prism of consent to accurately describe the victim's experience.

2.3.1 Hostile witnesses

In 54 of the 80 cases (67.5%), the acquittal was primarily based on the victim-witness turning hostile in court.[556] In 31 out of the 80 cases (38.8%), the victim-witness was married to the defendant at the time she testified. Marriage to the defendant was never acknowledged as the reason for testifying contrary to her earlier statements. Victim-witnesses claimed to have filed the original complaint because of anger (15), depression (11) or family pressure (3) – often in cases where the defendant or his family were opposing the marriage. Nine victim-witnesses claimed that they had some other grievance against the defendant, but this had been recorded as a rape

[556] The concept of hostile witnesses has been analysed in Section 2 of Chapter Five.

complaint, without their knowledge by the police (4), by the typist recording their complaint (4), or their lawyer (1). In other cases, victim-witnesses claimed that they had had some other altercation with the defendant and had been encouraged to file a complaint against him by the police (4), or by other well-meaning friends or acquaintances (6). There were 14 cases where the victim-witnesses said that they thought they had been raped as the result of a deceptive promise to marry at the time they complained, but the defendant later proved them wrong by reconciling with or marrying them. In one case, the victim-witness had filed a complaint because her relatives were defaming her, saying she had had sex with the defendant for money. In another case, the reason the victim-witness turned hostile was not clear.[557]

Where victim-witnesses reconcile with the defendant by the time of their deposition, they usually reject the possibility that the defendant married them solely to evade punishment for rape, at least on the record. For instance, when the victim-witness in one of the cases in the data set was confronted by the prosecution with this suggestion, she defended the accused saying that he had married her without any knowledge of the complaint against him.[558] While this may have been the case, it could also be an attempt to pre-empt the unlikely, but possible, conviction for the defendant. Victim-witnesses are usually aware that the marriage can be a result of the complaint. In one case observed for this study, the prosecutor suggested to a hostile victim-

[557] The total exceeds 54 because in many cases, there were multiple reasons at play. For a more general exposition of why victims turn hostile regardless of the veracity of their complaints, refer to Chapter Four.

[558] *State v Puneet Sharma* SC Number 10/16 (Special Fast Track Court, Patial House Courts) [9].

witness that the defendant was marrying her only to evade criminal liability. The victim-witness shrugged and said that at least he was marrying her. She was positive that things would improve once the case concluded. Lawyers and counsellors indicated that in many cases, marriage with the defendant is the victim-witness' primary motivation in filing the complaint.[559] This was confirmed by one of the two promise to marry victim-witnesses interviewed for this study. In the words of one CIC counsellor:

> And what often happens in these cases is, that the victim is very rigid. 'No, he is the only one I want to marry.' Our role is not to get them married…if you force him to marry you, then your relationship will not survive for a long time. Because if this boy has come right up to the police station [to resist the relationship], he is not going to survive well with you. Then these cases will get reported back as domestic violence cases. Then there will be a divorce. You will continue to suffer the same way…In all these cases, the only objective of the girl is to marry the boy. Mostly. If you interact a little bit with the victim, she will tell you on her own.

These cases are best understood by reference to the social understanding of the '[heteronormative] marital relationship as the exclusive site of legitimate sexuality.'[560] The centrality of marriage in large parts of Indian society is coupled with a condemnation of women engaging in sexual conduct of any kind, such that a breach of promise is experienced by many women as rape.[561] In these relationships, women have often been subjected to violence – including emotional, physical and financial

[559] This has also been observed of victims in promise to marry cases in Bangladesh: Siddiqi (n 494) 174.

[560] Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (1st edn, Sage Publications 1996) 123.

[561] Similar findings have been reported in the past from rural Sri Lanka: Ameena Hussain, *Sometimes There is No Blood: Domestic Violence and Rape in Rural Sri Lanka* (International Centre for Ethnic Studies, 2000) 29.

abuse – but it is the breach of promise that is regarded by them as the most serious violation.[562] For instance, of the cases in the dataset, 22 victim-witnesses (26.2%) alleged that they had been forced by their 'partner' to terminate one or more pregnancies. While many of these abortions were brought about through force or deception, in other cases, the defendant threatened to break off the engagement if the victim-witness insisted on continuing with the pregnancy. In an interview, a deeply religious Catholic victim-witness in a promise to marry case indicated that the forced abortions she underwent were experienced by her as particularly traumatic since they were forbidden by her faith. Yet none of these cases were reported until it was clear that the defendant refused to marry the victim-witness.

The factors that make it difficult for women to leave abusive relationships may be intrapersonal, relational or social.[563] Intrapersonal factors are experiences or traits associated with a specific victim, such as whether her parents are divorced, or whether she witnessed violence while growing up.[564] Relational factors are linked to the nature

---

[562] Anjali Dave, Yashoda Pradhan and Taranga Srirama, 'Changing Forms of Violence: Struggles in Non-Marital Intimate Relationships: A Study of the Experiences of Intervention at the Special Cells in Mumbai' Tata Insitutite of Social Sciences 2015 <www.esocialsciences.org/NeweSS/Articles/show_Article.aspx?qs=bGp0Ut9EHmCw/EpGtd/DaOq4y1LLX06ZTOar4K0Fq6M=> accessed 18 April 2017; Shruti Ravindran, 'Halting the Blow of Domestic Violence in India' (*Al Jazeera*, 4 August 2016) <www.aljazeera.com/indepth/features/2016/07/halting-blow-domestic-violence-india-160701121800822.html> accessed 18 April 2017.

[563] April Few and Karen Rosen, 'Victims of Chronic Dating Violence: How Women's Vulnerabilities Link to Their Decisions to Stay' (2005) 54 Family Relations 265, 267.

[564] Helen Hendy and others, 'Comparison of Six Models for Violent Romantic Relationships in College Men and Women' (2003) 18 Journal of Interpersonal Violence 645; Joseph Vandello and others, 'Stand by Your Man Indirect Prescriptions for Honorable Violence and Feminine Loyalty in Canada, Chile, and the United States ' (2009) 40 Journal of Cross-Cultural Psychology 81.

of the relationship, such as her own commitment to the relationship.[565] Social factors relate to the environmental context of the victim-witness, such as whether she has a social support system to fall back on, which may be through her family or through a larger community that she belongs to.[566] In promise to marry cases, relational factors acquire salience, since the relationship between the victim-witness and the defendant is often 'intensified by romantic fusion.'[567] Decisions to leave may be harder to make where the abuse is intermittent, and the violence is 'often countered with the onset of positive, warm and affectionate behaviors,'[568] as is likely in an abusive, intimate relationship. While it is not a marital relationship *per se* that is at stake, 'the emotional, physical and financial investment in the relationship is similar, if not the same, as in a marital relationship.'[569]

Similarly, social factors might be particularly relevant. While forcing the victim-witness to cut off social ties is itself a form of abuse,[570] social isolation can characterise relationships in these cases even when not caused by the defendant. The victim-witness is likely to be facing ostracism from her family and community for entering into a relationship of her own choice, especially (though not exclusively) where the

---

[565] Few and Rosen (n 563) 267.

[566] Ibid.

[567] Ibid.

[568] AJZ Henderson, K Bartholomew and DG Dutton, 'He Loves Me; He Loves Me Not: Attachment and Separation Resolution of Abused Women' (1997) 12 Journal of Family Violence 169, 173.

[569] Dave, Pradhan and Srirama (n 562) 17-18.

[570] Alison Towns and Hazel Scott, ''I couldn't even dress the way I wanted.' Young Women talk of 'Ownership' by Boyfriends: An Opportunity for the Prevention of Domestic Violence?' (2013) 23 Feminism and Psychology 536, 548-550.

defendant belongs to a different caste, class, sect or religion.[571] This heightens the victim-witness' vulnerability, and she may feel that she must prove the relationship is a success, since she has already made many sacrifices to be with the defendant.[572] Thus, while it is common for women in abusive relationships to feel that they have to 'make good on 'prior investments'',[573] the 'investment' is often particularly high where the victim-witness has incurred strong family and societal disapproval and prejudiced her own marital prospects to be with the defendant.[574] This explains not just why the report is made only when the relationship ends, but also why the victim-witness, even in lodging a rape case, often seeks reconciliation and marriage rather than retribution.

Counsellors typically expressed frustration with this category of victim-witnesses, since it is common knowledge that they are unlikely to support the prosecution if the defendant marries them. One counsellor articulated her concerns as follows:

> What I mean to say is, the victim should be stable in her statement. If you [complain], don't be scared, right? The time for being scared is past by then. The police will not protect you endlessly as an individual, right? Suppose the police protects you for some time, but the accused ends the relationship again. The relationship has ended again right? I mean, if you have complained to the police, then simply say 'I want to have him punished.' Don't get diverted. 'If he marries me, only then is [acquittal] possible.' Don't keep such terms and conditions. Simply say, 'I want him to be punished because he has raped me. He was in a relationship with me for three years, and after having sex with me, he refused to marry me…' Just get him punished in a straightforward way.

---

[571] Sharmila Rege, 'A Dalit Feminist Standpoint' in Anupama Rao (ed), *Gender and Caste* (1st edn, Zed Books 2005) 93; Chakravarti (n 502).

[572] Dave, Pradhan and Srirama (n 562) 7.

[573] Joel Brockner and JZ Rubin, *Entrapment in Escalating Conflicts* (1st edn, Springer-Verlag 1985) 5; Few and Rosen (n 563) 266.

[574] Dave, Pradhan and Srirama (n 562) 7.

The inconsistency was one of the many reasons for the high degree of scepticism directed at these victim-witnesses. However, often, the inconsistency is unrelated to the veracity of the complaint. It is an indication that what some victim-witnesses want out of the process (marriage) is not for the criminal legal process to provide.

2.3.2 Unreliable victims: Promise to marry v 'Real' promise to marry

In 27 out of 79 'promise to marry' cases (32.1%), the defendant was acquitted because the victim's testimony was found not to be reliable. Assessments of the victim's credibility were often based on regressive ideas about conjugality.

Chapter Two engaged with scholarship that discusses the use of prejudicial reasoning in rape adjudication more generally. Specifically, it elaborated upon the idea of a 'real rape', which refers to the only believable rape scenario in judicial and popular imagination.[575] The term was coined by Susan Estrich, commenting on rape prosecutions in the USA in the 1980's.[576] In her account, a 'real rape' is one in which a victim from a socially dominant group is violently raped by a perpetrator from a socially oppressed group in an obscure place, with the use of weapons.[577] Attributes of a 'real rape' will vary according to the time and place in question.

In line with this literature, the judgments in the data set demonstrated the use of stereotypical reasoning. However, the set of stereotypes that emerged from reading

[575] *See* Section 1.1 of Chapter Two.

[576] Estrich (n 119).

[577] Ibid.

these judgments was distinctive and unlike those that have been discussed so far in the wider literature – they related specifically to what counts as a socially acceptable marriage. Accordingly, the question sought to be answered in this section is: what is a 'real' promise to marry rape? Based on the court observations, interviews, judgments and secondary literature used for this thesis, this scenario can be framed as having the following attributes:

1. The victim was impoverished, ill-educated, from a rural background and of the same religion, caste and or religious sect as the defendant. She had never been married before.
2. The defendant was unmarried when he made the promise of marriage.
3. The couple had informed and sought the blessings of their families.
4. The victim did not have any romantic or sexual feelings for the defendant and had sex with him for no other reason than the promise of marriage.
5. There was only one incident of sexual intercourse, and it was reported without 'delay.'

While aspects of this scenario have been discussed elsewhere in this chapter, the data demonstrated how appellate court rulings are understood and re-interpreted by lower courts. Thus, while the judgment in *Uday* assumed the impossibility of inter-caste marriage,[578] it is mirrored in arguments made before lower courts which similarly assume the impossibility of marriage across religious lines. For example, in

[578] *Uday v Karnataka* (n 497) [24].

one case involving a Muslim victim and a Hindu defendant, the court observed that 'prosecutrix was well aware of the fact that the family of the accused might not be agreeable for her marriage because of their belonging to different religion[s].'[579] In another case, the court applied the same logic to ethnic and linguistic difference and held that the victim should have known that the promise 'may not be fulfilled on account of [the] fact that they both belong to different community/tribe and they speak different dialect[s].'[580] As described above, this is based on the logic of endogamy, which seeks to consolidate and maintain social hierarchies through the control of sexual choices.[581] It amounts to telling a victim that she should have anticipated that she would be discriminated against. It is also worth considering how far this logic can be stretched. A victim whose promise to marry case was pending at the time revealed that the defendant had refused to marry her because she was 'too dark,' even though they otherwise belonged to the same social group. Would the court be able to claim, analogous to the cases above, that the victim should have expected that the defendant would reject marriage with her based on racist 'beauty' standards?[582]

Further, *Prashant Bharti* has made it almost impossible to convict the accused in a promise to marry case where either party is married. In 23 out of 84 cases (27.4%) in

---

[579] *State v Gaurav Bhatia* SC number 7/15 (Special Fast Track Court, Patiala House Courts) [28].

[580] *State v Thianmin Thang Tonsin* SC Number 42/15 (Special Fast Track Court, Patiala House Courts) [20].

[581] *See* Section 1.2 of this chapter.

[582] Vanita Reddy, 'The Nationalization of the Global Indian Woman' (2006) 4 South Asian Popular Culture 61, 72-77.

the data set, either the victim, or the defendant, or both were still married to other people at the time of the incident(s). In two of these cases, the victim had been divorced through 'informal' proceedings, which had no legal authority, though she thought they did on account of a misunderstanding of the law. In one case, the victim had already initiated formal divorce proceedings against her husband when she had sex with the defendant based on a promise of marriage. In three cases, the victim and/or the defendant were married, but lived separately from their spouse, albeit without undertaking any formal or informal divorce proceedings. Except one, all these cases resulted in an acquittal. In some of these cases, the fact that the victim and/or defendant were married to other people had been raised by the victim, and the defendant had assured her of marriage nonetheless. However, even in these cases, the genuineness of the claimant's belief was disbelieved since 'nobody can be said to have misconception on account of an uncertain event like divorce which may or may not happen.'[583]

While these decisions often refer to the *ratio* in *Prashant Bharti,* they overlook the host of factors on which that decision was based, most of which are absent in routine promise to marry cases: the victim had falsely indicated in the police complaint that she was unmarried, and lied to the court about being divorced on the date of the incident; she had filed a writ petition in the High Court to quash her own complaint; she made no pleadings before the court despite being given many chances to do so,

[583] *State v Phaninder Singh Gulia* SC Number 142/15 (Special Fast Track Court, Patiala House Courts) [12].

and her allegations in respect of a related incident of sexual harassment were disproved.[584] In spite of its specificities, *Prashant Bharti* is now often used to suggest that if either the victim or defendant is married, a promise to marry could not have been regarded as sincere by the victim. This is a Brahminical/Hindu idea of marriage, in which marriage is regarded as an indissoluble sacrament.[585]

Further, it was assumed by some interviewees that a woman who has *ever* been married before will know not to take any promise of marriage seriously. In the words of one lawyer:

> …[i]f suppose a woman having two children or one child and who is a divorcee and who is habitual litigant also - because you will find a number of girls who visit court on, for their 498A cases and divorce cases and Domestic Violence Act cases[586] - so then they come in contact…with different people. And then, within their own development…they lure a boy in fact to have sex with them and then force them to marry, to use this as a tool to marry with them. Because a bachelor normally would…prefer to marry a spinster rather than a divorcee or a widow.[587]

---

[584] She alleged that she had been called by the accused, administered an intoxicant and sexually harassed in his car. However, the phone records of the two proved that they had not interacted with each other on that date and time, and that she had in fact been interacting with her other friends at the time she claimed to have been harassed. Both the victim and the accused were found to be in different parts of town instead of at the location of the alleged incident at the given date and time: *Prashant Bharti v Delhi* (n 544) [20] – [21].

[585] Saptarshi Mandal, 'The Impossibility of Marital Rape' (2014) 29 Australian Feminist Studies 255, 259. However, note that divorce is now allowed under Hindu personal law, as codified in Sections 13 to 15 of the Hindu Marriage Act 1955. 'Brahminical' is used interchangeably with 'Hindu' because the control of women's sexuality within Hinduism is used to perpetuate the caste system, which ultimately preserves Brahminical hegemony. Hindu ideas of marriage have therefore long been controlled and propagated by Brahmin communities who have historically been vested in preserving them. For a brief description of the caste system, *see* Section 5 of Chapter One.

[586] This is a reference to Section 498A of the IPC, which criminalises cruelty against a woman by her husband or his relatives. 'Domestic Violence Act' refers to the Protection of Women from Domestic Violence Act 2005.

[587] This would mirror public attitudes as well, as observed by a victim of domestic violence encountered in Srimati Basu's field research on organisations dealing with family law. As the victim's family phrased it, '..divorce meant 'a big ugly mark on the forehead', that she would not be able to remarry.': Srimati Basu, 'Family Law Organizations and the Mediation of Resources and Violence in Kolkata' in

While describing how courts deal with these cases, the lawyer added:

> So, in such cases the courts, the prosecution, they find themselves handicapped towards it.[588] But on some lacuna in the record or the file, they give acquittal to the boy or in some cases they convict them also. Then first appellate court or the second appellate court gives [acquittal] to such boys so ultimately on records it is shown that finally the case has been ended into an acquittal.

There were seven cases (8.3%) in the data set where the victim was a widow or a divorcee; six of them resulted in acquittal of the defendant. Again, it is a Brahminical/Hindu ideology that suggests that women can only be ritually married once since traditionally, it is 'only the marriage of a virgin with full rites within the acceptable limits of connubiality which sacralizes and sanctifies the girl's sexuality.'[589] While in certain lower castes, dissolution of marriage and remarriage of widows and divorcees might be permitted, these secondary unions are of a lower status, since they cannot be associated with female virginity, and consequently, female purity.[590] Rather, they are a 'concession to human weakness: a woman's need to satisfy sexual desire.'[591] However, while it is possible that there was subconscious stereotyping in this context, this was not the stated reasoning in the judgments. The total number of cases in which

---

Srila Roy (ed), *New South Asian Feminisms: Paradoxes and Possibilities* (1st edn, Zed Books 2012) 78. Widowhood comes with its own stigma, though it is often mediated by caste. While Brahmin widows are expected to continue a life of sexual abstinence, *dalit* widows are assumed to be sexually available: Susie Tharu, 'The Impossible Subject: Caste and the Gendered Body' (1996) 31 Economic and Political Weekly 1311.

[588] He was suggesting that the court officers are bound by law to proceed with the prosecution in these cases even though in their understanding, it is an unjust course of action.

[589] Dube (n 535) 235. However, note that under Section 5 of the Hindu Marriage Act 1955, there is no legal bar to the remarriage of Hindu divorcees and widows.

[590] Ibid 237.

[591] Ibid.

the victim was a widow or divorcee was quite low, making it difficult to ascertain the extent to which this factor is relevant.

The Supreme Court's requirement that the victim's consent be based solely on the promise of marriage, with no role being played by romantic or sexual feelings also came up frequently in the dataset.[592] Any expressions of the victim's love or attraction typically weakened the case for the prosecution, since this meant that the standard laid down in *Deepak Gulati* had not been reached. To illustrate, evidence that the victim had stealthily let the defendant into her house,[593] or had voluntarily gone to visit him late at night[594] was taken as evidence of a romantic relationship between the victim and the defendant, which prejudiced the case for the prosecution. In keeping with *Uday*, if the victim had not disclosed the defendant's promise of marriage to her family, it was treated as evidence that 'the prosecutrix was aware of the moral aspects of the relationship and the inherent risk involved in this kind of relationship.'[595]

The courts' assessment of delay in reporting is also complicated by the nature of the case. Since consent in these cases is granted based on the promise of marriage, as long as the promise persists, the victim will not frame the sex as rape. In many instances, the defendant will continue to assure the victim of marriage for long periods of time but say that he needs time before he can execute his promise - to find a job,[596]

[592] *Deepak Gulati v Haryana* (n 543) [18].

[593] *State v Mohd Yunus* SC Number 148/13 (Special Fast Track Court, Dwarka Courts) [17].

[594] *State v Anuj Yadav* SC Number 2/16 (Special Fast Track Court, Dwarka Courts) [25].

[595] *State v Sandeep* SC Number 54/13 (Special Fast Track Court, Karkardooma Courts) [38].

[596] *State v Deepak* SC Number 64/2015 (Special Fast Track Court (Central), Tis Hazari Courts) [1].

so his siblings can get married first,[597] or so he can graduate.[598] In many such cases, the delay is still counted from the first incident, which is a misunderstanding of the nature of delay in promise to marry cases.[599] Further, when the refusal is first made, the victim's first response will be to try to salvage the situation, and victims might spend several weeks or months trying to persuade the defendant to reconcile because what they want is marriage with the accused, rather than punishment for him.[600] They might also be experiencing the feelings of shame, which are common to the experience of women who have been sexually violated in other contexts.[601] Thus, there are often plausible and justifiable reasons to expect delays in these cases, even after the defendant has first refused to marry the victim. In other cases, there is no outright refusal, but an unrealistic demand for dowry which cannot met.[602] It is unclear what the appropriate length of time for the victim to report the rape should be in these circumstances before it can be justifiably regarded as unduly delayed.

[597] *State v Mudassir Khan* SC Number 5/14 (Special Fast Track Court (Central), Tis Hazari Courts) [4].

[598] *State v Firoz Ahmed* SC Number 1801/16 (Special Fast Track Court, Karkardooma Courts) [1].

[599] For instance, in *State v Saleem Khan* SC Number 37/13 (Special Fast Track Court, Karkardooma Courts) [35].

[600] For instance, in *State v Vikul Bakshi* SC Number 91/15 (Special Fast Track Court, Dwarka Courts) [10] – [12].

[601] Karen Engle and Annelise Lottman, 'The Force of Shame' in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (1st edn, Taylor and Francis 2010).

[602] *State v Gaurav Verma and Rashmi Verma* SC Number 1832/2016 (Special Fast Track Court, Karkardooma Courts) [1].

2.3.3 Complications around consent

Finally, the very notion of consent has been complicated by promise to marry cases. As one lawyer described it, these cases are 'clearly muddying the waters because the relationship is consensual.' Many cases turn on the point of whether there was consent or not. However, in promise to marry cases, there is the simultaneous presence and absence of consent – immediate consent to the physical act with the defendant is given, but it is based on a false promise, and this amounts to the absence of consent in law. This sequence of events is often clumsily summarised in a single line in police complaints, statements and testimonies. In one case the victim's complaint read that 'the accused forcibly made physical relations under promise of marriage with her despite her refusal.'[603]

The recording of facts would be much clearer if the word consent was qualified each time it was used. Different terms could be used to indicate whether the victim *thought* she had given consent, or whether she had given consent in law.[604] Often, while recording the victim's testimony in court, the question posed to the victim will be whether or not she gave consent for the sex, to which she is then expected to answer 'yes' or 'no.'[605] If the victim attempts to provide a more nuanced account, she is cut

---

[603] *State v Dev Jana Brata* SC Number 27/14 (Special Fast Track Court, Karkardooma Courts) [1].

[604] For instance, 'apparent' consent could indicate that she had given consent in the moment, while it could be said there was still no 'legal' consent where the immediate consent was based on a promise to marry. This terminology is derived from its use in a similar context by Alex Sharpe: Sharpe, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' (n 491) 31.

[605] Similar observations are made in respect of a trial court in Himachal Pradesh by Daniela Berti: Daniela Berti, 'Courts of Law and Legal Practice' in Isabelle Clark-Deces (ed), *A Companion to the Anthropology of India* (1st edn, Wiley-Blackwell 2011).

short and rebuked not just by the defence counsel, but also by the prosecutor and judge, since she is only meant to 'answer the question' and not volunteer information. What is ultimately dictated for recording (by either the lawyers, or the judges) to the stenographer is a rendering of the account as a consensual incident. This seriously undermines the credibility of the victim who, in spite of filing the complaint is said to have conceded that the sex was consensual.

3. MARRIAGE AND MODERNITY: UNDERSTANDING PROMISE TO MARRY CASES

Promise to marry cases are symptomatic of the larger shifts in culture that characterise contemporary India.[606] It is no coincidence that many interviewees stressed that this is a category of cases that is more common in urban areas. In the words of one lawyer:

> …in places like Delhi and other places, in larger cities, there is another category, which is, which has come to the fore…Promise to marry category right?…this [constitutes a] large majority of cases which are being filed in metropolitan cities by women…that's more prevalent in bigger cities rather than smaller cities or villages or rural India. It's more an urban phenomenon and that too, of the bigger metropolitan cities rather than the smaller towns or townships.

Within this category, a particular cause of resentment for many lawyers was the fact that victims in these cases are often well educated, middle class women. As a lawyer described:

> the women then, very well placed in life, highly educated, sometimes even older to men, go on and lodge these cases on account of frustration…And most of the time, the courts say in very, very vehement language, when they come across cases like, when somebody is a University student, somebody is working with KPMG then the [courts] say, 'Look here, a woman of her stature could not have a misconception of fact while she was entering into an act of coitus, and [everything else] is irrelevant.'

[606] Dave, Pradhan and Srirama (n 562) 15.

This was also reflected in the court observations, as many judges make it a point to emphasise to the prosecutor that they need the educational qualifications of the victim to be put on record in these cases. In some judgments, judges explicitly use the class, educational background or employment status of the woman to stress that she did not base her consent on the promise to marry. For instance, in one case, while describing why the victim could not claim to be a victim in a promise to marry case, the court observed, '…[t]his evidence is clear indication of consent on the part of the prosecutrix. The prosecutrix was about 29 years of age. She was an educated and a working woman.'[607]

The above observations indicate an incredulity that seemingly empowered (middle-class, well educated) women could be deceived by a promise of marriage, or would make their consent to sex contingent on such a promise. Yet, it is these women who 'struggle to keep up with modernization while being subject to scrutiny and judgment on the basis of the choices that they make.'[608] While these women are negotiating greater intrafamilial socio-economic power, by virtue of their class position, they remain surrounded by 'a highly judgmental social audience.'[609] Middle-class respectability requires the demonstration of a 'control of emotions and bodily

[607] *State v Libin* SC Number 1235/2016 (Special Fast Track Court, Karkardooma Courts) [42]. However, it is more common to base such judgments on age, and on whether the victim has been married before in her life. *See* Section 2.3.2 of this chapter.

[608] Dave, Pradhan and Srirama (n 562) 15.

[609] Sara Dickey, 'The Pleasures and Anxieties of Being in the Middle: Emerging Middle-Class Identities in Urban South India' (2012) [46] Modern Asian Studies 559, 582; Preeti Singh and Anu Pandey, 'Women in Call Centres Source' (2005) 40 Economic and Political Weekly 684, 688.

desires over the gratification of physical needs.'[610] Deviation from the strictures of 'proper dress and comportment for women' can result in bleak marriage prospects for women, many of whom are required to work late at night in their private jobs and are thus already regarded as having suspect morality.[611] Thus, a cultural ambivalence motivates the decisions of these women.[612] On one hand, they are in a position to push the boundaries of socially permissible romantic and social relationships; on the other hand, they are under constant pressure to have these relationships later 'validated' as marriage.[613] Their decisions exemplify what has been referred to by Pratiksha Baxi et al as the 'fractured modernity of postcolonial states.'[614]

It must be emphasised that while the disbelief of many interviewees concerned promise to marry cases that involved middle class victims, many victims were not from middle- or upper- class backgrounds. Data about socio-economic attributes of the victim were usually not indicated in the judgment, but there were certainly references in the cases to materially disadvantaged women.[615]

---

[610] Dickey (n 609).

[611] Ibid 589; Singh and Pandey (n 609) 687; B Devi Prasad, 'Call Centre as an Emerging Work Space: A Study of its Workers in Indian Context' Working Paper Number 11, Centre for Social Studies, September 2011 <www.css.ac.in/download/english/CSS%20Working%20Paper%20No.%2011.pdf> accessed 27 April 2017 19.

[612] Prasad (n 611) 25.

[613] Dave, Pradhan and Srirama (n 562) 10-11.

[614] Pratiksha Baxi, Shirin Rai and Shaheen Sardar Ali, 'Legacies of Common Law: 'Crimes of Honour' in India and Pakistan' (2006) 27 Third World Quarterly 1239, 1241.

[615] For example, in one case, the victim was a cook in the accused's house: *State v Apresh Kumar* SC Number 180/13 (Special Fast Track Court, Dwarka Courts). Domestic workers in India typically come from impoverished sections in society: Sara Dickey, 'Permeable Homes: Domestic Service, Household Space, and the Vulnerability of Class Boundaries in Urban India' (2000) 27 American Ethnologist 462,

4. PROMISE TO MARRY CASES: PERCEPTIONS IN THE FIELD

Many lawyers and victim-support personnel were under the impression that in a large number of promise to marry cases, the victim is lying. For instance, one lawyer described his experience as such:

> My experience of about 18-19 years is that in metropolitan cities…you can easily say in promise to marriage, 100 percent rape cases are false. I would…peg it at 100 percent, because those are cases which are filed on account of spite and vengeance….So to that extent, if you tabulate data, you would say that this is a piece of trash.

Another lawyer began his interview by asking me whether promise to marry cases had been segregated for the purposes of this study, and when pushed to explain further, reacted thus:

> No, promise to marry is not a category to look at. See, if you're looking at promise to marry as a case to understand [rape convictions], I think we'll miss the, we'll miss the real point here… To start studying an area by virtue of the false cases... It would be really disingenuous, you know?[616]

While CIC counsellors generally shared the views expressed above, counsellors from other NGOs were often defensive about the victims when the issue of promise to marry cases came up. In one such counsellor's words:

> The other thing is, these days many cases of this sort are being lodged, which women are not initiating. The police are doing it. Police and lawyers, they are doing it. These are cases where there was a long relationship. Not live-in, but

481; Parvati Raghuram, 'Caste and Gender in the Organisation of Paid Domestic Work in India' (2001) 15 Work, Employment and Society 607, 614.

[616] Srimati Basu similarly observed that these cases were dismissed as false in the women's organisations and feminist groups she undertook research with in Kolkata: Srimati Basu, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies 185, 188.

> just like that, they were in love with each other and had agreed to marry. When victims go to the police in such cases, the police registers [sic] it as a rape case.

When asked to explain why they thought the case was false, interviewees would typically cite evidence of a sustained romantic relationship between the victim and defendant that had eventually ended – these cases were hence framed as revenge rather than as rape. On one view, these cases could be understood as false since the law does not recognise consent influenced by love as vitiated under Section 90, even if it would not have been given had it not been for the promise of marriage. On the other hand, it is difficult to imagine a situation where the victim was devoid of any feelings for the accused in a promise to marry case.

Some lawyers cited clearer evidence for their claim that these cases are often false. One put it thus:

> 'He kept saying he would marry me, I didn't know he was married to someone else.' That was her testimony. And then when my instructing counsels dug various pieces of evidence…there were many SMSes in which she had sent these text messages saying that, 'Oh I am sure you are with your wife right now, and therefore you are ignoring me' and all of that.

Siddiqi, speaking of similar claims in Bangladesh recognises the possibility that many of these cases might be false, given that the social context is one where 'a public admission of rape is considered less dishonourable than the acknowledgement that a young woman has had sex willingly.'[617] However, currently such claims hinge on anecdotal evidence and there is no publicly available study that assesses the

[617] Siddiqi (n 494) 178.

proportion of such cases in which there is evidence that the complaint was false.[618] Though the DCW has given some backing to the claim that many rape cases are filed as revenge,[619] serious doubts have been cast on the methodology it adopted including, most significantly, that it characterised all pre-trial attrition as evidence of falsity.[620]

Some interviewees critiqued the legal framework itself and suggested that even where the consent is based on a false promise of marriage, this should not be prosecutable as rape. In the words of one lawyer:

> No I think you… [need to] separate the serious cases- at least I'm talking purely of sexual violence- you separate the breach of relationship/marriages…cases to a regular rape case, you will get rape convictions in no time in Delhi. Yeah? But if a judge is clogged with these hundreds of cases to say… 'we were in a relationship, on the false [promise]…this happened, it's rape.' It trivialises the whole offence, and it just clogs up the system. So that is where legislative intervention should be…

The prosecution of these cases cannot be understood without first acknowledging that each official the victim meets, at every stage - including the police, the CIC counsellor, the DCW advocate, the prosecutor, the defence counsel and the judge – will either doubt her story or challenge that it should lead to a rape conviction. One victim described the police officer in charge of her case as saying quite clearly that he

---

[618] Mandal similarly notes that claims of women 'misusing' laws relating to domestic violence 'do not have any empirical basis': Mandal (n 585) 262.

[619] '53% Rape Cases filed between April 2013 and July 2013 False: Delhi Commission of Women' (*DNA*, 2014) <www.dnaindia.com/india/report-53-rape-cases-filed-between-april-2013-and-july-2013-false-delhi-commission-of-women-2023334> accessed 24 April 2017. The DCW indicated that since the Report was prepared under the leadership of a different Chairperson, they no longer have a copy of the same (email correspondence to the author, 22 March 2017).

[620] Joanna Jolly, 'Does India have a Problem with False Rape Claims?' (*BBC*, 8 February 2017) <www.bbc.co.uk/news/magazine-38796457> accessed 24 April 2017.

did not believe that the defendant would have done anything if she had not led him on. Another CIC counsellor said that they often had to 'fight' the police in promise to marry cases but hastily added that they only did so in 'genuine' cases. Some lawyers and counsellors associated with independent NGOs, who are not duty bound to provide their assistance to victims, said that they refused their support to promise to marry victims 'on principle.' Thus, while all rape victims face the risk of being disbelieved within the criminal justice system, and consequently traumatised, victims in promise to marry cases face the unique challenge of being dismissed even when they are believed on facts. This ambivalence surrounding promise to marry cases raises the question of whether their treatment in law is currently satisfactory, as will be discussed in the concluding section.

5. CONCLUSION

The study of promise to marry cases undertaken herein illustrates how neutral concepts like 'misconception' become heavily loaded proxies for culturally salient issues. Nothing in Section 90 suggests that the only misconception that will vitiate sexual consent is one that relates to marriage. Indeed, a brief glance at other jurisdictions shows that similar provisions have been used to prosecute the defendant in a wide variety of situations with varying degrees of success. Examples include where the defendant lied about wearing a condom,[621] or about withdrawing before

[621] *R v Assange* 2011 EWHC 2849 (Admin). All the examples cited in footnotes 622 to 625 are from England and Wales.

ejaculation,[622] or about performing a medical procedure on the victim,[623] or about paying her a specified sum of money for the sex.[624] The merits of these arguments could be separately assessed, but the fact that none of these varying situations have ever been brought to court in India – at least before appellate courts – is important. It indicates the ease with which the facial neutrality of the law yields to interpretations that are heavily influenced by the context.

Social stratifications often influence judicial interpretation. Within India, marriage has routinely been used not just to control women's choices but also to thereby sustain and reproduce other hierarchies, such as those of caste and religion. The particular meaning that marriage has been imbued with in promise to marry prosecutions is also shaped by the dominant discourse on the limits of acceptable marital and sexual unions. In this conception, an acceptable conjugal union is one that does not disrupt the current political, social and economic order and is duly endogamous in respect of caste, religious, ethnic or linguistic identity. Sex is acceptable only when it is experienced within the bounds of this union. If there is a transgression from these boundaries, this is enough to mark the victim as a suspect witness. The subversive idea that the marriage could have been sought or promised outside these constraints is considered a judicial impossibility. Thus, it is only the text of the law that suggests that any misconception can vitiate consent. In legal practice, this negation of consent

[622] *R(F) v DPP* [2013] EWHC 945 (Admin).

[623] *R v Flattery* (1877) 2 QBD 410.

[624] *R v Linekar* [1995] 2 Cr App R 49.

is unlikely to result where the misconception operates to destabilize a well-entrenched system of socioeconomic stratifications.

The data reveal a construction of marriage that is embedded in India's history as a postcolonial nation, where 'sexuality and culture have been sutured together as a result of the 19th-century colonial encounter and nationalist resistance.'[625] A key plank of the nationalist struggle was to protect sexuality as a 'pure space of Indian culture', free from colonial contamination.[626] The dominant sexual ideology was one which legitimated sexuality only within the bounds of a heteronormative marriage characterized by caste and religious endogamy. In independent India, the 'longing for a strong cultural identity' continues to exert its influence, along with its associated ideas of legitimate and illegitimate sexuality.[627] Ratna Kapur describes the Hindu Right as key players in this movement, who 'continue to degrade sexuality and banish any overt expression of it outside the model of the good Hindu wife and heteronormative arrangements.'[628] Specifically at a time when the Hindu Right is on the rise, there is a need to rethink strategies that rely on using criminal law to address all sexual wrongs.

---

[625] Ratna Kapur, ''A love song to our mongrel selves': Hybridity, Sexuality and the Law' (1999) 8 Social and Legal Studies 353, 357; Siobhán Mullally, ''As nearly as may be': Debating Women's Human Rights in Pakistan' (2005) 14 Social and Legal Studies 341, 342.

[626] Kapur, ''A love song to our mongrel selves': Hybridity, Sexuality and the Law' (n 625); Ratna Kapur, 'Too Hot to Handle: The Cultural Politics of Fire' (2000) 64 Feminist Review 53, 55.

[627] Kapur, ''A love song to our mongrel selves': Hybridity, Sexuality and the Law' (n 625) 356 – 360.

[628] Kapur, 'Out of the Colonial Closet, but Still Thinking inside the Box: Regulating Perversion and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns' (n 42) 386.

Many legal feminists have been sceptical of a heavy reliance on criminal justice to ensure the physical safety of women.[629] They argue that such a strategy locks women into a perpetual state of victimization, while preventing a positive articulation of sexual rights for women and other sexual minorities.[630] It consolidates carceral power in the hands of the State, which can ultimately be used to persecute marginalized populations or even to police women's sexual choices.[631] In the same vein, relying on the criminal justice system in cases of deceptive sex has contributed to solidifying hegemonic ideas of marriage and sexuality. While these legal developments are ostensibly for the protection of women, they produce a static conception of conjugality and limit the space to renegotiate its meaning over time. The more emancipatory alternative will be to shift the focuss away from carceral justice and towards a less stigmatized social space for subversive sexual choices.

---

[629] Ratna Kapur, 'Gender Justice, Interrupted' *The Hindu* (29 March 2013) <www.thehindu.com/opinion/lead/Gender-justice-interrupted/article12404830.ece> accessed 2 August 2018. Cf. Pratiksha Baxi, *'Carceral Feminism' as Judicial Bias: The Discontents around State v. Mahmood Farooqui* (Council for Social Development 2016).

[630] Kapur, 'Gender Justice, Interrupted' (n 629).

[631] These criticisms are extensively developed by those who challenge the uncritical acceptance of 'governance feminism'. Broadly, governance feminism refers to the incorporation of feminists in positions of legal or institutional power. *See* Prabha Kotiswaran, 'A Bittersweet Moment: Indian Governance Feminism and the 2013 Rape Law Reforms' (2017) 52 Economic and Political Weekly 78, 81, 84; Shruti Iyer, 'Taking a Break from the State: Indian Feminists in the Legal Reform Process' (2016) 17 Journal of International Women's Studies 18, 22 (though these authors differ on the extent to which the Indian women's movement can be classified as endorsing governance feminism).

CHAPTER SIX: PLEASURE AS A FEMINIST GOAL – THE PERILS OF 'PROTECTING' WOMEN

This chapter draws on postcolonial feminism to highlight the pitfalls of constructing women constantly and solely as victims in need of protection. Instead, it proposes that there should be a public focuss on women's agency. These ideas are explored through an analysis of 'love cases' in Delhi district courts.[632] The phrase 'love cases' is used as a descriptor for those cases where the 'victim' and defendant run away with, and often marry, each other.[633] This elopement is a way to resist familial and social disapproval of their relationship, which is stronger where the victim and defendant belong to different castes, religions or communities. In response, members of the victim's family usually file a report about her disappearance with the police, recording their suspicion that the defendant has abducted her. This is one way for families to regain access to the victim.[634] The complaint is typically filed under Section 366 of the Indian Penal Code 1860 ('IPC'), which penalises '[k]idnapping, abducting or inducing woman to

[632] The role played by such prosecutions in sustaining a heteronormative, intracommunal marriage as the only legitimate site for sexual articulation is briefly discussed in Section 4.2 of Chapter Four.

[633] The usage of the term 'victim' in this chapter is to ensure consistency with the remainder of the thesis. In practice, the women in these cases are not sexually victimised by the defendant.

[634] Similarly, Usha Ramanthan's historical analysis demonstrates how criminal provisions relating to abduction were used by fathers to 'retrieve' daughters from their lovers even in the twentieth century: Usha Ramanathan, 'Images (1920 - 1950): Reasonable Man, Reasonable Woman and Reasonable Expectations' in Amita Dhanda and Archana Parashar (eds), *Engendering Law: Essays in Honour of Lotika Sarkar* (1st edn, Eastern Book Company 2007) 50.

compel her marriage.'[635] Once the victim is traced, her family, frequently with support from the police, exerts pressure on her to make an allegation of rape against the defendant. If the victim is under 18 years of age, an admission of sexual activity will be enough to secure a conviction for either statutory rape under the IPC, or the series of sexual assault offences punishable under the Protection of Children from Sexual Offences Act 2012.[636] However, the focuss of this chapter, like the rest of this thesis, is on adult victims.

Prior academic scholarship on love cases has described the manner in which these cases are used by lawyers to blame women for lying about rape, even though the complaint is usually filed by other members of their family, or under pressure from them.[637] This familial pressure has in turn been linked to the stigma surrounding women's sexuality.[638] On account of the shame surrounding premarital or extramarital sex, an admission of rape may be less dishonourable than the admission that a woman had consensual sex. Further, attention has been drawn to the state-sponsored violence

[635] The full text reads as follows: 'Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.' While this is less common, in some cases the victim would only have left home for a few hours to meet her boyfriend. In such cases, abduction may not be alleged. Further, in some rare cases, the criminal complaint may have been initiated by the victim herself.

[636] For an overview of these cases, *see* Section 3.7 of Chapter One.

[637] Vishwanath (n 367) 4.

[638] Barn and Kumari (n 170) 444.

that is inflicted on the couple in these cases, including torture in police custody and illegal detention of the victim in women's institutions, government hospitals and police stations.[639] The manner in which prosecutions in love cases are used to discipline women who exercise their sexual autonomy has also been highlighted.[640] In this vein, Pratiksha Baxi points to the 'dissonance between what is legally constituted as rape and the social uses the rape law is put to.'[641] This chapter builds on this scholarship. It carries out a postcolonial feminist examination of love cases and uses this discussion to reach more general conclusions about feminist engagement with legal systems.

The following findings draw from a close reading of trial court judgments over a period of 12 months (n=241), 61 interviews carried out with multiple stakeholders (victims, lawyers, judges and victim-support personnel) as well as court observation in each of Delhi's six court complexes.[642] This chapter starts by expounding on the theoretical concepts that inform this analysis. It goes on to assess the occurrence of love cases within the data set using the concepts of 'risk' and 'respectability,' as developed by Shilpa Phadke et al.[643] It suggests that these cases are a symptom of the societal reluctance to engage with women's sexual agency and desire. Based on this

---

[639] Vishwanath (n 367) 6; Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 251-255, 263.

[640] Vishwanath (n 367) 14, 18; Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 236-240.

[641] Baxi, 'Justice is a Secret: Compromise in Rape Trials' (n 368) 210.

[642] *See* Chapter Three for a detailed note on research methods.

[643] For instance, *see* Shilpa Phadke, Sameera Khan and Shilpa Ranade, *Why Loiter?: Women And Risk On Mumbai Streets* (1st edn, Penguin 2011); Shilpa Phadke, 'Dangerous Liaisons: Women and Men: Risk and Reputation in Mumbai' (2007) 42 Economic and Political Weekly 1510.

analysis, it concludes that rape continues to be understood by the public as an offence against women's respectability rather than as a violation of their sexual autonomy. Thus, instead of prioritising 'state feminism'[644], greater feminist resources need to be invested in public conversations about liberated sexualities.

1. RAPE, RESPECTABILITY AND RISK: IS THERE SUCH A THING AS TOO MUCH 'PROTECTION'?

This section discusses the analytical tools used in this chapter. It starts by recapping the contrast between postcolonial and radical feminism. It then critically reflects on aspects of radical feminism that have found a foothold in recent legal reform in India. As an alternative, it suggests a refocussing of feminist engagement on women's sexual exploration, pleasure and agency. Finally, it exposes the way in which the criminal law is mobilised to protect women's respectability rather than their autonomy. This theoretical framework is then used to analyse love cases in the data set.

1.1 Women as victims

The overall theoretical framework of this thesis, as discussed in Chapter Two, is derived from postcolonial feminist writing. Postcolonial feminism is preferred over 'dominance' or 'radical' feminism for two reasons. First, radical feminism is founded upon an understanding of the world as being structured by male supremacy and

[644] Broadly, state feminism refers to incorporation of more women into the working of states, such as through the setting up of institutions such as the DCW. For a detailed discussion, *see* Section 4 of this chapter.

female subordination. This structure leaves little space for a discussion of disadvantaged men or oppressive women since it prioritises gender over other forms of marginalisation, including caste, class, religion and disability. Secondly, precisely because it foregrounds gender, radical feminism can encourage a persistent focuss on the use of women's sexual victimisation as a way of sustaining patriarchy. In the radical feminist framing, sexual assault is an issue affecting all women, regardless of their other differences.[645] Emphasising this common experience allows a deflection from the differences among women, including their oppression by multiple power structures. It also starts from the premise that women are victims, without engaging with other aspects of their experiences, such as their role as agents or oppressors. Later in this chapter, I draw out why it is imperative not to fall into this trap.

Across the criminal law spectrum, reform has often been premised on women's perpetual victimisation, particularly where it relates to their sexuality. It is frequently assumed that women need protection from sexual contact of all kinds, whether or not it is consensual. Two recent amendments can be cited to exemplify this presumed victimisation of women. First, following the Criminal Law (Amendment) Act 2013, the statutory age of sexual consent has been increased from 16 years to 18 years.[646] This means that any woman below 18 years who engages in sexual acts with a man, is automatically labelled as a rape victim. In such a case, the convicted person must be

[645] By this I do not mean to suggest that the likelihood or nature of sexual victimisation stays the same across race or caste or other social demographics. I simply mean that all women are exposed to a threat of sexual violence, and this threat is used to insubordinate and control women.

[646] IPC, s 375.

sentenced to at least seven years of rigorous imprisonment.[647] Under this provision, there is no scope for young women to explore their sexuality in a consensual and healthy way with men.[648] Similarly, after the 2013 amendment, any man who makes a 'request for sexual favours' or 'sexually coloured remarks' is guilty of sexual harassment and can be punished up to four or three years of rigorous imprisonment respectively.[649] Consensual sexual interactions are therefore potentially criminalised.[650] Such broad-brush provisions are unlikely to protect women from sexual violence. Instead, they are likely to be enforced to the detriment of women who make 'transgressive' sexual choices.[651] If the underpinning ideology of these laws was to recognise women's agency as well as their frequent victimisation, these amendments would have been drafted differently. They would have given serious credence to women as sexual agents who often choose to engage in sexual experimentation and flirtation.

In sum, using a radical feminist framework for the criminal law on gender-based and sexual violence lends itself to highly carceral, over-protective statutory provisions that are often counterproductive for women. A better alternative can be found in

[647] IPC, s 376(1). Imprisonment in India can be either 'simple' or 'rigorous.' Under rigorous imprisonment the prisoner is required to perform hard labour: IPC, s 53.

[648] Agnes, 'Controversy over Age of Consent' (n 91) 12.

[649] IPC, s 354A(1).

[650] Kapur, 'Sexcapades and the Law' (n 210).

[651] For example, this is how overbroad provisions relating to deceptive sex are enforced: *see* Chapter Five.

postcolonial feminist approaches that focuss on women's agency. One such approach is 'risking' feminism,[652] as discussed in the following section.

1.2 The risks of being risqué: Choosing pleasure over protection

This section discusses and develops the concept of 'risking' feminism, as outlined by Phadke et al., which is then used to analyse love cases. Phadke's work focusses on the politics of space in urban settings. She deconstructs the public discourse on 'protection' as relating to the protection of middle class, Hindu respectability. Consequently, she suggests that aiming for women's protection is a limited and often counterproductive exercise, which also negatively impacts marginalised communities that are perceived as threatening women's respectability. Phadke et al. argue that a more appropriate approach would be to focuss on 'risking' feminism, *i.e.*, foregrounding the right of women to engage in 'risky' conduct, such as loitering in public spaces. I use this framework to analyse the phenomenon of love cases. The argument is set out at the end of this section and developed further in the following sections by drawing on the primary data collected for this thesis.

Phadke and others highlight how the idea of protection is deployed by civilian and institutional actors (such as the police) as a euphemism for securing respectability rather than physical safety.[653] They describe respectability as being constituted by two

[652] Broadly, this refers to actively and publicly asserting the freedom to inhabit the public sphere. For example, *see* Shilpa Phadke, Shilpa Ranade and Sameera Khan, 'Invisible Women' (2013) 42 Index on Censorship 40, 42; Anjali Arondekar, 'Loitering as a Feminist Right' (2012) March - April Biblio 28. A detailed discussion is provided in Section 1.2 and 3 of this chapter.

[653] For instance, Phadke, Ranade and Khan (n 652) 42; Arondekar (n 652).

related elements. First, respectability itself is fundamentally linked to the division between the private and public sphere.[654] In its gendered form, respectability requires Indian women to inhabit 'the private world of the home, away from corruption by ideas of western modernity.'[655] It is their habitation of the private sphere, as mothers and wives, which renders women respectable.[656] If these women are to be accepted in public spaces, their presence must be necessitated by a 'respectable and worthy purpose,' such as waiting to pick up their children from school; purposeless loitering will not suffice.[657] In such a case, markers of private life may be deployed as a visible demonstration of respectability, such as married Hindu women applying vermilion in the parting of their hair to signify their marital status.[658]

Secondly, 'respectable' women continue to be monitored by the community in public to ensure that their presence remains compliant with gendered codes of conduct.[659] Ultimately, they begin to engage in self-surveillance, resulting in what Michel Foucault in another context refers to as 'disciplined bodies.'[660] Transgression from gendered expectations is enough to impugn the respectability of these women,

---

[654] Phadke, Khan and Ranade (n 643) 24.

[655] Ibid 25.

[656] Ibid 25.

[657] Ibid 25.

[658] Ibid 33 – 34.

[659] Ibid 31.

[660] This analogy is drawn in: ibid 31; Shilpa Phadke, ''You Can Be Lonely in a Crowd': The Production of Safety in Mumbai' (2005) 12 Indian Journal of Gender Studies 41, 48; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edn, Vintage 2012).

at which point they are deemed unworthy of protection.[661] Thus, the idea of women's protection in public discourse usually pertains to their respectability, rather than their safety or autonomy. In fact, it will often take precedence over their actual physical safety. To illustrate, the authors describe a young woman from Mumbai who would get her boyfriend to drop her off some distance from her house after meeting him.[662] She would then walk through a deserted lane late at night to get to her house. While this may have put her at physical risk, it ensured that she was not visibly non-conformist (by entering into a consensual premarital romantic or sexual relationship), thereby ensuring her respectability and by extension, the respectability of her family and community.[663]

There are several corollaries to this understanding of respectability, some of which are recognised by the authors themselves. Two are of particular relevance here. For one, the object of this protective discourse is the (respectable) middle-class, cis, *savarna*, heterosexual, non-disabled Hindu women. The construction and preservation of respectability is closely linked to the modern history of the postcolonial nation. In direct response to the colonial imposition of an alien identity/culture, religious revivalism was used by Hindu nationalist groups as an assertion of national identity.[664] It was middle-class Hindu women, associated with revivalist movements,

[661] Phadke, Khan and Ranade (n 643) 28.

[662] Ibid 29.

[663] Ibid.

[664] Kumari Jayawardena and Malathi de Alwis, 'Embodied Violence: Communalising Women's Sexuality in South Asia' (1996) 4 Reproductive Health Matters 162, 162.

who came to be marked variously as 'cultural carriers of tradition' and 'symbols of purity.'[665] In line with this history, the object of protective discourse today, in large part, continues to be the middle-class Hindu woman. Her respectability is considered to be symbolic of communal honour. An attempt to tarnish it is understood as an insult to the entire community and specifically to the men of the community, who are deemed protectors of this honour.[666]

Since protection extends only to those who are respectable, it is a meaningless concept for women who are not considered respectable. For instance, commercial sex workers, who spend a large amount of their time in public, are regarded more as threats to social morality than as potential victims in need of protection.[667] While Phadke et. al do not explore the experience of trans persons, the logic of exclusion would apply equally to them. Several transgendered populations, such as *hijras*, have historically been deemed to represent 'a threat of moral, sexual and physical contagion' and their claims to public space have been tenuous since at least the 19th century.[668] Similarly, women who are typecast as promiscuous or hypersexual – including *adivasi* women, *dalit* women and women from the north-east of India – are by definition not considered to be respectable, since they are assumed to reject middle-

[665] Ibid; Elizabeth Chatterjee, Sneha Krishnan and Megan Eaton Robb, 'Feeling Modern: The History of Emotions in Urban South Asia' (2017) 27 Journal of the Royal Asiatic Society, Series 3 539, 550.

[666] Phadke, Khan and Ranade (n 643) 29.

[667] Ibid 26.

[668] Jessica Hinchy, 'Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India' (2014) 38 Asian Studies Review 274, 280. Hinchy describes *hijras* as 'Hijras are generally male-born persons who describe themselves as emasculates…, wear feminine clothing, usually adopt feminine names and have a socio-cultural role as performers at the time of births.' *See also* footnote 202.

class codes of sexual restraint.[669] Lesbian women and women with disabilities are typically not viewed as good wives or mothers and are unable to gain access to the gendered roles that establish respectability.[670] Protective discourse hence applies unevenly to different women.

Secondly, there is the question of what respectable women need protection *from*. Respectable women are deemed not to require protection from the non-disabled, middle-class, cis, *savarna* heterosexual Hindu man or woman, whom they encounter repeatedly in the private space of their home.[671] They are considered to require protection from the working-class, lower caste or Muslim man, who is constructed as a threat to their respectability in the public sphere.[672] While Phadke et. al do not engage with disability, the logic can equally be extended to men with certain types of disability who are constructed as 'dangerous.' For instance, it would extend to men with leprosy, who are characterised as ''lecherous and licentious'…as 'rough, drinking fellows': men to be feared rather than pitied'.[673] Further, if we are to accept

---

[669] Nitya Rao, *'Good Women do not Inherit Land': Politics of Law and Gender in India* (1st edn, Routledge 2018) 13; Tharu, 'The Dalit Woman Question' (n 99) 156; Vrushali Patil, 'Narrating Political History about Contested Space: Tourism Websites of India's Northeast' (2011) 38 Annals of Tourism Research 989, 993.

[670] Anita Ghai, 'Disabled Women: An Excluded Agenda of Indian Feminism' (2002) 17 Hypatia 49, 53 – 55; Ponni Arasu and Priya Thangarajah, 'Queer Women and Habeas Corpus in India: The Love that Blinds the Law' (2012) 19 Indian Journal of Gender Studies 413, 415;

[671] Phadke, Khan and Ranade (n 643) 29. This understanding of violence against women in terms of violence against this respectability also manifests in the marital rape exemption in the definition of rape, which is discussed in Section 3.6 of Chapter One.

[672] Shilpa Phadke, 'Unfriendly Bodies, Hostile Cities: Reflections on Loitering and Gendered Public Space' (2013) 48 Economic and Political Weekly 50, 52.

[673] James Staples, 'At the Intersection of Disability and Masculinity: Exploring Gender and Bodily Difference in India' (2011) 17 Journal of the Royal Anthropological Institute 545, 551 (citations omitted).

that what is at stake is respectability, protective discourse is not just about security from physical or sexual assault. It encompasses safety from the 'seductive prowess of the undesirable 'other'' that may lead to consensual sex between 'respectable' women and 'dangerous' men.[674] If such alliances are formed, they will pose a threat to the existent stratifications in society, which flourish along lines of caste, class, gender, disability and religion. Along these lines, Nivedita Menon observes:

> Inappropriate desire, whether it is lesbian desire or inter-community/caste heterosexual desire (both of which face similar degrees of violence), highlight fissures in the legitimate procreative sexuality. Appropriate desire is of course, that which perpetuates patriarchal lineage and property systems.[675]

The protection of non-disabled, middle-class, cis, *savarna*, heterosexual Hindu women in public spaces is therefore framed in opposition to the presence of disadvantaged men in this sphere. Similarly, respectable women are deemed to require protection from the 'corrupting' influence of women and non-binary trans persons who are not considered to be respectable, as described above.

Phadke et. al argue that petitioning for protection is counterproductive, since it reduces women's access to public spaces in two ways. First, it might be grounds to confine them solely to the private sphere where their respectability might stay intact but they are, ironically, at greatest risk of sexual victimisation from members of their

[674] Phadke, Khan and Ranade (n 643) 17.

[675] Nivedita Menon, 'Sexuality, Caste, Governmentality: Contests over 'Gender' in India' (2009) 91 Feminist Review on South Asian Feminisms: Negotiating New Terrains 94, 101; see also Mukta Sharangpani, 'Browsing for Bridegrooms: Matchmaking and Modernity in Mumbai' (2010) 17 Indian Journal of Gender Studies 249, 253, 270 – 271.

family, including their husbands.[676] This confinement will be felt most acutely by women who live in densely populated areas where their movements are easily monitored, such as women living in *chawls*.[677] Secondly, respectable women are deemed to require protection from women who are not respectable and a protective discourse might be used to support the removal of the latter from the public sphere.[678] In addition, the protection of middle class, Hindu women will often be the pretext to exclude 'undesirable' men from the public sphere. This exclusion can take a variety of forms, such as the state-sponsored demolition of slums that house migrant workers or the enforced ghettoization of Muslim citizens through discriminatory housing practices.[679] For Phadke et. al, aiming for protection is a limited goal with many adverse results. Instead, they argue in favour of women's freedom to publicly engage in what is understood as risky conduct - to be present in public spaces for no worthy purpose, to loiter and to cease self-surveillance and self-censorship.[680] Since this reclamation of public spaces is fundamentally linked to *defying* the strictures imposed by respectability, it extends to all women, and not just privileged ones. In fact, Phadke et. al argue that women's access to public space in this way 'cannot be imagined in the absence of a more general claim to city public spaces for all citizens.'[681] The exclusion

[676] Phadke, Khan and Ranade (n 643) 29.

[677] Phadke, 'Dangerous Liaisons: Women and Men: Risk and Reputation in Mumbai' (n 643) 1512. '*Chawls'* refers to low income housing in the form of tenements.

[678] Phadke, Khan and Ranade (n 643) 22.

[679] Ibid 10, 15.

[680] Phadke, Ranade and Khan (n 652) 42; Arondekar (n 652).

[681] Phadke, Khan and Ranade (n 643) 21.

of disadvantaged groups from public spaces is sustained to enforce class- and community-based ideas of respectability. These ideas cannot be dismantled until public access is real for all citizens, regardless of gender or other identity.

Phadke et al's theory of risking feminism is a useful framework to analyse love cases. Its emphasis is not on protecting women from victimisation, but on demanding a space where they can exercise their sexual and other agency. It is radical, precisely because it focusses on the politics of fun, pleasure and loitering. These are ideas that cannot find expression in the formal scope of criminal law, but their absence in public discourse continues to influence the working of the criminal justice system as seen in love cases. These cases have their roots in the perceived communal need to safeguard women's respectability. They are filed when respectable women engage in 'transgressive' sexual conduct. The protection of women in such circumstances means their protection from consensual but 'undesirable' sex – undesirable as per prevalent community norms of respectability. This is why these cases are treated as rape even though the sex involved is consensual. The next two sections use the primary data collected to evidence the deployment of these concepts in love cases.

2. LOVE CASES IN THE DATA SET

As discussed in Chapter Three, this thesis relies on 61 interviews with victims, lawyers, judges and victim-support personnel; observation of rape trials in each of Delhi's six court complexes; and the total population of Delhi trial court judgements in rape cases over a period of 12 months – from January to June in 2014 and 2016. Out

of the 254 such judgments issued during this period, 65 verdicts (25.6%) were delivered in 'contested' cases. The word 'contested' is used to describe all cases where the victim-witness did not turn 'hostile' to the prosecution, excluding 'promise to marry' rape cases.[682] This chapter and the next will analyse factors associated with conviction and acquittal in contested rape cases.

Of the 65 contested cases in the sample, 52 (80.0%) resulted in acquittals. Twenty seven acquittals (41.5% of all contested cases) were based mainly on exculpatory evidence that strongly suggested they were love cases. Drawing from the interviews, court observations and judgments used for this thesis, the main types of exculpatory evidence used in love cases has been identified in Table 6.1.[683] In addition to such evidence, the court also engages in a fact-sensitive assessment of the victim's credibility, weighing the plausibility and consistency of the prosecutions' case.[684]

To discuss an illustrative case, in *State v Balinder and Others*, the prosecution alleged that the defendant had abducted and repeatedly raped the victim.[685] Against this allegation, the defence adduced a panoply of exculpatory evidence. There were photographs of the victim getting married to the defendant where she was seen

[682] 'Promise to marry' cases are those in which the victim is deceived into having sex with the defendant based on an insincere promise of marriage. For a discussion on promise to marry cases *see* Chapter Five. 'Hostile' victim-witnesses are those who do not support the prosecution's case through their testimony. Factors associated with hostile victim-witnesses have been discussed in Chapter Four.

[683] Table 6.1 also summarises which trial court judgments in the data set rely on each category of evidence. Case names corresponding to the codes used in this table are provided in **Appendix 6**.

[684] For a critical discussion of the legal standards used to assess the rape victim's testimony, *see* Section 4.4 of Chapter Seven.

[685] *State v Balinder and Others* SC Number 77/15 (Special Fast Track Court, Dwarka Courts) [2].

'smiling and in a happy mood';[686] a High Court order granted to protect them from the victim's family once they had eloped;[687] the victim's statement to the investigating officer that she was living voluntarily and happily with the defendant;[688] documented evidence that the victim's previous husband had had to convene the local *panchayat* to force her return to his house after she eloped with the defendant;[689] and evidence of multiple attempts made by the victim and the defendant to elope.[690] The judge understandably acquitted the defendant.[691]

Exculpatory evidence in love cases can be quite dramatic – in one case observed, the defence evidence included love letters written by the victim to the defendant using her own blood. This is not to suggest that women in consensual romantic relationships should be presumed to have given their consent to all sexual intercourse with their partner. However, the romantic history between the couple often did not form part of the record until it was raised by the defence. Instead, the defendant was frequently portrayed as someone who had been harassing the victim.[692] The story of the victim's elopement was portrayed as the story of her abduction, no matter how implausible this reading of events might otherwise seem.

---

[686] Ibid [25].

[687] Ibid [26].

[688] Ibid [28].

[689] Ibid. A *panchayat* is a local self-governing institution found in rural or semi-urban India.

[690] Ibid [30].

[691] Ibid [31].

[692] For instance, *State v Rohit Patel* SC Number 154/13 (Special Fast Track Court, Dwarka Courts) [10].

Table 6.1: Summary of evidence commonly used to acquit the defendant in love cases

Case code	Prior statements by the victim, such as to the police, doctor or counsellor, admitting this is a love case	Evidence of the couple's wedding, including audios, videos, or testimony from those who performed, registered or attended the wedding	Evidence of peaceful, often lengthy, co-habitation by the couple with no attempts by the victim to escape or raise an alarm, even where the opportunity was there – including testimony from neighbours, landlords, friends, relatives, domestic workers and state officials whose intervention could have been sought	Evidence from hotels the defendant allegedly took the victim to without her consent, which established that she was not constrained at the time	Records of frequent, lengthy phone calls between the couple when their relationship was allegedly strictly professional or strained because he was blackmailing, threatening or harassing her	Love letters and/or romantic text messages, which sometimes mentioned familial disapproval of the couple's consensual, intimate relationship	Evidence of official documentation to prove the marriage, including rent agreements or records of legal proceedings from independent courts
X2	✓	✓	✓				
X9							
X11			✓				
X12			✓				
X17	✓		✓				
X20		✓	✓				✓
X21	✓		✓	✓			
X22			✓				
X23			✓				✓
X24	✓	✓	✓		✓		✓

X25			✓				✓
X28			✓				
X30	✓	✓					✓
X31			✓				
X32			✓				
X33	✓	✓					
X41	✓	✓		✓			
X43	✓					✓	
X44	✓		✓				
X45			✓				
X49			✓				
X50			✓		✓		
X52			✓		✓		
X54	✓		✓				
X63	✓		✓				
X64	✓	✓	✓	✓			
X70	✓				✓	✓	

The formal definition of rape does not allow for love cases to be prosecuted as rape. These cases are nonetheless lodged and proceed to trial, possibly on account of the shared understanding between the public and the police about the wrongful nature of violations of respectability.[693] The investigation and prosecution proceed even in the face of strong exculpatory evidence.[694] It is possible that the recorded facts are manipulated by the police to facilitate a trial, since prosecution for consensual sex between adults is otherwise a legal impossibility.[695] This could also explain why exculpatory evidence often does not form part of the record until it is brought in by the defence. Many lawyers interviewed for this study, including some prosecutors, were deeply frustrated by the possible suppression of evidence by the police, in love cases as well as more generally. While the interviewees did not include police officers, interviews with lawyers, victims and victim-support personnel and my observations in court reinforced how police investigations determine the fate of the prosecution. The following vignette illustrates this point.

Vignette 6.1
The victim's cross-examination had just ended. She had alleged that she was forcibly raped, whereas the defence claimed that she was already married to the accused.[696] The prosecutor and investigating officer were discussing the case on their way to the former's office. The investigating officer commented that the victim was a very

[693] Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 240.

[694] The rarity of attrition in rape cases more generally has been discussed in Section 2 of Chapter One.

[695] Similar observations have been made in context of other offences: Beatrice Jauregui, *Provisional Authority: Police, Order and Security in India* (1st edn, University of Chicago Press 2016) 60-61, 81; Agnes, 'Section 498A, Marital Rape and Adverse Propaganda' (n 85) 13-14.

[696] This would not legally count as rape on account of the marital rape exemption as discussed in Chapter Section 3.6 of Chapter One.

suspicious character who drank alcohol and engaged in *jagrans*.[697] She further stated that the victim had been married six times by the date of the trial and that one of the husbands was too scared to testify because of the victim's links with some violent gangs. The police officer admitted that after a point they had stopped investigating because they had discovered so much exculpatory evidence. For instance, they had left out a rent agreement from the case file because it identified her as the wife of one of her ex-husbands. She said the only reason they had registered the case was because the victim was well-connected and had been able to create a scene in the police station. The prosecutor was surprised and asked why they had not just filed a cancellation report, but immediately recognised that doing so would be complicated.[698] She added that she was amazed by how many lies one person could tell. The conversation moved on to other topics thereafter. The prosecutor seemed to accept the veracity of what the investigating officer told her at face value. She did not, in my presence, challenge anything the investigating officer said or request that all the relevant evidence be produced before the judge. Later, in informal conversations with the judge and other lawyers, she used this case as an example of rape victims who were not credible.

At the very least, this discussion highlights that the construction of the charge sheet is a subjective exercise. It may depend, among other factors, on the personal beliefs of the police officers, the institutional culture of the police including openness to corruption, the burgeoning workload of most Indian police forces, the political or other interference with the discharge of their investigative role and the minimal oversight of their daily functions.[699]

[697] Usually night long rituals of Hindu worship.

[698] It is possible for the police to submit a report to the court saying the case should not proceed, though this is rarely done, as discussed in Section 2 of Chapter One.

[699] Some of these factors have been discussed in more general studies on policing in India, for instance: Jauregui, *Provisional Authority: Police, Order and Security in India* (n 695); Mahesh K Nalla and Manish Madan, 'Determinants of Citizens' Perceptions of Police–Community Cooperation in India: Implications for Community Policing' (2012) 7 Asian Criminology 277, 278; Anasuya Sengupta, 'Concept, Category and Claim: Insights on Caste and Ethnicity from the Police in India' (2010) 33 Ethnic and Racial Studies 717, 732; Arvind Verma, 'Cultural Roots of Police Corruption in India' (1999) 22 Policing: An International journal of Police Strategies and Management 264, 267 – 268.

Having identified the evidence associated with acquittals in love cases, in the following section I suggest that the problematic rationale underlying prosecutions in these cases is the protection of women's respectability. I go on to argue that the registration of these cases will end only if the respectability construct is countered and dismantled through the acceptance of subversive sexualities.

3. LOVE CASES AS RESPECTABILITY POLITICS: REJECTING SHAME, EMBRACING PLEASURE

It is usual for rape laws to be deployed where the protection of women is at stake. However, it is problematic if, as discussed above, it is only the respectability of women that is deemed worthy of protection. In love cases, the sex is consensual, but the vocabulary of rape is used to describe the damage done to the woman's respectability. In this understanding of rape, women engaging in transgressive sexual or romantic relations can never be agents. They can only be victims because even sex which they actively desire is damaging to their respectability. This damage is the greatest where the ideal respectable woman – the non-disabled, middle class, cis, *savarna*, heterosexual Hindu woman – stands to be corrupted by the 'seductive prowess of the undesirable 'other.''[700] This explains why rape cases are still filed against adults in consenting romantic or sexual relationships. For similar reasons, 'missing person' complaints are also often filed with the police where lesbian couples elope.[701] Since

[700] Phadke, Khan and Ranade (n 643) 17.

[701] Maya Sharma, '"She Has Come from the World of the Spirits…": Life Stories of Working-Class Lesbian Women in Northern India' in *Women's Sexualities and Masculinities in a Globalizing Asia* (1st edn, Palgrave Macmillan 2007) 253; Meena Karthika, 'I'm Queer And I Couldn't Care Less About Section 377' (*BuzzFeed*, 26 December 2017) <www.buzzfeed.com/meenakarthika/im-queer-and-i-couldnt-care-

rape is legally defined in heteronormative terms, rape charges cannot be framed in those cases but other offences, such as illegal confinement, kidnapping or abduction are alleged.[702]

The protection of women in this way can jeopardise their safety. In an attempt to be clandestine about their boyfriends, women might expose themselves to physical or other dangers. In one case in the data set, the relevant constable testified that he found the victim and defendant loitering on a national highway well past midnight, which might in other circumstances be regarded as a dangerous thing to do.[703] In other cases, the facts indicated that the only sites the couple found for intimacy were hotel rooms or cars, which are both easy targets for police harassment and 'moral policing', as discussed below.

Women themselves may use the vocabulary of rape to describe consensual sex. This point is exemplified through Sneha Krishnan's study of the young Tamil women's sexual expression in residential hostels in Chennai. She highlights the distinction some students made between 'rape' and 'violent rape.'[704] The unqualified word 'rape' referred to:

---

less-about-section-377?utm_term=.afnwD6YoV&utm_source=bffbdialoguebybuzzfeed&ref=bffbdialoguebybuzzfeed#.evgOalkDp> accessed 16 November 2018.

[702] Arasu and Thangarajah (n 670) 417.

[703] *State v Kailash* SC Number 80/11 (Special Fast Track Court (West), Tis Hazari Courts) [12].

[704] Sneha Krishnan, 'Agency, Intimacy, and Rape Jokes: An Ethnographic Study of Young Women and Sexual Risk in Chennai' (2016) 22 Journal of the Royal Anthropological Institute 67, 73.

> their experience of men's 'passionate behaviour' or 'uncontrollable desire'…one that ambiguously signified a place of foreclosed desire on their parts, and closely interlocking love and violence in intimate relationships.[705]

Thus, Krishnan records girls saying, 'Did your boyfriend rape you or what?' or 'I just want to go and get raped, dude' while discussing their dating life, and one 18-year-old took delight in describing her 'rape' by her boyfriend as 'the kind [of sex] that leaves hickies.'[706] Since there exists no socially acceptable way of discussing women's sexual desire, 'rape' comes to stand in for all 'illegitimate sex' and the denial of sexual agency becomes one way for women to maintain their respectability.[707] Fantasies of rape voiced and play-acted in front of Krishnan reinforced the link between rape and respectability. These fantasies assumed that the 'rapist' was a 'dark-skinned, brawny, and rough talking' man with a working-class accent and *dalit* background.[708] For middle-class women, it is liaisons with such men that are considered most disreputable, even though the stereotypes of aggressive masculinity associated with these men made them the most desirable in the middle-class imagination of Krishnan's participants.[709]

In a context where protection-oriented laws are used to persecute women's sexual choices, arguing for more protection reflects limited imagination and ambition. Instead, it is desirable to demand the freedom to take risks. This means creating a

[705] Ibid.

[706] Ibid 74-75.

[707] Ibid 76.

[708] Ibid 77.

[709] Ibid 77-79.

space where women can pursue romantic or sexual relationships of their choice, which may or may not end up in marriage; where they can explore sexual expression not for the 'worthy or legitimate purpose' of sustaining bloodlines structured according to caste or community norms, but for no reason except that they want to; and where they do not have to run away to hotel rooms, national highways or cars to explore intimacy, pleasure or fun with their partners. As one legal aid lawyer interviewed for this study pointed out, love cases are a stark reminder that consenting adults will find a way to have sex with each other whether it is criminalised or not. Accordingly, she suggested that the better alternative is for parents to embrace this truth and demand sex education in schools to encourage responsible sexual behaviour.

Exploring the feelings and desires of women is a process of reversing their commodification *i.e.*, their treatment as objects of sexual desire, rather than sexual agents themselves. At the same time, the feminist enterprise must necessarily entail arguments for the freedom of all marginalised and non-marginalised populations who seek to explore sexual desire, particularly when it takes them outside the confines of socially sanctioned sexual endogamy. The control of women's sexual choices is irrevocably tied with the control of all those who engage in transgressive sexualities including: lesbian women, gay men, marginalised men and privileged women in romantic/sexual relationships, non-binary people, commercial sex workers, asexual persons, persons with disabilities who challenge stereotypes of being asexual, and many others. Respectability politics attempts to erase and persecute the sexual

expression of members of all these groups. Challenging respectability politics to safeguard women's right to consensual sexual exploration must be done in tandem with challenging these other sexual taboos.

It is noteworthy that even in love cases, usually the couple get married immediately after running away. This is done partly to make it more difficult for their families to separate them since the husband's right over his wife is commonly considered to be as strong as that of the father over his daughter.[710] This decision to get married is often used by lawyers as grounds for an acquittal, at least on the rape charge, since most marital rape is excluded from the legal definition of rape.[711] However, it is likely that marriage is performed partly to afford some legitimacy to the relationship between the victim and the husband. The couple thus refutes 'the allegations of unrestrained sexuality and 'un-Indian' immorality heaped upon their conjugal bed.'[712] No doubt they may actively want to commit to a marriage, but it is also true that unmarried couples face tremendous social hostility. This hostility finds historical echoes in beliefs voiced at least as far back as the 1870s when the first attempt was made by the colonial government to legitimate love marriages (*i.e.*, self-arranged marriages) between men and women from different religions.[713] Orthodox groups branded this as an attempt to extend legal support to men with 'impure desires' and

[710] Arasu and Thangarajah (n 670) 421.

[711] *See* Section 3.6 of Chapter One.

[712] Mody (n 369) 256.

[713] Ibid 228.

'corrupt women' who chose to live with their 'paramours' as husband and wife.[714] Social sanctions continue to exist for unmarried couples today, such as discrimination in the housing market, which makes it difficult for couples to find joint accommodation.[715] It is only by ending the persecution of unmarried couples that their prosecution too will cease. One way to do this would be 'destabilising marriage's position as the sole system of intimate relationships and social organisation.'[716] In contrast with this aim, public displays of intimacy currently expose the parties to harassment, not just by the public but also by the police. Criminal law provisions can facilitate such harassment.

Section 294 of the IPC criminalises causing 'annoyance' through 'obscene' acts and songs in public and Section 91 of the Delhi Police Act 1978 prohibits behaving 'indecently' in public.[717] The uncertainties inherent within these provisions make them prone to misuse. For example, the word 'obscenity' has not been defined and has been given meaning through case law. Frequently, this provision is invoked where the defendant has verbally abused the complainant in public.[718] However, it is also used to persecute couples who choose to engage in any sort of intimacy in public. To

---

[714] Ibid 236.

[715] Rishav Thakur, *Real Estate Brokers in the Rental Housing Market: A Study of Vijay Nagar, a Student Area near Delhi University* (Centre for Civil Society Working Paper Number 273, 2012) 34.

[716] Arasu and Thangarajah (n 670) 429.

[717] Any person found guilty under Section 294 of the IPC can be punished with imprisonment of either description up to three months and/or a fine. Any person who violates Section 91 of the Delhi Police Act 1978 can, under Section 97 of that Act, be punished with a fine of hundred rupees and in default of payment, with imprisonment of up to eight days.

[718] For instance, in *Madhya Pradesh v Giriraj Dubey* (2013) 15 SCC 257 [3]; *Madhya Pradesh v Mohan* (2013) 14 SCC 116 [3].

illustrate, in *A and B v State* a married couple, who claimed they were taking photos of each other on their mobile phones, were arrested and the police sought to charge them under Section 294.[719] Though it could not be proven, the prosecution alleged that they were 'sitting in an objectionable position' and 'kissing each other.'[720] The case against them was quashed by the Delhi High Court, by which time they had already been harassed for over eight months, including through a brief illegal detention and being made to pay bribes.[721] While the above provisions apply only to public places, there is no guarantee the police will not invoke them to harass unmarried couples in hotel rooms, lodges and resorts. There is precedent for this from Maharashtra where analogous provisions in the Bombay Police Act 1951 are applicable.[722]

Some recent urban campaigns have sought to challenge the shame associated with sexual intimacy; others shift the focuss on to women's sexual agency and their right to take risks. For instance the 'Kiss of Love' protests in 2014 involved 50-odd individuals kissing publicly in the city of Kochi, though it was not long before they were all arrested and taken to the police station.[723] Another example is the Pink *Chaddhi* campaign, where pink *chaddhis* (panties) were mailed to members of a right-

[719] *A and B v Delhi* 2010 Cri LJ 669 [1], [4].

[720] Ibid [19].

[721] Ibid [15], [19].

[722] Sanya Samtani, 'Tackling Moral Policing in Mumbai: A Human Rights Approach' (*Oxford Human Rights Hub*, 4 September 2015) <ohrh.law.ox.ac.uk/tackling-moral-policing-in-mumbai-a-human-rights-approach/> accessed 10 November 2018.

[723] G Sampath, 'Is Kissing in Public an Obscene Act?' (*LiveMint*, 4 November 2014) <www.livemint.com/Opinion/5DKL9wuITBg8LosTQFFX8O/Is-kissing-in-public-an-obscene-act.html> accessed 10 November 2018.

wing organisation that had attacked and molested women for drinking in pubs in Mangalore.[724] This was regarded by the attackers as un-Indian, unrespectable behaviour. Similarly, the first of many Indian SlutWalks, *Besharmi Morcha* (Rally for Shamelessness) was launched in 2011.[725] Like the Canadian campaigns they were inspired by, these walks involve women dressing 'shamelessly' and walking through the streets to assert that sexualised or 'unrespectable' clothing is not an invitation to inflict sexual violence.[726] In the same vein, the Meet to Sleep campaign of the Blank Noise Project involves women meeting up to nap in public parks – an activity usually only undertaken by working-class men.[727] Perhaps most relevant to the literature cited in this chapter, the 'Why Loiter?' movement began as a result of Phadke et al.'s scholarship.[728] It involved more than 250 women reclaiming city space in Mumbai through loitering, cycling and using public transport at all times of the day and night.[729]

These examples could be multiplied but this illustrative list is sufficient to highlight the sort of feminist interventions that can counter the oppressive force of

[724] Ratna Kapur, 'Pink Chaddis and SlutWalk Couture: The Postcolonial Politics of Feminism Lite' (2012) 20 Feminist Legal Studies 1, 11.

[725] Durba Mitra, 'Critical Perspectives on SlutWalks in India' (2012) 38 Feminist Studies 254, 254.

[726] The impact of the protests was dampened somewhat, given instructions by organisers, urging women to dress 'modestly' to avoid backlash: Rituparna Borah and Subhalakshmi Nandi, 'Reclaiming the Feminist Politics of 'SlutWalk'' (2012) 14 International Feminist Journal of Politics 415, 416.

[727] Srila Roy, 'Breaking the Cage' (2016) 63 Dissent 74; Shilpa Phadke and Anuradha Roy, 'Women Walk Out' (2017) 46 Index on Censorship 50, 52.

[728] Roy, 'Breaking the Cage' (n 727); Phadke and Roy (n 727).

[729] Roy, 'Breaking the Cage' (n 727).

respectability codes. However, these projects must be augmented and diversified if a liberating conception of women's sexuality is to be normalised and made mainstream. Movements such as the ones cited are accessible mostly to urban, middle class women.[730] Much of the organisation is done through social media, which itself is exclusionary in a country with low (but growing) internet penetration.[731] Yet, to dismiss movements that focuss on sexual agency as elitist would be to assume marginalised women are 'utterly victimised without any agential capacity.'[732] The reach of these campaigns is currently limited, but there is vast potential to make these movements more intersectional and widespread. Take Back the Night Kolkata (TBNK), for instance, has actively sought to ally with trans feminist groups. As a result, women from *dalit*, working class, trans backgrounds collaborate with the more middle class TBNK organisers to take up public space or use public transport at 'unsafe' hours in the night.[733] Similarly, there is a particular need to ally with disabled women who are consistently desexualised in India.[734] It would also be instructive to give greater public space to lesbian movements, whose politics have foregrounded the importance of associating sex with pleasure and fulfilment rather than shame. As Ponni Arasu and Priya Thangarajah describe:

---

[730] Sujatha Subramanian, 'From the Streets to the Web: Looking at Feminist Activism on Social Media' (2015) 50 Economic and Political Weekly 71, 76.

[731] Ibid.

[732] Kapur, 'Pink Chaddis and SlutWalk Couture: The Postcolonial Politics of Feminism Lite' (n 724) 14.

[733] Roy, 'Breaking the Cage' (n 727).

[734] Ghai (n 670) 55.

> …lesbian women's sexual activity is one that is only for sexual pleasure. Sexual pleasure, a 'luxury' not allowed to women as a whole and to some men (the disallowing being a gendered process) is in many ways the basis of lesbian sexual activity, thus making it incomprehensible and a threat… (citations omitted)[735]

Creating solidarities across multiple axes could be transformative in a deeply heterogenous milieu where some women are considered more respectable than others. The implications of this discursive shift have been further developed in the conclusion below.

4. CONCLUSION

This chapter analysed love cases as enmeshed with the discourse on respectability that requires women to conform to certain gendered expectations. Respectable women, according to this understanding, do not enter into relationships that violate caste, class and community norms. The protection of women in this context refers to the protection of their respectability. Correspondingly, rape laws are freely invoked by parties where women's respectability is violated, even where the relevant actions entail consensual sex and/or relationships. The appropriate response to this phenomenon is not to ask for greater protection, but to demand the liberty to engage in risky pursuits of fun and pleasure. In this concluding section, I highlight two implications of this analysis.

First, prosecutions in love cases make clear that rape continues to be understood in popular imagination as an offence committed against women's respectability.

[735] Arasu and Thangarajah (n 670) 416.

Concerted attempts have been made in scholarship and policy documents to encourage an understanding of rape as the violation of women's sexual autonomy and bodily integrity.[736] Nonetheless, the data discussed in this chapter show that these attempts have not been wholly successful. Violations of respectability (or 'modesty' or 'chastity') continue to be prosecuted, even where the relationship between the victim and defendant is consensual. An ideological shift in the understanding of rape has still not found a foothold, whether in the police or public imagination. This also indicates a greater need to examine the role of the police in allowing these cases to proceed through the criminal justice system.

Secondly, the persistence of love cases suggests a need to shift feminist focuss away from state feminism and reformism. By 'state feminism' I mean the inclusion of women in state agencies, such as through reservation (quotas) in political institutions or the establishment of bodies that focuss on women's issues, including the DCW.[737] Legal reform has always been a strategy used by the feminist movement in modern India and state feminism has become increasingly pronounced since the 1990s.[738] The rise of state feminism has been accompanied by a shift away from grass-roots political organisations, and the concentration of feminist capital in the hands of '9-to-5

[736] For instance, Verma, Seth and Subramanium (n 52) i; Geetanjali Gangoli, 'Controlling Women's Sexuality: Rape Law in India' in Nicole Westmarland and Geetanjali Gangoli (eds), *International Approaches to Rape* (1st edn, The Police Press 2011) 112.

[737] Srila Roy, '#MeToo Is A Crucial Moment to Revisit the History of Indian Feminism' (*EPW Engage*, 20 October 2018) accessed 15 November 2018.

[738] Ibid.

feminists' working for NGOs and policy organisations.[739] The persistence of love case prosecutions gives us reason to pause and reconsider these trends, and the distribution of feminist resources more broadly. Love cases continue to represent a significant proportion of rape prosecutions because social attitudes towards rape have not caught up with the (limited, but valuable) legal advances that have been made in this area. To quote Nandita Haskar, 'the legal battle [has taken] precedence over the political one.'[740] There is a need to explore a reversion to grass-roots feminist advocacy and large-scale consciousness raising that extends beyond state actors such as police or judicial officers.[741] This is not to suggest that there is an inevitable tension between legal and social transformation,[742] and I recognise the laudable work that continues to be undertaken by women's collectives on the ground. My limited claim is that there is a need to foreground, support and expand such efforts, to compensate for the overfocuss on legal solutions.

---

[739] Ibid.

[740] Nandita Haskar, 'Human Rights Lawyering: A Feminist Perspective' in Amita Dhanda and Archana Parashar (eds), *Engendering Law: Essays in Honour of Lotika Sarkar* (1st edn, Eastern Book Company 2007) 87.

[741] Roy suggests this has begun to happen since the turn of the millennium in the 'third wave' of Indian feminism, as evidence by efforts such 'Why Loiter?' and 'Take Back the Night Kolkata.': Roy, '#MeToo Is A Crucial Moment to Revisit the History of Indian Feminism' (n 737). *See also* Kotiswaran, 'A Bittersweet Moment: Indian Governance Feminism and the 2013 Rape Law Reforms' (n 631) 79; Rahul Saha, Surya Bala and Rohan Saha, 'Looking Beyond Law: A Review of the Indian Sex Workers' Movement' (2008) 4 NALSAR Student Law Review 1, 12.

[742] Vina Mazumdar rightly warns against this line of thinking in Vina Mazumdar, 'Political Ideology of the Women's Movement's Engagement with Law' in Amita Dhanda and Archana Parashar (eds), *Engendering Law: Essays in Honour of Lotika Sarkar* (1st edn, Eastern Book Company 2007) 374.

To conclude, the prosecution of love cases demonstrates the urgent need to focuss on women's sexual agency rather than primarily on their victimisation. The constant association of sex with shame, especially for women,[743] needs to be replaced with positive narratives about liberated sexualities. In the past, much of the social, academic and policy discussions about sex have been about reproduction or violence. This chapter argues that it is equally important to have more open conversations about women's sexual pleasure, desire and agency.[744] The recognition of women as victims in some circumstances should not preclude their celebration as agents in others.[745]

[743] Arasu and Thangarajah (n 670) 414.

[744] Sharma (n 701); J Devika, 'Bodies Gone Awry: The Abjection of Sexuality in Development Discourse in Contemporary Kerala' (2009) 16 Indian Journal of Gender Studies 21, 39; Manuela Ciotti, 'After Subversion: Intimate Encounters, the Agency in and of Representation, and the Unfinished Project of Gender without Sexuality in India' (2011) 23 Cultural Dynamics 107, 122.

[745] Shilpa Phadke, 'Thirty Years On: Women's Studies Reflects on the Women's Movement' (2003) 38 Economic and Political Weekly 4567, 4575.

CHAPTER SEVEN: AN EMPIRICAL ANALYSIS OF JUDICIAL DECISION-MAKING IN CONTESTED RAPE CASES

1. INTRODUCTION

The prosecution in contested rape cases faces two intractable challenges. First, adjudication is frequently governed by stereotypes of what a real rape looks like. Secondly, there is often little evidence to corroborate the victim's allegations. This chapter provides an empirical analysis of the impact of these issues on rape cases in Delhi trial courts and argues in favour of more rigorously reasoned trial court judgments. In making this assessment, it draws upon the total population of trial court judgments from January to June in 2014 and 2016, court observation in six trial courts and 61 interviews conducted with multiple stakeholders in rape prosecutions in Delhi. It starts by giving an overview of the data sources that inform the following analysis. It goes on to examine the prevalence of misconceptions in trial court judgments about women's reactions to rape. Further, it demonstrates the centrality of forensic and medical evidence in the data set. It concludes that a richer judicial understanding about the context in which women experience violence is needed. There is a particular need to understand how victim responses to rape are heterogenous and greatly influenced by women's social and familial environment.

2. DATA SOURCES

This chapter analyses all contested cases except those categorised as 'love cases', as discussed in Chapter Six.[746] As mentioned in Chapter Six, the term 'contested cases' refers to those cases in which the victim-witness did not turn hostile to the prosecution, excluding 'promise to marry' cases.[747] In the complete dataset of 254 trial court judgments, there were 65 contested cases, of which 38 remained once love cases were excluded. Twenty-five of these resulted in acquittals (65.8%).[748] These 38 cases are analysed here in light of the court observation carried out in each of Delhi's six court complexes and the 61 interviews conducted with victims, lawyers, judges and victim-support personnel. This set of interviews specifically includes responses to the questionnaire administered to nine sitting trial court judges in 2016 with the support of the Delhi High Court.

3. RAPE MYTHS ABOUT RESISTANCE AND REPORTING IN JUDICIAL REASONING

This section considers and critiques the mistaken presumptions underpinning judicial reasoning about women's reactions during and immediately after the assault. As

[746] Love cases are those in which the 'victim' and defendant elope with each other. When she is found, the victim is generally forced to file or support a rape case against her boyfriend by members of her family who disapprove of the consensual relationship. These cases have been analysed in Chapter Six.

[747] 'Promise to marry' cases are those in which the victim is deceived into having sex with the defendant based on an insincere promise of marriage. For a discussion on 'promise to marry' cases *see* Chapter Five. 'Hostile' victim-witnesses are those who do not support the prosecution's case through their testimony. Factors associated with hostile victim-witnesses have been discussed in Chapter Four.

[748] One case involved two accused persons, of whom one was acquitted and the other was convicted (*State v Vijeta and Mahendra* (n 4)). This case has been categorised once as an acquittal, and once as a conviction.

discussed in Chapter Two, judicial decision-making in the criminal justice system may be based on biases associated with victims, defendants or the manner in which the offence is committed.[749] For instance, Nils Christie describes that the 'ideal' or most credible victim is one who is weak, respectable and blameless and is victimised by a big, bad offender with whom she shares no prior relationship.[750] Feminist scholarship has highlighted the potency and specificity of similar beliefs in the adjudication of rape cases.[751] This scholarship suggests that judges frequently rely on 'rape myths', resulting in a relatively lower conviction rate.[752] As mentioned before, rape myths are 'prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists' that contribute to 'creating a climate hostile to rape victims.'[753] These beliefs can be prescriptive or descriptive.[754] An example of a descriptive rape myth is the idea that most women are raped by strangers. A prescriptive rape myth is the suggestion that

[749] For instance, *see* C Neil Macrae and John W Shepherd, 'Do Criminal Stereotypes Mediate Juridic Judgements?' (1989) 28 British Journal of Social Psychology 189, 190; Susanna Vezzadini, 'Being (Almost) Invisible: Victims of Crime in the Italian Juvenile Criminal Justice System' (2014) 17 Temida 87, 96; Jeffrey J Rachlinski and others, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 Notre Dame Law Review 1195, 1225 – 1226.

[750] Christie, 'The Ideal Victim' (n 114).

[751] Francis X Shen, 'How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform' (2011) 22 Columbia Journal of Gender and Law 1, 25 – 26; Amy M Buddie and Arthur G Miller, 'Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims' 45 Sex Roles 139, 140; Lynn Hecht Schafran, 'Eve, Mary, Superwoman: How Stereotypes about Women Influence Judges' (1985) 24 The Judges' Journal 12, 17, 48 – 50.

[752] Meghan Sacks, Alissa R Ackerman and Amy Shlosberg, 'Rape Myths in the Media: A Content Analysis of Local Newspaper Reporting in the United States' (2018) 39 Deviant Behavior 1237, 1240.

[753] Martha Burt, 'Cultural Myths and Supports for Rape 1980' (1980) 38 Journal of Personality and Social Psychology 217, 217.

[754] Durba Mitra and Mrinal Satish, 'Testing Chastity, Evidencing Rape' (2014) 49 Economic and Political Weekly 51, 56.

women should dress conservatively to avoid being raped. Stereotypical reasoning in rape cases is the basis on which Susan Estrich constructs a 'real rape' scenario, which she describes as the only believable rape scenario in judicial and public imagination.[755] According to Estrich, a 'real' rape is one in which a stranger violently rapes a woman who physically resists his attack and reports the incident to the police immediately after.[756]

What counts as a 'real' rape depends on the socio-cultural context.[757] This can be illustrated by reference to the *Mathura* rape case in which the alleged rapists of a young, tribal girl were acquitted by the court, partly because of her sexual history with other partners.[758] The decision was arguably influenced by two rape myths: one, that tribal women are 'promiscuous' and two, that sexually active women routinely lie about rape.[759] Similarly, in the oft-cited *Bhanwari Devi* rape case, the upper caste accused rapists of a *dalit* victim were acquitted by the trial court on the assumption that they would not have had had any sexual contact with the victim to preserve their caste purity.[760] This line of thinking ignores and perpetuates the longstanding

[755] Estrich (n 119).

[756] Ibid.

[757] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2018) 69 Crime, Law and Social Change 91, 98.

[758] The decision was overturned by the High Court but the defendant was ultimately acquitted by the Supreme Court: *Tukaram and Others v Maharashtra* (1979) 2 SCC 143.

[759] Geetanjali Gangoli, 'The Right to Protection from Sexual Assault: The Indian Antirape Campaign' (1996) 6 Development in Practice 334, 336; *see also* Amita Baviskar, 'Adivasi Encounters with Hindu Nationalism in MP' (2005) 40 Economic and Political Weekly 5105, 5106.

[760] Shreya Atrey, 'Women's Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum' (2018) 40 Human Rights Quarterly 859, 882.

impunity with which upper caste men routinely rape *dalit* women.[761] In *Bhanwari Devi*, the judges also seemed influenced by the assumption that the *dalit* woman before them was an 'adulteress and had loose character.'[762] Against this background, this section assesses if and how judicial decision-making in Delhi trial courts draws upon stereotypical narratives about rape.

Rape myths can be built into the legislative framework. For instance, the marital rape exception in the Indian definition of rape reflects the rape myth that married women cannot, and/or ought not, refuse to have sex with their husbands.[763] However, this section is mainly concerned with the enforcement of law. Based on a joint reading of the data sources used for this study, two rape myths featured strongly in judicial decision-making about rape: first, women who are being raped will, or should, do whatever they can to verbally and physically resist their attacker; second, that rape victims will, or should, immediately report the incident to law enforcement agencies.

The focuss of this section is on rape myths that were expressly invoked by the court. Other prejudicial beliefs about rape may have led to subconscious stereotyping by judges, but it is difficult to gauge their extent or impact. For example, a common rape myth is that only those who are strangers to the victim are 'real' rapists.[764]

---

[761] Ibid 881 – 882.

[762] Shally Prasad, 'Medicolegal Response to Violence Against Women in India' (1999) 5 Violence Against Women 478, 495. On the assumption that *dalit* women are sexually available *see* Uma Chakravarti, 'The Everyday and the Exceptional: Sexual Violence and Impunity in our times' in Uma Chakravarti (ed), *Fault Lines of History: The India Papers II* (1st edn, Zubaan Books 2017) 22.

[763] IPC, s 375.

[764] Sakshi Singh, Eva Sharma and Madhav Dubey, 'A Critique of Causes and Measures of Rape: A Systematic Review of Literature' (2018) 18 Language in India 293, 295.

However, there was only one case in the sample where a stranger rape was alleged and the judgment did not emphasise the relationship between the victim and the perpetrator. Similarly, the idea that a 'real' rape involves a young victim is frequently referenced in literature about rape.[765] But in most cases the judgment did not indicate what the age of the victim or perpetrator was or dwell on this issue at length.[766] It has also been suggested that the victim is regarded as more credible where the rape is perpetrated in a public place, but none of the three cases that fit this description gave any sustained attention to this factor.[767]

It is important to remember that the features discussed below were part of several pieces of evidence that the court relied on to reach a verdict. It is possible that the verdict would remain unchanged whether or not the faulty reasoning was removed from the judge's consideration. However, it is impossible to conclude how the court would respond to this counterfactual. Consequently, this section focusses mainly on highlighting problematic aspects of the judgments studied without claiming that addressing these issues would automatically alter the conviction rate.

3.1 Judicial expectations of victim's resistance during the rape

Victims' reactions during rape can be varied. Amongst other emotions, victims could feel frightened, startled, shocked, disgusted, panic-stricken, humiliated, desperate,

[765] Hannah Bows, 'The 'Ideal' Rape Victim and the Elderly Woman: A Contradiction in Terms?' in Marian Duggan (ed), *Revisiting the 'Ideal Victim'* (1st edn, Policy Press University of Bristol 2018).

[766] *See* **Appendix 7** for a breakdown of cases according to what the relationship between the victim and the defendant was.

[767] *See* **Appendix 7** for a breakdown of cases according to what the location of the incident was.

angry or insulted.[768] Contrary to popular imagination, many victims respond with 'tonic immobility', *i.e.*, they involuntarily lose their ability to provide any kind of verbal or physical resistance.[769] Despite this, secondary literature suggests that decision-making in rape trials is often based on the idea that real rape victims physically or at least verbally resist their rapist.[770] This idea can also manifest in the expectation that the rape victim would have suffered some injuries during the rape.[771] This expectation is particularly strong in case of women from labouring classes who are assumed to be stronger and therefore more capable of physical resistance.[772]

Under the IPC, there is no formal legal requirement for the victim to physically or verbally resist her rapist. This is most directly reflected in the amended legal definition of consent, which is as follows:

> Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> > Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.[773]

---

[768] James Selkin, 'Protecting Personal Space: Victim and Resister Reactions to Assaultive Rape' (1978) 6 Journal of Community Psychology 263, 266.

[769] Grace Galliano and others, 'Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates' (1993) 8 Journal of Interpersonal Violence 109, 109.

[770] Nathan Ryan and Nina Westera, 'The Effect of Expert Witness Testimony and Complainant Cognitive Statements on Mock Jurors' Perceptions of Rape Trial Testimony' (2018) 25 Psychiatry, Psychology and Law 693, 693 – 694, 696.

[771] Louise Ellison, 'Credibility in Context: Jury Education and Intimate Partner Rape' (2018) The International Journal of Evidence and Proof OnlineFirst 1, 4; The expectation that the rape victim would have suffered physical injury is discussed in the next section.

[772] Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 69.

[773] IPC, s 375.

The proviso expressly engages with the issue of physical resistance, but it could also be inferred from the definition of consent that the absence of verbal resistance cannot by itself render the sex consensual.[774] Even before the introduction of this definition, Supreme Court case law discussed sexual consent in the very similar terms:

> Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between the resistance and assent.[775]

This understanding of consent as embodying the free choice and agency of the consenting party has now been reinforced by the introduction of the positive definition of consent through the 2013 amendment. This section first uses the primary data collected to assess how trial courts treated the issue of victims' resistance. It then analyses the way in which appellate courts have ruled on the necessity of rape victims' resistance in the *Farooqui* case (2018). While *Farooqui* was not applicable law when fieldwork for this study was conducted, the analysis presented below demonstrates that there is continuity in how trial courts were ruling at the time and the manner in which the issue of resistance was ultimately decided by appellate courts.

3.1.1 Victim resistance as evidence of 'real' rape in Delhi trial courts

The lack of verbal and physical resistance from the victim is nearly always raised by defence counsels and seemed to be accorded high probative value by courts. This was

[774] Cf. *Mahmood Farooqui v Delhi* (n 70). A detailed exposition of this case is provided Section 3.1.2 of this chapter.

[775] *Himachal Pradesh v Mango Ram* (2000) 7 SCC 224 [12].

done in one of two ways. First, the allegations were regarded as less credible where the victim claimed she had screamed during the assault, but this was not proved[776] or was disproved[777] by adducing relevant witnesses, such as neighbours. Judges did not necessarily believe victims' accounts of verbal resistance without corroborating evidence.[778] Second, if the victim had not verbally or physically resisted the assault, the court regarded it as unlikely that she had been raped.[779] For example, in *Arvind*, the victim and defendant were tenants in the same house.[780] He had been asking her to marry him before the incident, but she refused because she belonged to a different caste from him.[781] On the night of the incident, she started crying as he pulled her towards himself, after which he gagged her mouth.[782] She explained that when she tried to raise an alarm during the incident, he threatened that he would kill her and her son.[783] This lack of resistance was considered to discredit her account and the court held as follows:

---

[776] *State v Dalip Kumar Rai* SC Number 162/13 (Special Fast Track Court, Dwarka Courts) [15]; *State v Pherudin* SC Number 11/14 (Special Fast Track Court (West), Tis Hazari Courts) [65].

[777] *State v Anil Kumar Yadav* SC Number 129/13 (Special Fast Track Court, Dwarka Courts) [22]; *State v Sunil* 271/12 (Special Fast Track Court (Central), Tis Hazari Courts) p 25.

[778] *State v Pherudin* (n 776) [65]. Cf. *State v Rahul Tomar* SC Number 108/13 (Special Fast Track Court (West), Tis Hazari Courts) [54]; *State v Mukesh Singhal* SC Number 89/10 (Special Fast Track Court (West), Tis Hazari Courts) [33] where the victim's account was supported by forensic and medical evidence respectively.

[779] *State v Sunder Shyam* 126/13 (Special Fast Track Court, Dwarka Courts) [2]; *State v Ishaq Ali* SC Number 46/13 (Special Fast Track Court (Central), Tis Hazari Courts) [14] – [15]; *State v Jeetu Dass* SC Number 15/14 (Special Fast Track Court (West), Tis Hazari Courts) [26].

[780] *State v Arvind* SC Number 135/13 (Special Fast Track Court, Dwarka Courts) [2].

[781] Ibid.

[782] Ibid [6].

[783] Ibid [6].

> It is also apparent from the testimony of the prosecutrix that she did not raise any alarm when she was being raped by the accused and during the period of that half an hour when the accused was present in her room. It is not the case of the prosecution that the accused continued to keep the mouth of the prosecutrix gagged by one hand during the entire period of that half an hour.[784]

The implicit assumption is that the victim would, or should, risk physical harm to herself and her child in order to thwart her rapist. Further, victims raped by perpetrators known to them – as was the case here – might experience strong feelings of betrayal, which make it harder for them to resist.[785] This was not something considered by the court in *Arvind* or in other similar cases. Thus, a victim's explanation that she was unable to resist the rapist on account of 'trauma, pain and the force used by the accused' was not accepted by the court as credible.[786] The defendant in this case was her neighbour and her father's friend and colleague.[787] In contrast, the absence of resistance was regarded as well-explained in cases which conformed to 'real rape' stereotypes, such as in *Udaivir and Ram Rattan,* where the victim alleged that she was gang-raped by five strangers in a dark, deserted godown.[788]

The judicial expectation of resistance seemed to attach particularly to physically strong women. In one case, there were estranged property relations between the

---

[784] Ibid [13].

[785] This sense of betrayal where the rapist is known to the victim is discussed in Allison West, 'Tougher Prosecution When the Rapist is Not a Stranger: Suggested Reform to the California Penal Code' (1994) 24 Golden Gate University Law Review 169, 177.

[786] *State v Randhir Kumar Ojha* SC Number 103/13 (Special Fast Track Court (West), Tis Hazari Courts) [54], [41].

[787] Ibid.

[788] *State v Udaivir and Ram Rattan* (n 4) [1] – [2], [47]. 'Godown' is the local term for a warehouse.

defendant and the victim's husband.[789] On the relevant night, the defendant and his associates tried to force their way into her residence in order to assault her husband. However, she 'stood at the door of the room and did not allow them to enter the room.'[790] Shortly after, when her husband left for work, they entered the room and gang-raped her.[791] Although she was not cross-examined about whether she physically resisted her assailants,[792] the court observed as follows:

> The role played by the prosecutrix, during the said attack manifests that she is a very brave and strong lady as she single handedly offered resistance to the accused and his associates and did not allow them to enter her room and beat her husband. Therefore, I feel that she could have offered some amount of resistance at the time of second attack also when [the defendants] had come to her room at 7.30 pm. From her deposition in this regard, it appears that she did not offer any resistance at all and permitted the accused to do whatever they did as per her deposition. This also brings the case of the prosecution within the cloud of suspicion.[793]

While judgments do not discuss demographic data, as pointed out before, this association of strength with physical resistance specifically disadvantages working class or 'lower' caste women, who frequently engage in manual labour. However, these are women who may find it particularly difficult to resist defendants since they are disadvantaged by multiple intersecting power structures, such as those of caste, class and gender.

---

[789] *State v Manoj Kumar and Rohtash Maan* SC Number 161/13 (Special Fast Track Court, Dwarka Courts) [9].

[790] Ibid.

[791] Ibid.

[792] Ibid [11].

[793] Ibid [16].

In *Ishaq Ali*, the court's expectations went beyond resistance as the victim was disbelieved for not making an attempt to escape in the time it had taken the defendant to wear a condom.[794] Here too, the defendant had threatened to kill her if she did not comply quietly with his wishes.[795]

These cases demonstrate that even though there is empirical evidence to suggest that victims will refrain from offering physical or verbal resistance, for a variety of reasons, courts still frequently expect them to do so. This is so in spite of the clearly worded definition of consent, which *prima facie* recognises that consent is more than just the absence of resistance. Yet, the interpretation of this legal definition in recent years has set the clock back in respect of certain categories of victims, as analysed in the next section.

3.1.2 Regressive readings of resistance in State v Mahmood Farooqui

The victim in *Farooqui* was a doctoral student who had initially met the defendant through an academic contact.[796] They went on to become friends and consensually kissed on a few occasions.[797] On the night in question she went to his house and saw that he was drunk and 'crying so hard that his mucus was running down upto his mustache.'[798] He confided that he was upset with his mother and wife, and the victim

[794] *State v Ishaq Ali* (n 779) p 4, 16.

[795] Ibid.

[796] *State v Mahmood Farooqui* (n 148) [3].

[797] Ibid [11].

[798] Ibid.

tried to comfort him.[799] Farooqui then kissed the victim and she responded by saying that she did not think that that was what he needed.[800] He continued to kiss her as he told her that she was a 'great woman.'[801] Thereafter, he said he wanted to 'suck' her but she said 'no.'[802] He tried to pull down her underwear, but she pulled it back up from the other side.[803] She told him not to do what he was doing.[804] Following this, the defendant pinned down her arms and performed oral sex on her.[805] In her testimony, she stated that she was scared of his strength and did not want him to hurt her more and she froze.[806] Finally, she pretended to have an orgasm and he stopped.[807]

The trial court convicted the defendant, who appealed the conviction before the Delhi High Court.[808] The Delhi High Court acquitted the defendant.[809] One of the main grounds for the acquittal was that the defendant had not known that the oral sex was non-consensual.[810] In reaching this determination, the Court observed:

> Instances of woman behavior are not unknown that a feeble 'no' may mean a 'yes'. If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be

[799] Ibid.

[800] Ibid [3].

[801] Ibid.

[802] Ibid.

[803] Ibid.

[804] Ibid.

[805] Ibid.

[806] Ibid.

[807] Ibid.

[808] *Mahmood Farooqui v Delhi* (n 70) [1].

[809] Ibid.

[810] Ibid [77] – [86].

> difficult to lay down a general principle that an emphatic 'no' would only communicate the intention of the other party. If one of the parties to the act is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble 'no', was actually a denial of consent.[811]

An appeal against this decision was filed before the Supreme Court, which refused to admit it.[812] While the dismissal order does not detail the Court's reasoning, in oral arguments, the judges focussed on the past relationship between the victim and defendant, where 'even according to her own evidence, she went to his house, they wanted to have drinks, and do several things together.'[813] The judges further highlighted that in confronting the defendant about his misconduct, the victim had re-iterated that she had love and respect for the defendant, which made her less credible. [814] This line of thinking is particularly pernicious since rape is frequently committed frequently by people the victim might love and respect, including her intimate partner. As a result of the Supreme Court's dismissal, the above observations of the High Court bind all the Delhi trial courts.

---

[811] Ibid [78].

[812] *State v Mahmood Farooqui* Special Leave Petition (Criminal) No D8248/2018 (Supreme Court of India).

[813] Utkarsh Anand, ''She Said I Love You, Kissed Him': Argument That Led to Reprieve for Mahmood Farooqui in SC' (*News18*, 19 January 2018) <www.news18.com/news/india/she-said-i-love-you-and-even-kissed-him-the-argument-that-led-the-sc-to-decide-in-favour-of-peepli-live-director-mahmood-farooqui-1636829.html> accessed 16 January 2019.

[814] Ibid.

The *Farooqui* judgment has subverted the objective with which the 2013 amendment on consent was introduced, which was to require an *unequivocal* and voluntary agreement between sexual partners. Not only are courts now entitled to expect resistance by the victim if a finding of non-consent is to be made, this must be vigorous resistance (as opposed to 'feeble' resistance). This might especially be the case where the victim is educated and/or has had consensual sexual contact with the defendant in the past. This interpretation of consent is textually and teleologically unsound and has no basis in empirical scholarship on the point. It sets a dangerous precedent for trial courts who already operate on the stereotypical assumption that a 'real' rape victim would fight her rapist under all circumstances.

3.2 Prompt police complaints as evidence of victim credibility

Having discussed the prevalence of rape myths about resistance in the data set, this section will assess the potency of a second misconception according to which a 'real' rape victim immediately reports the incident to the police. Rape victims often file delayed complaints. Reasons for this are varied and can include victims experiencing trauma, intimidation by the defendant, social stigma, lack of social or familial support, unwillingness to characterise someone known to them as a rapist, and, where a colleague or employer is the perpetrator, fear of unemployment.[815] Women who belong to over-policed communities – including Muslim, 'lower' caste and *dalit*

[815] Mary Carr and others, 'Debunking Three Rape Myths' (2014) 10 Journal of Forensic Nursing 217, 218; Hunter (n 164) 160; Tanishka S Safri, 'Prevalence of Rape Myths in Contemporary India' (2015) 3 International Journal of Research – Granthaalayah 147, 149.

women – are unlikely to make complaints immediately on account of their communities' estrangement from the police.[816] Further, women are not likely to complain immediately where they are dependent on the perpetrator. Thus, disabled women might find it difficult to complain immediately against care-givers who sexually abuse them.[817] Typically, courts are sceptical of delayed criminal complaints, since there is greater scope for the evidence to have been fabricated in such cases.[818] However, given the unique circumstances surrounding rape, repeated Supreme Court judgments have held that delayed reporting in a rape case will not undermine the prosecution as long as it is explained.[819] Unfortunately, these judgments are based on the idea that Indian society is 'non-permissive', with the result that a rape complaint could damage the family's 'honour', reduce marriage prospects for the victim and lead to social stigma.[820] Judicial acknowledgment of the multiple considerations that can influence the promptness of rape complaints is important since this will ensure fair

[816] For a discussed of religion- and caste-based alienation from the police, see Anand Teltumbde, 'Delhi Gang Rape Case: Some Uncomfortable Questions' (2013) 48 Economic and Political Weekly 10, 11; Asghar Ali Engineer and Amarjit S Narang (eds), *Minorities and Police in India* (1st edn, Manohar Publishers 2006).

[817] Darja Zaviršek, 'Pictures and Silences: Memories of Sexual Abuse of Disabled People' (2002) 11 International Journal of Social Welfare 270, 272.

[818] Hunter (n 164) 160.

[819] *Santhosh Moolya v Karnataka* (2010) 5 SCC 445 [10]; *Satpal Singh v Haryana* (2010) 8 SCC 714 [13]; *Uttar Pradesh v Manoj Kumar Pandey* (2009) 1 SCC 72 [3]; *Chhattisgarh v Dehra* (2004) 9 SCC 699 [7]; *Karnel Singh v Madhya Pradesh* 1995 SCC (5) 518 [7].

[820] *Punjab v Gurmit Singh and Others* (n 168) [7]; *State v Sanjay Kumar* (2017) 2 SCC 51 [29]; *State v Om Prakash* (2002) 5 SCC 745 [8]; *Karnel Singh v Madhya Pradesh* (n 819) [7].

decision-making even where the victim is perceived by the court to be less 'traditional' and more 'permissive.'[821]

Previous research has found that prejudices surrounding delayed reporting are not very potent amongst appellate court judges.[822] The data revealed that this finding is not equally true of trial court judges, whose treatment of delayed reporting was more mixed. In cases where the delay did weaken the prosecution's case, the court often backed this determination with sound reasoning. For instance, the court was loath to accept fear of defamation through a non-consensually recorded video or photographs as an acceptable reason for delayed reporting where the impugned images or recording were not produced by the prosecution.[823] In one case, the victim had made inconsistent statements about whether the delay in reporting had been for six months or five years, which led the court to disbelieve her explanations for the delay.[824] The delay was also regarded as inadequately explained where the victim was

---

[821] This would likely be women who are considered to be more sexually available, such as women from north-eastern India or 'Westernised' women: Dolly Kikon, 'Memories of Rape: The Banality of Violence and Impunity in Naga Society' in Uma Chakravarti (ed), *Fault Lines of History The India Papers II* (1st edn, Zubaan Books 2017) 102; Alison Phipps and others, 'Rape Culture, Lad Culture and Everyday Sexism: Researching, Conceptualizing and Politicizing New Mediations of Gender and Sexual Violence' (2018) 27 Journal of Gender Studies 1, 3; Namita Goswami, 'Autophagia and Queer Transnationality: Compulsory Heteroimperial Masculinity in Deepa Mehta's Fire' (2008) 33 Signs 343, 346 – 347, 358-363. See Chapter Section 1.2 of Chapter Six for a more general discussion of women's 'respectability.'

[822] Barn and Kumari (n 170) 445.

[823] *State v Naushad* SC Number 288/13 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts) [39], [47] (six months or five years); *State v Om Prakash Nayak* SC Number 1253/16 (Special Fast Track Court (East, North East and Shahdara)) [33], [35] (complaint for two incidents, delayed by 27 days and two days respectively). Where there was no allegation of non-consensual, sexually explicit recording, fear of defamation and social stigma was regarded as an acceptable cause of delay: *State v Chottan Kumar* SC Number 61/13 (Special Fast Track Court, Saket Courts) [8] (5 days).

[824] *State v Naushad* (n 823) [47]. Similarly, there were inconsistencies in the victim's accounts of the incident in *State v Jeetu Dass* (n 779) [25]. The court found it difficult to compute how long the delay was

inconsistent regarding the reason for delay,[825] or did not disclose the reason during the investigation.[826] To give one example, the victim explained a delay of 20 hours in her FIR by citing threats to her life from the defendant.[827] However, when re-examined by the prosecutor on this point, she denied that the defendant had threatened her after the incident.[828] In general, courts seemed more sympathetic to explanations of delay where the victim came from a rural background and had no support system in Delhi.[829] Surprisingly, given the court's reluctance to sympathise with women who are allegedly duped by promises of marriage, a deceptive promise of marriage was accepted as a justifiable reason for delay in one case.[830]

Nonetheless, there were still many instances where the court's evaluation of delayed reporting was unduly stringent. For example, one case involved multiple incidents of rape.[831] In several of these, the defendant had shown the victim his pistol and threatened to kill her.[832] The court pointed out that this was not true of one incident and the delay in reporting that incident was regarded as prejudicial to the

---

and was unable to properly assess whether or not the delay was justified. This was regarded as damaging for the prosecution's case.

[825] *State v Arvind* (n 780) [12]; *State v Pappu and Lal Babu Sharma* SC Number 158/13 (Special Fast Track Court, Dwarka Courts) [25]; *State v Sunder Shyam* (n 779) [14].

[826] *State v Sunil* (n 777) pp 21 – 22.

[827] *State v Arvind* (n 780) [12].

[828] Ibid.

[829] *State v Narender Mohan Mittal* SC Number 146/13 (Special Fast Track Court, Dwarka Courts); *State v Rahul Tomar* (n 778).

[830] *State v Manas* SC Number 52/13 (Special Fast Track Court (Central), Tis Hazari Courts) (22 days). For a detailed account of promise to marry cases, *see* Chapter Five.

[831] *State v Mool Chand* SC Number 1/16 (Special Fast Track Court, Dwarka Courts).

[832] Ibid [11].

prosecution.[833] Further, after she had relayed the incidents to her fiancé, she took one more month to approach the police since she wanted to make sure she had the support of her parents.[834] This was regarded as implausible by the court, since:

> [i]f at all she had apprised her fiancee about her plight, it would have sent chills down the spine of her fiancee and he would have definitely encouraged her to report the matter to the police.[835]

This observation overlooks the context in which the victim's rape could have been regarded as a violation of her entire family's 'honour', reducing her fiancé's keenness to pursue a legal remedy in the case.[836] It also creates a judicial expectation that credible victims would disregard what their parents say, while complying with what their marital partners say – in line with the regressive idea that a woman is 'handed over' to her husband when she gets married.[837] Notably, the Supreme Court has earlier observed, '[a]s honour of the family is involved [in a rape case], its members have to decide whether to take the matter to the court or not.'[838] This observation undermines the victim's agency in the matter of reporting rape, but at least it recognises that the victim might be operating within the context of familial constraints.

---

[833] Ibid [28].

[834] Ibid.

[835] Ibid.

[836] On family 'honour' *see*, Sahba Hussain, 'Breaking the Silence: Sexual Violence and Impunity in Jammu and Kashmir' in Uma Chakravarti (ed), *Fault Lines of History: The India Papers II* (1st edn, Zubaan Books 2017) 127.

[837] Huma Ahmed-Ghosh, 'Chattels of Society: Domestic Violence in India' (2004) 10 Violence Against Women 94, 104.

[838] *Satpal Singh v Haryana* (n 819) [15].

Chhotu provides another example of judicial reasoning that fails to take familial power asymmetries into account. In this case the reported incident followed past attempts of sexual assault that had been made by the defendant.[839] The victim deposed that she had informed her husband about a past incident 'but he did not care.'[840] The court responded to this by saying:

> These allegations of the prosecutrix does not inspire any confidence as even a poor or weak person would not keep mum when any person would try to play with his/her prestige. Even if for the sake of arguments, it is assumed that her husband did not care about her complaint regarding sexual assault by accused on earlier occasions, she did not bother to inform about incident to her mother or her landlord…[841]

This reasoning suffers from a further defect. It overlooks that where rape disclosures are not met with support and affirmation, women are unlikely to explore alternate avenues for support.[842] The resulting isolation of the victim can expose her to repeat victimisation, particularly where the defendant is proximate to her. Trial courts did not seem to factor this risk into their analysis. Thus, the court found the victim lacked credibility where there was 'no explanation for why the complaint was not made immediately at the first instance and why the prosecutrix allowed the

---

[839] *State v Chhotu* SC Number 109/15 (Special Fast Track Court, Patiala House Courts).

[840] Ibid [13].

[841] Ibid.

[842] Courtney E Ahrens, 'Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape' (2006) 38 American Journal of Community Psychology 263, 264. The court similarly downplayed the potency of familial pressure in *State v Anil Kumar Shukla* SC Number 70/13 (Special Fast Track Court (West), Tis Hazari Courts) [101] – [117], [134] (10 days); *State v Kailash* SC Number 189/13 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts) [26] – [29] (72 days).

incident to be repeated three times.'[843] The victim had alleged rape against her colleague in this case. She had made repeated unsuccessful attempts to report the perpetrator to the unsupportive employers.[844] In contrast with the court's thinking, a legal aid lawyer speaking on the issue of repeat victimisation described the phenomenon as follows:

> …most of these cases that are being reported come from a certain section of society which do not have adequate recourse to law. They come from an uneducated background, they could be daily wage earners, they could be people who are employed in small jobs, they could be unskilled labourers and these are the persons who at the first instance would be very reluctant to go to the police. So I have even seen cases where, you know, there would have been an instance of the crime being committed but they have only reported it after the 3rd or 4th instance. When it's crossed a certain threshold that they could not even tolerate it beyond that point. So you can imagine how bad it is…they belong to society where they are usually…on the wrong side of law...They're probably doing some sort of business or work where they don't have licenses, they're living in a place where they don't have permit to reside there. So because they're always running away from the law, when something like this happens, the crime is committed, they are reluctant to go to the police in the first instance.

Thus, there are many reasons that may prevent women from reporting their rape to the police, including absence of support systems and alienation from the legal system. In such circumstances, it is dubious judicial reasoning to say that the victim 'allowed the incident to be repeated.'

On occasion, even an overnight delay counted against the victim's credibility. In *Pappu and Lal Babu Sharma*, the victim informed her husband of the incident at night

[843] *State v Jeetu Dass* (n 779) [25].

[844] Ibid [10].

but only lodged the report in the morning.[845] The court regarded the delay of one night as unexplained delay, even though she had testified that when she disclosed the incident to her husband, '[h]e also became perturbed and did not know what to do.'[846]

Further, scholarship on delayed reporting of sexual assault records heightened reluctance by victims to consider criminal justice remedies where the perpetrator was close to them.[847] Again, this factor did not seem to be taken into account by trial courts as demonstrated in *Randhir Kumar Ojha*.[848] Here, the defendant was a close friend of the victim's parents, which deterred her from raising the issue with her parents.[849] The court did not accept this as a 'logical explanation' for a delay of three months.[850]

In some cases, it seemed that the issue of delay in reporting was raised only to corroborate whatever judgment the court had already reached. This was most evident where the same reasons for roughly similar lengths of delay were regarded by the court as compelling in one case but not in another. Thus, where the victim was found to be credible on other grounds, a delay of one day was condoned on the ground that the defendant had threatened to kill her and members of her family.[851] Whereas, where the victim's account was not otherwise thought to be believable, threats to kill her

---

[845] *State v Pappu and Lal Babu Sharma* (n 825) [2] – [3].

[846] Ibid [14], [27].

[847] West (n 785) 177 – 178.

[848] *State v Randhir Kumar Ojha* (n 786).

[849] Ibid [38], [54]. She also alleged that he had threatened to defame her and ensure that she had to discontinue her education.

[850] Ibid [51].

[851] *State v Sandeep* SC Number 172/13 (Special Fast Track Court, Dwarka Courts) [32].

were regarded as an inadequate explanation for a delay of less than two days.[852] The idea that delay was not too significant for courts was also reflected in one case where there were two defendants who had allegedly conned the victim into believing she was married to one of them, when they were actually married to each other.[853] The court regarded the same delay in reporting as prejudicial to the prosecution's case in respect of one defendant (who was acquitted) but not the other (who was convicted).[854] There were other instances in which the delay was noted but not otherwise discussed by the court.[855] Cases have been classified according to the length of delay in lodging the FIR with the police under Table E in **Appendix 7**.

To conclude, in line with rape myths about victim responses to rape, the data analysed demonstrated that victims who do not make any attempt to resist their rapist are unlikely to be regarded as credible witnesses. Further, victims who do not report the incident immediately to the police are frequently regarded as less credible. In order to improve the quality of decision-making, it is important for courts to assess the psychological, social and familial constraints that operate on women in resisting

[852] *State v Ramesh Kumar* SC Number 121/13 (Special Fast Track Court (West), Tis Hazari Courts) [26] (threatened to kill her).

[853] *State v Vijeta and Mahendra* (n 4) [1].

[854] Ibid [34]. The delay was not discussed in respect of the second (convicted) defendant.

[855] *State v Prabhat Ranjan* SC Number 14/15 (Special Fast Track Court, Dwarka Courts) [15]; *State v Sunil Kumar* SC Number 14/14 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts) [31].

and reporting rape. In the next section, I will analyse the role played by forensic and medical evidence in informing the verdict.

4. TO CORROBORATE OR NOT TO CORROBORATE? : UNDERSTANDING THE ROLE OF FORENSIC AND MEDICAL EVIDENCE IN RAPE CASES

This section reviews the need for corroborative evidence in rape cases and goes on to focuss specifically on forensic and medical evidence. In doing so, it critiques the assessment of such evidence where it draws upon flawed medical understandings, many of which can be traced to colonial medico-legal literature. It concludes that while it is technically permissible, convictions in rape cases are difficult to secure without corroborating forensic and medical evidence.

4.1 The importance of victim credibility in rape cases

Aside from the victim's statements, evidence is difficult to secure in most sexual assault cases, since there are typically no eyewitnesses.[856] Independent evidence, such as medical evidence, is also frequently absent.[857] Genital injuries may be present even where the sex is consensual and absent where it is non-consensual.[858] Physical injuries are also unlikely to be present except for where the allegations are about forceful sex, which may be accompanied by physical violence (rather than just non-consensual

[856] Hunter (n 164) 157.

[857] Ellison and Munro (n 164) 203.

[858] Gethin Rees, ''It is not for me to say whether consent was given or not': Forensic Medical Examiners' Construction of 'Neutral Reports' in Rape Cases' (2010) 19 Social and Legal Studies 371, 375; Sarah Anderson, Natalie McClain and Ralph J Riviello, 'Genital Findings of Women after Consensual and Nonconsensual Intercourse ' (2006) 2 Journal of Forensic Nursing 59.

sex).[859] In any case, forensic and medical evidence might be lost as a result of delayed reporting in rape case.[860] For example, even forensic evidence that is undisturbed by washing and cleaning will be usually not persist after 72 hours of the incident.[861] It will almost certainly be lost after a lapse of 96 hours from the incident.[862] Further, many victims might refuse to have a medical examination out of fear or trauma, including that which results from hostile or indifferent treatment by medical staff.[863] For several victims, the medical examination could be perceived as a kind of secondary victimisation with the doctor's actions resembling the original sexual assault.[864] In recognition of this social reality, the Supreme Court has observed that a conviction in a rape case can be based on solely on the victim's evidence if the material particulars of her allegations have remained consistent over time.[865] Such convictions are permissible where the victim establishes herself as a 'sterling witness' in the following way:

> …the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable…There should not be any prevarication in the version of such a witness. The witness should be in a

---

[859] Janice Du Mont, Karen-Lee Miller and Terri L Myhr, 'The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women' (2003) 9 Violence Against Women 466, 469

[860] Ellison and Munro (n 164) 203. For a more detailed account of why rape complaints tend to be delayed, *see* Section 3.2 of this chapter.

[861] Ministry of Health Guidelines (n 389) 29. In fact, the recovery of semen becomes unlikely after 48 hours of the incident happening: Prasad (n 762) 489.

[862] Ministry of Health Guidelines (n 389) 29.

[863] Maier (n 365) 790.

[864] Ibid.

[865] *Himachal Pradesh v Shree Kant Shekari* (2004) 8 SCC 153 [21]; *UP v Pappu* (2005) 3 SCC 594 [12]; *Santhosh Moolya v Karnataka* (n 819) [7].

> position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness.[866]

While the above extract seems to indicate an unduly stringent standard of victim credibility, the Court has reinforced that the victim's credibility is adversely impacted only if 'discrepancies [across all the evidence] are such which are of fatal nature.'[867] Minor contradictions or improvements are not meant to undermine the prosecution.[868] This becomes particularly relevant given the negative effects of delay and trauma on memory,[869] and the fact that most trials are marked by lengthy delays. For example, the average lapse of time between the filing of the FIR complaint and the delivery of a decision was 759 days for the judgments studied in this chapter.[870]

Like for all other crimes, the prosecution is required to prove guilt beyond reasonable doubt in rape cases. However, the Court has contextualised what counts as reasonable doubt, reinforcing that it might not be reasonable to expect corroborating evidence where the circumstances make it impossible to provide any.

---

[866] *Rai Sandeep v Delhi* (n 168) [15].

[867] *Santhosh Moolya v Karnataka* (n 819) [7].

[868] *Punjab v Gurmit Singh and Others* (n 168) [8]. 'Improvements' refers here to facts that are initially undisclosed but are added by the victim in statements that are made later in time.

[869] Nina J Westera, Mark R Kebbell and Becky Milne, 'It is Better, But Does It Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence' (2013) 19 Psychology, Crime & Law 595, 596; Ellison (n 771) 4.

[870] This average is based on the 27 cases for which this information was available in the judgment.

Unfortunately, this legal development is also rooted in the Court's observation that 'no self-respecting woman would come forward in Court to falsely make such a humiliating statement against her honour.'[871] Again, this thinking can easily work to the disadvantage of women who are typically not considered respectable, including those simultaneously disadvantaged along the axes of gender, race, class, caste and/or disability.[872] Further, one of the reasons cited for doing away with the necessity of corroboration is that 'Indian' women are unlikely to fabricate rape charges[873] — as if the morality of non-Indian women is suspect.[874]

This section elucidated why rape convictions should be allowed in the absence of corroborating evidence where the victim is proved to be a credible witness. However, in practice it might be possible to collect at least *some* independent evidence to corroborate *some* details of the victim's account. For example, there may be call records or emails exchanged between the victim and defendant, or mobile phone location (collected through telephone towers) which provide supporting evidence for some part of the prosecution's case. The following sections draw upon the data sources used to establish how the victim's account is nonetheless seldom believed, unless there is medical or forensic evidence to support her case.

---

[871] *Mehboob Batcha v State* (2011) 7 SCC 45 [8].

[872] *See* Section 1.2 of Chapter Six for a discussion on 'respectable' women.

[873] *UP v Chhoteylal* (2011) 2 SCC 550 [22]; *Maharashtra v Chandraprakash Kewalchand Jain* (1990) 1 SCC 550 [22]-[23].

[874] This is connected to negative attitudes associated with 'Westernised' women: Goswami (n 821) 346 – 347, 358-363.

4.2 Judicial assessments of credibility in the shadow of colonial constructions of science

Despite the legal framework outlined above, scholarship on sexual assault cases suggests that convictions based solely on the victim's testimony are rare. This body of literature has brought out the centrality of medical evidence in court judgments, tracing it to colonial medico-legal jurisprudence.[875] An entire body of medico-legal scholarship developed because colonial administrators insisted that European scientific standards were inadequate to deal with their less trustworthy Indian subjects.[876] A key medical figure in the 19th century, Norman Chevers stated:

> [I]t is only by thoroughly knowing the people, and by fixing the mind sedulously upon the records of their crimes, that an European can learn how strange a combination of sensuality, jealousy, wild and ineradicable superstition, absolute untruthfulness, and ruthless disregard of the value of human life, lie below the placid, civil, timid, forbearing exterior of the natives of India.[877]

While colonial law was already based on scepticism of women's allegations of rape, the native woman was regarded as 'doubly suspect.'[878] In turn, the weight of unreliability was borne differentially by native women from different socio-economic backgrounds, with the harshest assessments of credibility being reserved for 'low-

[875] Mitra and Satish (n 754) 52; Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 61 – 116; Kolsky (n 166).

[876] Mitra and Satish (n 754) 52.

[877] Norman Chevers, *A Manual of Medical Jurisprudence for Bengal and the North Western Provinces* (1st edn, F Carbery, Bengal Military Orphan Press 1856) 8 cited in Baxi, *Public Secrets of Law: Rape Trials in India* (n 127) 65.

[878] Kolsky (n 166) 111.

caste and low-class' women.[879] In this context, medical jurisprudence posited the untrustworthy nature of women as a matter of scientific fact. It was hence essential that their testimony not be believed in the absence of corroborative medical evidence. Contemporary medical textbooks draw extensively from this scholarship and are cited heavily by courts in making credibility determinations.[880] Correspondingly, in the absence of a medical record of injuries or forensic evidence to connect the defendant to the crime, it could be difficult for the prosecution to secure a conviction.[881]

Determinations of victim credibility can also be fallaciously linked to their virginity or (lack of) prior sexual history.[882] Even though this evidence is legally inadmissible for assessing whether or not there was consent,[883] it sometimes comes to form part of the record either explicitly or implicitly through medical reports. Two devices are used in medical reports to make an indirect reference to sexual history. First, a torn hymen is taken to indicate that the woman is not a virgin. While a fresh hymen tear may provide proof of sexual penetration, if an old tear is recorded, it may be mistakenly taken to connote prior sexual activity.[884] Second, if the hymen is intact, the 'fingers test' is used to distinguish 'true virgins' from 'false virgins.'[885] Under this

[879] Ibid 118; Elizabeth Kolsky, 'The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–57' (2010) 69 The Journal of Asian Studies 1805, 1106 – 1110.

[880] Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 68 – 69.

[881] Mitra and Satish (n 754) 55 – 57.

[882] Ibid 56.

[883] IEA, s 53A.

[884] Baxi, *Public Secrets of Law: Rape Trials in India* (n 129) 82.

[885] Ibid 74 – 76.

'test', the doctor measures the number of fingers that can be easily admitted by the victim's vagina.[886] If two or more fingers are easily admitted, this is taken to mean the victim is likely to have been sexually active.[887] Neither of these 'tests' is in keeping with recent developments in medical science. The hymen's shape, size and elasticity varies and it may remain intact despite repeated sexual activity.[888] It may also break for any number of reasons ranging from physical exercise to masturbation.[889] Similarly, the Supreme Court has found the fingers test to be unscientific as well as unconstitutional *inter alia* on the grounds that it violates the victim's privacy and dignity.[890]

Based on these considerations, the latest government guidelines on post-rape medical care disallow 'any mention of past sexual practices through comments on size of vaginal introitus, elasticity of vagina or anus.'[891] They also explicitly forbid the fingers 'test.'[892] Even so, there is some evidence that the test continues to be used in many parts of the country.[893] Having analysed the main ways in which medical and forensic evidence is typically used in rape cases, the next section will assess the manner in which these themes played out in the data set drawn on in this chapter.

---

[886] Ibid.

[887] Ibid.

[888] Mitra and Satish (n 754) 54.

[889] Ministry of Health Guidelines (n 389) 28.

[890] *Lillu v Haryana* (2013) 14 SCC 643.

[891] Ministry of Health Guidelines (n 389) 28, 60.

[892] Ibid.

[893] Bajoria (n 403).

4.3 Forensic and medical evidence in the data set

Lawyers and judges interviewed for this study highlighted the many uses to which the victim's medical record in the case can be put: it provides a record of the genital and/or physical injuries suffered by the victim; documents the results of the forensic tests conducted; and summarises the victim's allegations as relayed to the doctor, which can then be used to contradict or corroborate her story.[894] Many lawyers also raised the significance of hymen-related evidence, but when pushed, some of them retracted their claim. The medical examination of the defendant can similarly be used to record the presence of injuries, collect relevant samples and establish whether or not he is capable of having sexual intercourse. Finally, medical evidence can be used to test for the presence of drugs or alcohol in the bloodstream of the victim and defendant if the allegations suggest this is relevant.

In the data set, not all judgments explicitly engaged with the medical or forensic evidence in the case. However, there were physical injuries or medical samples containing the defendant's DNA in seven out of the ten convictions that discussed this evidence. By any standards, some of these cases involved the perpetration of brutal physical violence with a weapon, which was incontrovertibly proved through the medical report. This evidence was regarded as important corroboration. For example, in one case, the rapist repeatedly stabbed the victim's hands, face, throat and back

[894] The issue of inconsistencies across the victim's various statements is discussed in Section 4.4.1 of this chapter.

with a knife and then left her for dead in a drain.[895] The incident was reported immediately with help from a stranger who was passing by.[896] The medical report was therefore prepared shortly after the incident, recorded extensive injuries and was discussed by the judge as a ground for conviction.[897] Similarly, in another case, the victim was slapped, punched and beaten with a wheel spanner before she was raped.[898] Here too, the complaint was made within a day of the incident and the court placed reliance on the well-documented injuries.[899] However, even where the violence was less intense and inflicted without a weapon, the documented injuries were regarded as important corroborative evidence.[900] In contrast, there were no injuries recorded in the medical report in any of the cases that resulted in acquittal.

The presence of physical injuries seemed to influence the court's assessment of the remaining evidence. For instance, where injuries were otherwise present, the presence of semen stains was given importance.[901] In other cases, semen stains were not accorded the same importance in the absence of DNA evidence to connect them with the defendant.[902] This seemed to be especially true where the victim was a married

---

[895] *State v Suraj Kumar* SC Number 163/13 (Special Fast Track Court, Dwarka Courts) [2].

[896] Ibid.

[897] Ibid [26].

[898] *State v Sandeep* (n 851) [2].

[899] Ibid [16], [29].

[900] *State v Udaivir and Ram Rattan* (n 4) [47].

[901] *State v Suraj Kumar* n (895) [40]. Similar, semen stains were afforded importance in *State v Mukesh Singhal* (n 778) [37] – [38], where no injuries were recorded, but blood was found om the victim's clothes, undergarments and pubic hair.

[902] *State v Manas* (n 830) 26.

woman. In such cases, courts acknowledged that the victim could have had sex with her husband.[903] This reasoning reinforces the regressive judicial belief that women only have sex within the parameters of marriage.[904] The differential treatment of the forensic evidence in light of severe physical injuries extended even to cases where the forensic report *disproved* the presence of the defendant's DNA in the sperm stains. This occurred in a case where there were allegations of gang-rape.[905] Presumably, the court reasoned that the presence of sperm stains proved sexual activity and the negative DNA test established the presence of other people at the scene of crime. However, this is faulty reasoning since the DNA was not definitively matched with any of the other alleged perpetrators. Notably, in other cases where the presence of the defendant's DNA in the relevant samples was disproved, this was typically regarded as evidence that could not support the prosecution.[906] These cases lend support to findings from other jurisdictions that decision-makers in the criminal justice system lay greater emphasis on the presence of injuries than they do on forensic evidence.[907]

---

[903] *State v Ramesh Kumar*(n 852) [32]; *State v Dhruv Gupta* SC Number 159/13 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts) [32]; *State v Anil Kumar Shukla* (n 842) [46], [47] (though in this case, the court reasoned that the victim had only been in the company of her husband after the incident until the complaint).

[904] For a discussion of such attitudes to premarital sex, *see* Chirodip Majumdar, 'Attitudes towards Premarital Sex in India: Traditionalism and Cultural Change' (2018) 22 Sexuality and Culture 614, 615.

[905] *State v Udaivir and Ram Rattan* (n 4) [61].

[906] *State v Sunder Shyam* (n 779) [16]; *State v Pappu and Lal Babu Sharma* (n 825) [29]; *State v Arvind* (n 780) [14].

[907] Ira Sommers and Deborah Baskin, 'The Influence of Forensic Evidence on the Case Outcomes of Rape Incidents' (2011) 32 The Justice System Journal 314.

In several cases, the judge noted the absence of medical or forensic evidence as one of many factors leading to the acquittal of the defendant.[908] This included cases where there had been a substantial delay and it was unlikely for medical or forensic evidence to still be present.[909] However, some judgments recognised the effect of delayed reporting on such evidence.[910]

In a few cases where genital injuries were absent, judges excused their absence by referring to the victim's status as a married woman and mother[911] or by discussing why she was inhibited in resisting the defendant.[912] It is not clear from the judgment why the victim's status as a mother or wife was relevant. It is possible that the court was relying on the fact that genital injuries are relatively more common where the rape victim is a virgin.[913] However, medical research indicates that genital injuries are unlikely to be present in most cases of sexual assault.[914] These observations reinforce the need for judges to carry out a more precise appraisal of medical evidence. Hymen

---

[908] *State v Pherudin* (n 776) [31] – [34]; State v Jeetu Dass (n 779) [28]; *State v Om Prakash Nayak* (n 823) [27]; *State v Rakesh and Nand Lal* SC Number 150/13 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts) [47] – [53]; *State v Anil Kumar Yadav* (n 777) [25].

[909] *State v Chhotu* (n 839) [14] (delay of 51 or more days); *State v Anil Kumar Shukla* (n 842) [28] – [35] (delay of 10 days); *State v Naushad* (n 823) [40] (delay of 6 days from last incident); *State v Kailash* (n 842) [36] (delay of 72 days).

[910] *State v Randhir Kumar Ojha* (n 786) [31]; *State v Sunil Kumar* (n 855) [32].

[911] *State v Chottan Kumar* (n 823) [8].

[912] *State v Udaivir and Ram Rattan* (n 4) [47].

[913] Samuel Robsam Ohayi and Euzebus Chinonye Ezugwu, 'Prevalence and Pattern of Genital Injuries among Adolescent Rape Victims attending Enugu State University Teaching Hospital, South East Nigeria' (2019) 39 Journal of Obstetrics and Gynaecology 190, 192 – 193.

[914] Iain McLean and others, 'Female Genital Injuries Resulting from Consensual and Non-consensual Vaginal Intercourse' (2011) 204 Forensic Science International 27.

tears were specifically mentioned in a few judgments, although hymen evidence formed an explicit part of the judge's assessment in only one case.[915]

The medical record was sometimes put to unintended uses and relied on to make unjustified inferences. For example, in one case the victim had initially agreed to have her internal examination carried out but after that, changed her mind. This was interpreted by the judge as evidence that the victim has sought to manipulate the process to reflect her willing compliance with it:

> In consent column of the MLC she was ready for internal examination and sampling but at the time of examination she did not allow. It shows that complainant was very clever that is why she first agreed for internal examination and at the time of examination she refused.[916]

As highlighted before, there are many reasons why victims might refuse an internal medical examination, including its mimetic likeness to the sexual assault. Further, the judge recorded the absence of a 'P/V test' ('per vaginal' or fingers test) as a ground for acquittal in this case.[917] But the fingers 'test' is especially similar to sexual assault and victims may be particularly disinclined to allow the doctor to carry it out. As mentioned above, this 'test' is forbidden under the latest guidelines on the point. Most of the judges surveyed lauded this as a positive development, but one judge

---

[915] *State v Mukesh Singhal* (n 778) [37]. The torn hymen supported the prosecution's case. Hymen tears were also mentioned in: *State v Suraj Kumar* (n 895) [27]; *State v Shiv Pujan Verma* SC Number 131/15 (Special Fast Track Court (South), Saket Courts) [29]. None of these cases mentioned whether the hymen tear was old or fresh.

[916] *State v Archana and Others* SC Number 48/14 (Special Fast Track Court (Central), Tis Hazari Courts) [109].

[917] Ibid.

referred to more ambiguous guidelines on the topic that were issued by the Delhi Government in 2015 in the following terms:

> …the Delhi Government has issued guidelines…[which] say that it cannot be recommended that the physician be made to function under the constraint of complete ban of these essential steps to the internal examination of a sexual assault survivor…
>
> The Supreme Court has said that such tests are inhuman and should be banned – a thought widely echoed by NGO working in the fields.
>
> The government in its advisory has clarified that PV examination is not done to judge if the woman under examination is habituated to sexual intercourse. Government has also listed reasons for which PV examination is necessary. Vaginal examination is conducted on patients who come with bleedings or with some discharge, so the vaginal examination cannot be completely stopped. It is to treat the patient and to save her life and which is being done in some specific rape cases.

While the Delhi Government later 'clarified' that the test can only be done for 'treatment purposes' they did not specify what these are or respond to criticisms that the 'test' serves no medical purpose.[918] This ambiguity seems to have given some judges and medical practitioners space to push for the fingers 'test' despite the Supreme Court's declaration of its unconstitutionality. The above quote also highlights a dangerous elision between 'vaginal' and 'per vaginal' examination – misleadingly suggesting that a vaginal examination cannot be carried out without using the fingers 'test.' It is imperative that the Delhi Government is unequivocal on this issue, so as to not legitimise misinformation among medico-legal practitioners.

[918] Suryatapa Bhattacharya, 'What Delhi's New 'Two-Finger Test' Guidelines Really Say' *The Wall Street Journal* (8 June 2015) <blogs.wsj.com/indiarealtime/2015/06/08/what-delhis-new-two-finger-test-guidelines-really-say/> accessed 31 January 2019.

Further, notwithstanding the proforma currently in place to standardise medical examinations in rape cases, the medical opinions observed through the judgments sometimes fell outside the doctor's remit. In one case, the medical report of the doctor recorded that the victim was 'constantly lying', although no reason was given for this observation.[919] Consequently, the judge did not place any reliance on this assessment.[920] The assessment of the victim's credibility is the exact legal issue the court has to rule on. Where the doctor is responsible for carrying out the victim's physical examination, it is dangerous for them to opine on the victim's credibility since this may unduly influence the judge.[921]

The preceding analysis reinforces the importance of medical and forensic evidence in rape cases. If this evidence is absent, the court can still convict the defendant if the victim is found to be a credible witness. The following section critically engages the considerations based on which courts gauge victim credibility in rape trials.

4.4 Of sterling witnesses and tarnished testimonies: Judicial assessments of witness credibility

To recap, a high standard of consistency is expected from rape victims, particularly where the allegations are not corroborated by independent evidence. This consistency

[919] *State v Mukesh Singhal* (n 778) [37]. Similarly, another report recorded the victim 'uncooperative and was not allowing her proper examination.' It is not clear what the doctor meant by this, though the victim is certainly under no obligation to consent to any aspect of the medical examination which she does not want to undergo: *State v Dhruv Gupta* (n 903) [22].

[920] *State v Mukesh Singhal* (n 778) [37].

[921] Shally Prasad similarly found character evaluations of victims in medical reports prepared for rape cases: Prasad (n 762) 492 – 494.

is expected across all the statements made by the victim including her complaint; statements made by her during the investigation to the police, doctor, judicial magistrate and victim-support person; and her testimony. At the same time, courts have noted that only material contradictions and improvements to the victim's account will be considered as damaging the victim's credibility. Where the victim is not thus established as a sterling witness, the prosecution can prove its case by adducing corroborating evidence. Conversely, the defence can adduce contradictory evidence to challenge the victim's credibility. Each of these factors are discussed in turn below.

4.4.1 The impact of 'inconsistent' or 'implausible' accounts on victim credibility

This section highlights the pliability of terms such as 'plausible' and 'material', which are used to assess the credibility of victims' accounts and the inconsistencies therein. Based on survey responses, most judges were aware that assessments of victim credibility can only be affected by material contradictions and improvements. As one judge explained:

> Some inconsistencies/improvements are bound to occur at the time of recording of the evidence in the court due to errors of memory or due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. The minor inconsistencies/improvements on trivial matters which do not affect the core of the prosecution case should not be made a ground on which the evidence can be rejected in its entirety…Mere marginal variations in the statement of a witness cannot be dubbed as improvement as the same may be elaboration of the statement made by the witness earlier.

This understanding was not always implemented in the judgments. In some cases, the determination of whether or not the inconsistencies were material was quite clear-

cut. For instance, the victim was not found to be a credible witness where she complained that the defendant had raped her thrice, but later told the judicial magistrate that he had raped her only once.[922] In another case, she told the police that the incident had taken place six months before; mentioned no timeline in her statement to the judicial magistrate; and testified in court the incident took place five years before her complaint.[923] In her cross-examination, she was unable to mention the date or time of the incident.[924] These inconsistencies reasonably damaged her credibility to a great extent.

In other cases, the victim's testimony was rejected on shakier grounds. For example, in one case, the victim alleged that she had been trafficked and forced into sex work by the defendants.[925] She had come to Delhi after a mutual friend in Assam introduced her to one of the traffickers, with whom she came to Delhi by train.[926] She filed the complaint after she escaped from her place of confinement.[927] She was not regarded as a credible witness *inter alia* because she had not furnished the train ticket for her journey to Delhi.[928] She had also failed to disclose the time of her escape in the

[922] *State v Arvind* (n 780) [10]. Similarly, there was a discrepancy in the number of times she was raped in *State v Mool Chand* (n 831) [20] – [21].

[923] *State v Naushad* (n 823) [47].

[924] Ibid.

[925] *State v Archana and Others* (n 916) [2] – [4].

[926] Ibid [2].

[927] Ibid [5].

[928] Ibid [110].

police complaint although this was mentioned in several statements that followed, including the medical case history and her statement to the judicial magistrate.[929]

In another case, the victim's allegations were disbelieved because she was inconsistent about the time at which she had reached the locality where she alleged she was raped. In her FIR, she claimed she reached there at about 2 pm, though in her statement to the judicial magistrate, she stated she had left her house around 2 pm and reached the locality about half an hour later. Several months later, she testified that she had left her house around noon.[930] This is arguably not a material discrepancy. It is likely that the victim simply did not note the time her train pulled in, since she did not anticipate having to testify in a rape trial several months down the line. Notably, when one of the judges surveyed was asked to cite an example of what counts as a minor consistency, she stated, 'Minor inconsistency can be discrepancy with regard to the time of rape varying by a few hours…' To give another example, in *Chhotu*, the court ruled:

> From the statement available on record, it is clear that there are major contradictions in the testimony of the prosecutrix...As per her complaint...she was alone in her room along with her two children about two months prior to filing of complaint when accused entered into her *jhuggi*[931] and committed rape upon her while in her statement [to the judicial magistrate]...she deposed that on 9.2.2013 she was cooking food and her both children were taking meal when accused entered into her *jhuggi* and committed rape and prior to that he committed rape in previous year. Whereas in her statement before the court...prosecutrix testified that on the date of incident it was Winter Season

[929] Ibid [109] – [110].

[930] It is not clear at what date she testified, but charges in her case were framed more than four months after the date of incident and police report. It took one year and two months for the matter to be reserved for judgment.

[931] A temporary dwelling in a slum.

> and at about 3.00 pm she was alone with her children; she was feeding her children when accused entered into her *jhuggi*…

It is not clear what aspects of these statements the court regarded as materially contradictory, since they all seem to be giving substantially the same account. With respect to improvements in the victim's account, the court's approach was similar. For instance, it was regarded as material by the court when the victim's complaint recorded that the rape was perpetrated in the afternoon, but she later specified in her testimony that she meant it was perpetrated between noon and 1 pm.[932] This is arguably not a material improvement that should be used to discredit the victim. In fact, even minor contradictions and improvements were likely to be overlooked only where the victim had not been cross-examined about them, or where there was corroborating medical or forensic evidence.[933]

Another device successfully used by the defence to undermine the prosecution was to point to the implausibility of the prosecutor's account. Assessments of plausibility tended to be stated rather than explained in the judgments, such as the assertion that a 'real' rapist would not use a condom.[934] In *Prabhat Ranjan*, the victim alleged that the defendant tried to rape her after she got drunk with him at a party in

[932] *State v Randhir Kumar Ojha* (n 786) [72].

[933] The role of corroborating forensic and medical evidence has been discussed in the previous section. The fact that the defence counsel did not cross-examine the victim on several points benefitted the prosecution in *State v Rahul Tomar* (n 778) [35], [40] – [42]; *State v Manas* (n 830) p 17; *State v Udaivir and Ram Rattan* (n 4) [46].

[934] *State v Ishaq Ali* (n 779) p 15.

a University residence.[935] She said she was going to vomit as a result of which the defendant took her to the communal bathroom.[936] There, she asked him to bring a glass of water and as he left her to do so, she ran away to safety.[937] The court reasoned that if the defendant had really been 'so determined to have sexual connection with the prosecutrix despite all resistance and odds,' then he would not have gone to get her water.[938] He was acquitted of attempted rape. However, the defendant may have been willing to have sex without the victim's consent, while still not wanting her to come to fatal or serious bodily harm through excess alcohol consumption. These two facts need not be incompatible, even though the court assumed otherwise.

Other assessments of plausibility seemed to be underpinned by sociologically ill-informed presumptions. For example, in one case, the victim testified that she had gone to Delhi to find a cure since she was under the influence of 'evil spirits.'[939] This term was used to describe situations where she would '[start] moving her head and seeing upwards and her body [would stop] moving.'[940] It was considered implausible that her husband had not sought medical treatment for her condition before.[941] In the words of the court:

---

[935] *State v Prabhat Ranjan* (n 855) [1].

[936] Ibid.

[937] Ibid.

[938] Ibid [18].

[939] *State v Sunil Kumar* (n 855) [1].

[940] Ibid [46].

[941] Ibid.

> [The victim's husband] stated that his wife had been suffering from evil spirit for the last 12-13 years. He also stated that he had never taken his wife to a doctor but volunteered to state that the hospital is at distance of 20 kilometers from his house. It would be difficult to accept that the prosecutrix kept on suffering from problem of that nature for such a long time but she was not shown to a doctor. The husband of the prosecutrix and the prosecutrix are residing at district Ghaziabad which is adjacent to Delhi. Even if it be assumed that the husband of the prosecutrix found it difficult to take her to a Government Hospital on account of distance of 20 kilometers, the prosecutrix would have been shown to a private doctor.[942]

Even setting aside the inaccessibility of private healthcare in the country, there is significant evidence that persons with mental illnesses are frequently considered to be under the influence of evil spirits or curses.[943] It is therefore common for such patients to continue without diagnosis and treatment. In contrast, the court presumes that seeking medical intervention would have been the natural response for someone in the victim's husband's situation.

In another case, the victim alleged that she was gangraped by her brother in law and his friend on account of an ongoing matrimonial dispute with her husband.[944] She claimed that she had shouted for help during the incident, but her in-laws had not come to her rescue.[945] The court ruled:

> I also fail to persuade myself to believe that the accused would have the audacity to commit gang rape upon his own [sister-in-law] in his own house when his own family members including his parents were present in the house.

---

[942] Ibid.

[943] Soyuz John and others, 'Addressing Stigma and Discrimination towards Mental Illness: A Community Based Intervention Programme from India' (2015) 2 Journal of Psychosocial Rehabilitation and Mental Health 79, 82.

[944] *State v Anil Kumar Yadav* (n 777) [2].

[945] Ibid.

> It is also not believable that the wife and the parents of the accused would have permitted him to commit gang rape upon the prosecutrix.[946]

In a similar vein, the judges surveyed seemed unlikely to accept the role that could be played by members of the defendant's family in perpetrating sexual violence, particularly where these members were women. When asked to give an example of an implausible rape scenario, one judge described the following situation:

> In one of the case, it was alleged that mother and the wife of the accused were holding the hands and legs of the prosecutrix and asking the accused to commit sexual intercourse with her but the real dispute was over the property.

In response to the same question, another judge responded as follows:

> Allegation of rape involving several members of the same family attributing their role and participation in the occurrence the same time raises suspicions making case implausible or improbable.

These assessments of plausibility must be viewed in light of the context, where domestic violence is frequently perpetrated against women by men and women in the marital family in complicity with each other.[947] In particular, it is important to recognise the well-documented role that women can play in inflicting violence against other more disempowered women.[948]

Despite the poorly reasoned assessments of plausibility in many judgments, discretion to make determinations of witness credibility must inevitably rest with the judges. However, it is important that these judges justify claims they seem to regard

---

[946] Ibid [22].

[947] Abigail Bentley, 'The Role of In-laws as Perpetrators of Violence against Women in Mumbai' (2018) 3 International Journal of Social Sciences and Interdisciplinary Studies 4, 5.

[948] For instance, *see* Tanika Sarkar, 'The Woman as Communal Subject: Rashtrasevika Samiti and Ram Janmabhoomi Movement' [1991] Economic and Political Weekly 2057.

as common-sensical, particularly where they are at stark odds with the lived experience of many rape victims.

4.4.2 Lapses in investigation or prosecution agencies

Aside from the victim's testimony, the prosecution failed where key witnesses or evidence were not produced before the court.[949] For instance, in one case, neighbouring tenants who had reached the scene of the rape immediately following the incident were not called as prosecution witnesses, including the person who had called the police.[950] Similarly, in another case, the victim alleged that the defendant had pretended to marry the victim to prevent her from reporting him, but the person in whose house the wedding was performed was not called to testify before the court.[951] Further, in *Manoj Kumar and Rohtash Maan*, the victim's husband was not called to testify even though he had been involved in an altercation they had with the defendant and his associates shortly before the alleged rape incident.[952]

Often, there were lapses in the investigation itself. To illustrate, the police failed to submit the site map of the location of the incident[953] or important call records that could have proved part of the victim's account.[954] In other cases key evidence was not

---

[949] *State v Anil Kumar Shukla* (n 842) [62], [150] – [152]; *State v Pherudin* (n 776) [98] – [105]; *State v Archana and Others* (n 916) [111]; *State v Randhir Kumar Ojha* (n 786) [66], [107] - [108].

[950] *State v Dalip Kumar Rai* (n 776) [15].

[951] *State v Aftab Alam* SC Number 131/13 (Special Fast Track Court, Dwarka Courts) [24]

[952] *State v Manoj Kumar and Rohtash Maan* (n 789) [15].

[953] *State v Om Prakash Nayak* (n 823) [36].

[954] *State v Pherudin* (n 776) [109].

seized, such as the clothes the victim was wearing during the incident[955] or the mattress on which the incident was allegedly perpetrated.[956] Several lawyers and victim-support personnel expressed their concern about investigative practices. The head of one NGO that has been working for women's rights for the past 35 years described the situation as such:

> …evidence is not properly collected by the police. So police investigation is faulty… The police's investigation is not taking care of all the details which should be taken care of when it is going to the court for proving the case. Then there is lot of corruption in the system. So they spoil it, as it is called you know? Spoiled investigation. Now how do they spoil it?...[the police] make the case weak by eating money from the party.

The Supreme Court has also suggested that loopholes in the prosecution's case might be a deliberate attempt by the investigating agency to weaken the case.[957] Whether these lapses are on account of corruption or negligence or both, it will be difficult for the prosecution to succeed while they persist.[958]

4.4.3 Contradictory evidence adduced by the defence

The defence often produced contradictory evidence to undermine the prosecution's case. In one example the victim claimed she was unconscious during the assault, but

---

[955] *State v Anil Kumar Shukla* (n 842) [159].

[956] *State v Randhir Kumar Ojha* (n 786) [141].

[957] *Karnel Singh v Madhya Pradesh* (n 819) [6]. Jayshree Mangubhai similarly highlights how this is done especially where *dalit* women complain of violence perpetrated by upper caste men, as a result of class- and caste-based networks between the police and perpetrators: Jayshree P Mangubhai, 'Violence and Impunity in a Patriarchal Caste Culture: Difference Matters' in Uma Chakravarti (ed), *Fault Lines of History: The India Papers II* (1st edn, Zubaan Books 2017) 271.

[958] Although, the benefit of a defective investigation typically does not go to the accused where the offence is otherwise proved: *State v Mukesh Singhal* (n 778) [41] – [45].

call detail records showed that phone calls were exchanged between her number and her husband's number during this time.[959] In another case, the defence adduced a no objection certificate that had been filed by the victim in relation to his petition to quash the FIR, attesting that the rape complaint had been filed on account of a misunderstanding.[960]

4.4.4 Incorrect understanding of law: Conflating mens rea with motive

Finally, some judgments relied on the absence of motive to acquit the accused, though they noted that this was an ancillary ground.[961] However, the 'motive' for a sexual offence might be something so diffuse as reinforcing patriarchal and other power relations.[962] In such cases, it is dangerous to construe absence of motive as a ground for acquittal. Discussions of motive also allowed the court to draw upon class-based assumptions about 'real' rapists such as where it held:

> The accused is a married man with a daughter of marriageable age and would such a man commit rape, does not appear true… He is a married man with children and he also has a sister. He is a priest and a lecturer whose conduct is supposed to be much higher than others. The prosecutrix also used to address him as a brother…[963]

---

[959] *State v Anil Kumar Shukla* (n 842) [85].

[960] *State v Pherudin* (n 776) [57].

[961] *State v Jeetu Dass* (n 779) [29] – [31]; *State v Anil Kumar Shukla* (n 842) [135] – [140]; *State v Pherudin* (n 776) [85] – [90]; *State v Ramesh Kumar* (n 852) [34] – [35].

[962] Joanne Conaghan, ' The Essence of Rape' [2018] Oxford Journal of Legal Studies Advance Articles 24 – 26.

[963] *State v Randhir Kumar Ojha* (n 786) [98], [126].

Along with the stereotypes reflected in this type of judicial reasoning, of even greater concern is the fact that these judgments often used '*mens rea*' and 'motive' synonymously. While it was sometimes difficult to make sense of what the judge was trying to relay, a detailed excerpt will help to illustrate this point:

> 29. In the present case, a story has been projected that the accused has raped the prosecutrix on three occasions. This version appears to be untrue as there is no reason why he would do so. No reason is shown as to why the accused would jeopardize his future...
> 30. In the present case there is sufficient evidence on record to show that the accused did not have a motive to commit the offence. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause such as enmity against the accused, to with to implicate him falsely. However, there can be no sweeping generalization. Each case must be judged on its own facts. These observations are only made to combat what is often put forward in cases as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts. There does not appear to be any criminal intention and *mens rea* on the part of the accused.
> 31. The case of the prosecution has to stand of its own legs and is required to prove all its allegations against the accused and all the ingredients of the offence alleged to have been committed by the accused.[964]

This conflation of *mens rea* with motive is alarming because they are legally distinct concepts. *Mens rea* is the mental element of the offence that establishes culpability – usually understood as the defendant's intention or knowledge that the victim has not given her sexual consent in a rape case.[965] It must be established by the prosecution for there to be a criminal conviction, which also seems to be the thrust in [31] in the above excerpt. A motive is something more remote. It is the broader aim or purpose of the

[964] *State v Jeetu Dass* (n 779) [29] – [31].

[965] For a detailed discussion of *mens rea* in rape cases, *see* Section 3.2 of Chapter One.

perpetrator in committing the offence. Establishing a motive can have some probative value but it is not mandatory for either party to prove or disprove its existence.[966] It is imperative that there be clarity in how these concepts are discussed and deployed in court.

To conclude, it is technically possible for the judge to convict the defendant in the absence of corroborating evidence in a rape case. But this is unlikely to happen in practice – especially in the absence of medical or forensic evidence. In other cases, even minor inconsistencies in victims' statements are emphasised while acquitting the defendant. Further, judgments record victims' accounts as being implausible without turning adequate attention to the victim's familial or social environment. Finally, there can be lapses in the execution of the investigative, prosecutorial or judicial function, which influence the verdict. Following this detailed exposition of judicial reasoning in contested cases, the final section will present concluding observations.

5. CONCLUSION

This chapter undertook a rigorous empirical analysis of the factors influencing verdicts in contested rape cases in Delhi. In doing so, it studied data from trial court judgments over a period of twelve months, ethnographic observation in six court complexes and interviews with 61 stakeholders, including surveys administered to 9 sitting trial court judges. It showed the continued influence of rape myths in judicial

[966] IEA, s 8.

decision-making in rape cases and the undue weight given to corroborating evidence in securing convictions. It also brought out the way in which the burden of different rape myths is borne out differently by women based on interlocking systems of disadvantage, including those of caste, class, disability and gender. There are two main implications of these findings.

First, trial court judges need to reconsider what counts as common-sense in rape cases. To that extent, this study affirms previous scholarly suggestions that it is important for judges to reject the use of rape myths. However, it suggests going further. A re-examination of what is regarded as natural, logical or self-evident is also needed for other aspects of adjudication, such as when the victim's account should be regarded as implausible, or what the absence of genital injuries may indicate.

Secondly, this chapter establishes the need to be wary of reaching progressive outcomes through regressive routes. To give an example, Supreme Court pronouncements in rape cases have yielded progressive outcomes, such as doing away with the rule requiring corroboration. Further, the Court has directed lower courts to be cognisant of the inevitability of delayed rape complaints in the Indian context. Yet, this progress has almost exclusively been grounded in the discourse that rape victims will be perceived as having lost their 'honour', resulting in compromised marriage prospects and social ostracism. According to the Court, these are the sort of factors that inhibit women from reporting rape and make it unlikely that they would lie about it. This understanding is reflected repeatedly in trial court judgments on rape. However, there is little space in this alternate mythology for individual

psychological trauma, fear of unemployment while dealing with material deprivation, or confusion about being victimised by a care-giver or another trusted person. There is no acknowledgement of the constraints that might render 'dishonourable' women reluctant to approach the legal system, such as their alienation from the legal system. All of these factors are side-lined by the courts' insistence on treating honour, chastity, shame, virginity and marriageability as the central concerns of women's experiences. It is laudable that the Supreme Court has begun to question stereotypes about victim conduct in rape cases. But it remains important for courts to add nuance to their understanding and appreciate the multiplicity of concerns that influence the rape victims who testify before them.

CONCLUSION

Drawing upon postcolonial feminism, this thesis has provided a socio-legal analysis of rape prosecutions in Delhi. The main research question it has addressed is, what are the factors associated with acquittal and conviction in rape prosecutions in Delhi? The analysis carried out in response to this question relied on three primary data sources: the total population of Delhi trial court judgments in rape cases from January to June in 2014 and 2016 (n=254); ethnographic observation in each of Delhi's six trial courts; and interviews with victims, victim-support personnel, lawyers and judges. This final chapter starts by recapping the main findings of this thesis. It draws on these findings to develop five key conclusions concerning: the criminal justice system as a social institution; the multiplicity of agencies within the criminal justice system; the interconnectedness of power structures; the agency and victimisation of women; and the increase in representation of women in legal systems. Finally, it highlights the significant and substantial academic contributions made by this thesis.

1. WHAT ARE THE FACTORS ASSOCIATED WITH ACQUITTAL AND CONVICTION IN RAPE PROSECUTIONS IN DELHI?

In seeking to understand why so many rape cases in Delhi result in acquittal, this thesis found that the dominant factor associated with acquittals is the victim-witness' hostility to the prosecution (**Chapter Four**). She may sometimes be forced to do this because of threats issued by the defendant or his associates. She may also be

compelled to turn hostile by her own family, who 'steal' the dispute from her and accept bribes from the defendant in exchange for the victim-witness' support during the trial. However, in many cases the victim-witness may *choose* to turn hostile to the prosecution. This choice is made by the victim where she prioritises her material, matrimonial or other needs over her desire that the defendant be punished. Consequently, where the defendant offers to resolve other socio-economic difficulties in her life, the victim-witness might undertake to testify in his support during the trial.

These agreements are facilitated by India's legal pluralism, where several legal and non-legal fora for conflict management flourish. This pluralism is a legacy of India's colonial past. Since the legal system in its current institutional form was a colonial imposition, it was not always accepted as the sole or central mechanism for resolving disputes. Social solutions to legal problems have subsequently been commonplace, as reflected in the pervasiveness of illegal rape settlement agreements in trial courts. In addition, victim-witnesses may turn hostile to the prosecution where they have faced extensive secondary victimisation within the legal system and consequently feel alienated by and less invested in the criminal proceedings. As anticipated by the postcolonial feminist framework, the nature and extent of secondary victimisation experienced by different women is simultaneously linked to multiple social variables, including their caste, class or disability.

Secondly, acquittals are very likely in promise to marry cases (**Chapter Five**). Here too, the victim-witness may turn hostile to the prosecution where her primary motivation is reconciliation rather than retribution. In other such cases, the

prosecution fails because of regressive judicial ideas, which only regard a promise of marriage as believable where it is intra-caste and intra-communal. These constrained ideas of marriage are premised on and sustained through the control of women's sexuality, and consequently (it is assumed) bloodlines. In this way, current distributions of wealth and political power are perpetuated. This analysis reinforced the postcolonial feminist idea that gendered hierarchies are enmeshed with other socio-economic stratifications.

Finally, it is difficult to formally record the complex, simultaneous co-existence of consent and non-consent in promise to marry cases. These difficulties typically results in confused and poor-quality evidence from the victim-witness, paving the way for an acquittal. The persistence of promise to marry cases as the only deceptive sex cases prosecuted in the Indian criminal justice system can be traced to the salience of marriage in social life, which can, in turn, be rooted back to revivalist, nationalist movements under colonialism. These movements sought to preserve the private sphere as free from colonial contamination since the public sphere had had to be relinquished to the British. Traditional, conservative notions of intracommunal conjugality were hence aggressively protected and propagated. These ideas continue to inform social and judicial ideas about marriage today.

Thirdly, acquittals are highly likely in love cases, which entail consensual, extramarital or premarital intimate relationships between the victim and defendant, especially where they belong to different castes or communities (**Chapter Six**). These cases are filed because in practice, legal and social protections are more often geared

to protect women's respectability, rather than their sexual agency. This is why even consensual intimate relationships are frequently prosecuted if they are regarded as 'dishonourable' by the public and the police. The corollary to this analysis is that rape laws are enforced to protect only respectable women, *i.e.*, middle-class, caste Hindu, non-disabled, cis women. The respectability of such women is deemed to be under threat from 'dangerous' (*i.e.* marginalised) men, women and non-binary persons. In this context, demanding greater 'protection' runs the risk of consolidating the state's power to punish transgressive sexuality. The more appropriate response would be to demand freedom for everyone to engage in consensual pleasure and flirtation. The recognition of women's sexual victimisation in some contexts must not preclude respect for their sexual agency in others.

Fourthly, in other contested cases (**Chapter Seven**), adjudication is characterised by the use of rape myths such as the ideas that 'real rape victims' resist their rapist and report the offence without delay. Further, even though a guilty verdict can technically be based solely on the victim's testimony, this rarely happens. Minor contradictions and inconsistencies in the victim's statements are used to discredit her. This mode of reasoning can be traced to colonial medico-legal ideas, which treated the unreliability of women's testimonies as a scientific fact, especially when they came from disadvantaged castes, classes and tribes. Favourable medical reports were regarded as vital to corroborate the victim's statement according to this line of thinking. This tendency is still visible today, in the judgments analysed for this thesis. Finally, trial court judges often make unsupported assertions about the implausibility

of the prosecution's account or make errors in law, such as where they confuse motive with *mens rea*.

2. CONCLUDING REFLECTIONS ON CRIMINAL JUSTICE, ITS USERS AND ENFORCERS

The theoretical and empirical analysis recounted above has generated consideration of five main themes. Each of these is addressed in turn.

2.1 The criminal justice system as a social institution

This thesis demonstrated how entrenched legal institutions are in their historical and socio-economic context. For example, it is difficult to make sense of the prevalence of illegal, out-of-court settlements in rape cases without reference to the legal pluralism that thrives in postcolonial India. Further, the structural oppression women face outside the legal system has a significant bearing on whether they enter into such agreements. Similarly, the analysis of promise to marry cases and love cases demonstrated that women's sexual expression is only understood as legitimate when carried out within the heteronormative, intracommunal marriage. These ideas of gender and sexuality are best explained as a legacy of the nationalist, anti-colonial emphasis on the purity of the private sphere, free from colonial contamination. Finally, as the critique of adjudication in contested cases drew out, the persistence of the idea that women usually lie about rape is rendered comprehensible by referring to the colonial medico-legal literature which created and perpetuated this myth. The

enforcement of seemingly neutral rape laws is thus closely tied to the social and historical context.

This understanding of the criminal justice system as a social institution has two implications. First, it reveals the limits of attempting to use top-down criminal law reform as a way to transform society. The analysis of love cases best illustrates these limitations. Love cases do not technically qualify as rape cases but formed a significant proportion of the data set. The reason they are lodged by the victim's family, and allowed to proceed to trial by the police, is because the statutory and public concepts of rape do not fully overlap. Legally, rape is broadly understood as an offence against women's sexually autonomy;[967] socially, it continues to be regarded as an offence against women's respectability and honour. Similarly, Chapter Seven teased out how an honour-based paradigm of rape influences judicial thought, even in cases where the Supreme Court has sought to dismantle the use of rape myths in adjudication. For example, the Court has ruled that delayed reporting is not necessarily detrimental to the prosecution's case and that the defendant can be convicted without corroborating evidence. However, these rulings are based solely on the deleterious consequences of reporting rape on the honour and marital prospects of the victim. The Court does not consider factors such as psychological trauma or material dependence on the rapist, which could equally lead to delayed reporting, resulting in the loss of corroborating

[967] I recognise that the statutory definition of rape does not adequately safeguard the autonomy of all women, especially trans women, married women and young women. For a complete analysis of the legal definition of rape, see Section 3 of Chapter One.

forensic or medical evidence. It is thus possible that these evidential developments will not be equally available to all women, particularly to those who are not considered honourable or respectable to start with. The transformation of such regressive, honour-based understandings of rape is unlikely without adequate public mobilisation of feminist groups.

Secondly, accepting the social underpinnings of the criminal justice system suggests the adoption of a more nuanced approach to law-making. It shows that while determining the formal scope of evidentiary regulations, criminal law and legal procedure, it is imperative to give due weight to the impact of implementing them. It is especially important to recognise that the consequences of legal regulation are differentially borne by people depending on their gender, caste, class, ethnicity, religion and disability, a theme developed further in Section 2.3 of this chapter.

2.2 The building blocks of criminal justice

This thesis brought out how each stage of the trial is enmeshed with the next one. This was especially prominent in Chapter Four, where the victim-witness' negative pre-trial experiences were found to result in her hostility to the prosecution at trial leading, in turn, to adjudication in favour of the defendant. Similarly, Chapters Six and Seven highlighted how decisions about policing and prosecution have a direct bearing on what the verdict will be. As Chapter Six showed, the decision to investigate or prosecute love cases is almost guaranteed to result in acquittals. Chapter Seven highlighted that the benefit of a lax investigation is likely to accrue to the defendant,

since it will contribute to the prosecution's inability to prove the case beyond reasonable doubt.

These findings also make the point that while the various criminal justice professionals have a lot in common, they still have distinct roles to play. For example, Chapter Four demonstrated that rape myths inform decisions and influence behaviours by legal professionals in almost all criminal justice agencies, leading to secondary victimisation. However, the implications of the victim's counsellor espousing and articulating regressive beliefs about rape might be particularly distressing for her. This is because it is the institutional obligation of the counsellor to provide support to the victim. There is a strong need for legal and socio-legal scholarship to remain alive to these commonalities and differences

The focuss of legal scholarship in India has remained on judgments – particularly, on appellate court judgments. Scholarship on policing remains relatively uncommon and studies about prosecution are even rarer. There is a need for greater scholarly attention to be paid to non-judicial agencies that play a significant role in enforcing the law, particularly at the district court level. This will lead to a more granular analysis of the legal system. Further, the Indian legal academy has typically emphasised doctrinal or philosophical approaches to law. Empirical work about legal systems has generally been the preserve of other disciplines, such as anthropology or sociology. This thesis revealed that there is significant scope for rich, empirical legal studies in India, which triangulate data from a variety of sources and methods.

2.3 The intersection of power systems: Is the sum greater than the parts?

The heterogeneity of women's experiences was a recurring theme throughout this thesis. Chapter One, analysing the gendered definition of rape in Indian law, highlighted how sex and gender are themselves contested concepts. 'Woman' is thus an unstable category. The following chapters teased out the limits of a homogenous understanding of women's decisions or encounters within the criminal justice system. Here, I reflect on my research findings about working-class women to illustrate this point.

All rape victims are vulnerable to being met with disbelief in the criminal justice system. As explored in Chapter Four, in pre-trial stages, this disbelief contributes to their secondary victimisation and can result in them turning hostile to the prosecution at trial. At the adjudication stage, as the examination in Chapter Seven revealed, this scepticism about the victims' allegations can result in the judicial treatment of their testimony as implausible or incredible. Consequently, judges are unwillingness to convict the defendant without corroborating medical evidence of injuries. However, scepticism is not directed against all rape victims in the same way. Working-class women are regarded as especially unreliable. This view is partially a result of their historical treatment in the medico-legal literature as an especially suspect category. It is partly borne of the presumption that they are 'promiscuous' and cannot be raped. In other words, they are not considered respectable and rape laws do not operate to safeguard their sexual autonomy – a theme developed in Chapter Six. Suspicion of working-class women's allegations is also based on the idea that they engage in

manual labour and are therefore physically strong. There is thus a heightened judicial expectation that they will physically resist the rapist, an expectation that will not be satisfied where the victim was unable to do so on account of trauma, confusion or fear. In addition, the logistical burdens of participating in the trial have a disproportionate impact on working-class women since they have fewer resources to cope with the trial process. They may therefore become less keen to support the prosecution at trial.

In all, working-class women face additive, cumulative and intersectional discrimination while navigating the criminal justice system. Their experience is shaped not just by their gender, and not just by their class, but by the simultaneous, intersecting operation of class and gender. Through several similar examples, this thesis made clear that the nature and extent of women's marginalisation in the criminal justice system is heavily dependent on the interlocking power structures, such as those of caste, class, ethnicity, religion and disability. Legal initiatives aimed at women therefore need to be aimed at all women, from all demographics.

2.4 Are women oppressed or liberated? (or, no woman is an island)

This thesis drew out the tension between women's experiences as victims and agents. Chapter Four highlighted that in some circumstances, women may 'choose' to support their rapist at trial. However, this choice is frequently made by them while facing the pressure of poverty, or the intolerable anxiety associated with pending material or matrimonial disputes. Similarly, Chapter Five showed that the decision to enter into sexual relationships is often made by women in a coercive social context that heavily

stigmatises extramarital or premarital sex. This is why some women's decisions to enter into these intimate relationships are contingent on defendants' promises to legitimate sexual relations through marriage.

Taken together, these findings demonstrate the limits of regarding agency and victimisation as absolute concepts. Hence, the thesis argues for a recognition of agency where it is typically rendered invisible, such as in love cases. Conversely, it supports a recognition of contextual duress in circumstances where women's choices may be fallaciously regarded as evidence of their unreliability, dishonesty or manipulative nature. This is how women's decisions to enter into out-of-court settlements are usually treated. Similarly, women are regarded as cunning and calculating where they initiate prosecutions in promise to marry cases, particularly where they subsequently marry the defendant. This is regarded as a misuse of the criminal justice system. It is important to recognise the social pressures on women in these cases and to give due consideration to the legal permissibility of prosecuting such cases as rape. While Chapter Five argued against the criminalisation of promise to marry cases, turning attention to the compulsions of normative sexuality will still prevent criminal justice professionals from baselessly attributing malice to victims. This is especially important since such attributions are then used to fuel the rape myth that women nearly always lie about rape.

In sum, a critique of seemingly problematic choices is incomplete where it is made without understanding the structural forces that shape those choices. Further, the effective functioning of trial courts is unlikely while systemic oppression continues to

flourish in society, constraining women's decisions. Those who make and enforce rape laws are hence well-advised to turn their attention to the simultaneous operation of women's victimhood and agency.

2.5 Understanding the increased representation of women in the criminal justice system: Are women good or evil?

Recent rape reforms have focussed on increasing the representation of women in the criminal justice system, whether as police officers or as judges. In Delhi, this has been accompanied by the introduction of women counsellors and advocates who can support rape victims during the investigation and trial respectively. Even the presence of women in male-dominated spaces, such as police stations or courts, can be a source of support for rape victims, helping to put them at ease. However, the findings of this thesis suggest that two caveats are in order in this regard.

First, there is no guarantee that women will espouse progressive or feminist beliefs since patriarchy can shape attitudes regardless of gender. Chapter Four illustrated how prejudicial beliefs about rape can influence victim-support personnel's interactions with the victim. In such circumstances, the introduction of these personnel within the system may be counterproductive, since it can exacerbate the secondary victimisation of rape victims. Similarly, Chapters Five and Seven demonstrated the frequent reliance on rape myths in adjudication, regardless of whether judgments are authored by men or women. Chapter Six brought out how state feminism has been insufficient to transform how the public and the police

perceive women's sexual autonomy, thereby creating the conditions in which love cases continue to be prosecuted.

Secondly, even assuming that women will bear their lived experience in mind while discharging their official duties, this may not necessarily result in better informed decision-making. This is because, as argued above, women are not a homogenous group. *Savarna* women will not personally know what it is like to be *dalit;* non-disabled women will be unable to identify with the experiences of disabled women; middle-class women will not know what poverty feels like.

This analysis then has two implications, corresponding to each of the above arguments. First, schemes to promote greater representation of women within the legal system will not necessarily infuse its structures with more feminist decision-making. There may, of course, be other strong rationales for their introduction, such as the need for a more egalitarian distribution of public jobs. Secondly, if attempts are made for greater recruitment of women into legal systems, it should be recognised that gender intersects and connects with other power systems as well. Efforts to recruit more women should thus be careful not to recruit only more middle-class, non-disabled, cis, caste Hindu women.

3. CONTRIBUTIONS

In line with previous postcolonial feminist research, this thesis argued that the working of the criminal justice system is heavily intertwined with the society it operates in. Further, as postcolonial feminism suggests, this thesis found that

women's experiences are influenced not just by their gender, but also by other power systems such as caste or class. These power structures interact with gender to produce cumulative and intersectional discrimination. In this section, I highlight four significant and substantial contributions made by this thesis to existent research.

First, this thesis is one of the only academic studies to be carried out about rape trials in India, following the introduction of extensive legal and policy reforms in 2013. It was thus able to assess the strengths and limits of recent procedural innovations in India, such as the introduction of victim-support counsellors and DCW lawyers into the criminal justice system.

Secondly, this thesis provided a detailed analysis of promise to marry cases in India. While these cases have garnered extensive media attention, feminist scholarship has not engaged adequately with them, perhaps to counter the overemphasis on them by anti-feminist groups, including 'men's rights' activists. This thesis provided an empirical assessment of how rape laws are enforced in such cases and drew attention to the specific issues associated with victim-witness hostility in these cases. It analysed the distinctive stereotypes that make up the 'real' promise to marry rape case and provided a critical discussion of how the simultaneous presence and absence of consent complicates decision-making in these cases. It connected complaints filed in these cases to the need to preserve respectability by legitimating premarital sex through marriage. Finally, this thesis discussed the inappropriateness of criminalising the defendant's conduct in such cases.

Thirdly, this thesis illustrated how postcolonial feminism can be a useful frame for the study of legal materials and processes. Postcolonial feminists often adopt a critical approach to legal doctrine and are loath to take formal categories as the centre of their analysis. On the other hand, this thesis provided substantial engagement with the minutiae of formal substantive, procedural and evidentiary laws. While it maintained a critical approach to the operation of law, it was able to signal concrete ways in which judicial reasoning can be differently imagined. For example, Chapter Five distilled out stereotypes relating to marriage that should be eliminated, pending an overhaul of the legal regime governing deceptive sex cases. Again, Chapter Seven gave specific examples of judicial assertions that ought to be better supported. These changes in judicial reasoning can be introduced while still recognising that a transformation of legal standards must be complementary to a transformation of the broader social, political and economic context. This thesis thus demonstrated the synergetic possibilities of using postcolonial feminist frameworks in the study of formal legal doctrine and procedure.

Finally, this thesis provided a detailed analysis of access-related difficulties encountered by researchers in highly bureaucratised, opaque, non-automated, postcolonial environments. It critically discussed the benefits and disincentives associated with pursuing a range of methodological strategies in these circumstances. It provided a reflexive account of how researcher identity can hinder or facilitate research endeavours, arguing in favour of greater transparency of state institutions.

In a similar vein, this thesis emphasised the importance of more concerted efforts by the state to collate and share data relating to crime commission and prosecution.

The contributions made by the thesis should be viewed in light of the fact that the doctoral fieldwork was carried out in Delhi. As mentioned in the introduction, the district of Delhi includes the national capital and is consistently subject to national and international media scrutiny. It was also the physical space where the national demonstrations against the state's failure in safeguarding women's rights began in 2012, leading *inter alia* to the Criminal Law (Amendment) Act 2013. Therefore, we can expect that the institutions studied in this thesis were better organised and more progressive than those in many other parts of the country. Similarly, unlike a few other regions in the country, Delhi is not characterised by everyday armed struggle or the regular imposition of emergency rule. However, barring the presence of such exceptional circumstances, the findings of this thesis will assist in understanding the nature of legal decision-making in adversarial criminal justice systems, especially those in postcolonial societies. They will be especially valuable for those who are interested in understanding the experiences of gender-based and other minorities.

On a regular basis, there is public outrage about falling conviction rates in rape cases in India. This outrage results in clarion calls to 'Hang the Rapists!', leading to increasingly harsher penalties so that the state can be seen to be doing something about the issue. Ironically, this seems to depress conviction rates further on account of judicial reluctance to sentence the defendant to long mandatory minimum

sentences. The past few years have seen this cycle played on loop, while there is little change in the ground realities of legal pluralism, intersectional discrimination and social unease with transgressive sexuality. All of these are identified as the most potent factors influencing rape conviction rates in the postcolonial feminist analysis presented in this thesis. It is hoped that this thesis will thus contribute to a better informed engagement with conviction rates in rape cases, which cuts through the maze of moral panic and penal populism currently gripping the Indian state.

APPENDICES

1. APPENDIX 1: LEGISLATIVE EXTRACTS FROM THE INDIAN PENAL CODE 1860

90. Consent known to be given under fear or misconception.— A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.— if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.— unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

375. Rape.— A man is said to commit "rape" if he—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include *labia majora*.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. Punishment for rape.—

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description[968] for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever, —

(a) being a police officer, commits rape —

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

[968] It is likely that the term 'of either description' form part of this definition on account of legislative oversight.

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.:— For the purposes of this sub-section, —

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

2. APPENDIX 2: INTERVIEW SCHEDULES

2.1 Schedule for Victims

Introductory Questions

1. Name, age, background (where she was born and grew up), occupation, marital status

Pre-trial

2. Were you able to talk to anyone about the incident after it happened?

   [Follow up with: Whom did you first tell? Was it immediately afterwards, or some time later? Why did you want to share the experience?]Tell me about your experience with the police.

3. Tell me about your experience with the police.

   [Follow up with: Was there anyone with you at the time? What did the police say? How long did the interview last?]

4. How did your family react to what was happening?
5. How did the accused react to what was happening?
6. Whose decision do you think it was to prosecute the accused?
7. Were the proceedings delayed?

[Prompts- When did the case go to court? How much time elapsed between the complaint and the proceedings? How long did the court proceedings last?]

Experience as a witness

8. Tell me about your experience in court.

[Follow up with: How did you reach the court from your home? How did this impact your daily life? How many times did you go to the court during your case? How did you get to know at what point in the day your case would come up?]

9. How would you describe the role played by the different lawyers in court? Did you get the chance to talk to any of them?

[Prompts- How many times did you meet the prosecutor? Did you have independent legal representation as well? How would you describe your relationship with the prosecutor/victim's lawyer? What did you think about the defence lawyer?]

10. Who else was there to support you through the court proceedings? What help did they provide?

Verdict

11. What was the verdict in your case? What do you think were the reasons for this? How did that make you feel?
12. If you could change anything, what would you change about the way your case was conducted?
13. Are you now glad that you reported this offence?

[Residuary question

14. I am sure there are other important things you might want to share with me about your experience in court. What is it that I have not asked you yet?]

2.2 Schedule for lawyers and judges

Where the questions required rephrasing for judges, the alternative version (for judges) is italicised, and within round brackets.

Introductory question

1. Name, age, background (where she was born and grew up). In case of lawyers, ask role in trial (prosecutor, defence, victim's counsel)

General questions

2. How do you find practising (/adjudicating) in the trial court?
3. Why did you decide to practise in criminal law (/*join criminal courts*)?
4. How would you describe your duties as a lawyer (/*judge*)?

Specific questions

5. Can you describe some of the strategies you have used in rape cases in the past (/*Can you describe some of the strategies that have been used in your courts by lawyers appearing in rape cases)*?

6. How would you describe your duties as a lawyer (/*judge*)? What factors do you think make for a strong or weak rape case?
7. What factors do you think make for a strong or weak rape case?
8. Can you describe for me the issues raised in your last rape trial, and the verdict that followed?

   [Prompts: Did it result in a conviction? What was the defence used? What were the reasons for acquittal?]
9. What do you typically do if the victim retracts her statement?
10. What do you think is distinctive about adjudication in rape cases?

    [Prompt- why do you feel conviction rates in rape cases are low?]
11. For lawyers only- How would you describe your relationship with the victim-witness (*in case of defence lawyer*- 'the accused') in rape cases?
12. Are there some cases that keep you awake at night?
13. Do you think there are ways in which the trial process could be improved in rape cases?

[Residuary question

14. I am sure there are other important things you might want to share with me. What is it that I have not asked you yet?]

2.3 Schedule for victim-support personnel

[Introductory questions

1. Name, age, background (where she was born and grew up), role.

General questions

2. Why do you do this job?
3. How would you describe the most challenging part of your job?
4. How would you describe the most rewarding part of your job?
5. What do you think is distinctive about adjudication in rape cases?

   [Prompt- why do you feel conviction rates in rape cases are low?]
6. What do you do in cases where the victim wants to retract her statement?
7. How well do most victims of rape cope with the trial process?
8. Do you encourage victims to go to court or to the police? Why/ why not?
9. If you could tell the court to do one thing differently, what would it be?

   [Residuary question
10. I am sure there are other important things you might want to share with me. What is it that I have not asked you yet?]

2.4 Schedule for police personnel

Introductory questions

1. Name, age, background (where she was born and grew up), role.

General questions

2. What do you think is the most important aspect of being a police officer?
3. Do you think different complainants have different needs?
4. Do you think your training prepares you for all kinds of cases?

Specific questions

5. Do you get to know the victims well when you investigate a rape case?
6. If you have any experience testifying in rape cases, tell me a little bit about that.
7. Why do you think some rape victims do not report the crime immediately after the rape?
8. Are some victims anxious about making a complaint?
9. What do you do if a woman is unsure about making a statement?
10. What do you think is distinctive about adjudication in rape cases?

    [Prompt- why do you feel conviction rates in rape cases are low?]
11. In your opinion, what factors do you think lead to victims retracting their statements?
12. Are some victims better witnesses in court?

13. If you could change one thing about how rape cases are prosecuted in our system, what would it be?

[Residuary question

14. I am sure there are other important things you might want to share with me. What is it that I have not asked you yet?]

3. APPENDIX 3: SURVEY ADMINISTERED TO JUDGES

-What gender do you identify as?

-What is your religion/caste?

-How many rape trials would you have presided over?

Questions

1. According to you, what are the distinctive issues associated with adjudication in rape cases?
2. What are the most important pieces of evidence in a rape case? What is their importance?
3. Could you give some examples of what counts as 'minor' and 'major' inconsistencies/improvements while assessing the credibility of the prosecutrix?
4. If the victim turns 'hostile' to the prosecution, what do you typically do?
5. What do you think are the factors associated with victims turning 'hostile' to the prosecution?
6. Could you give instances of rape scenarios that you would judge to be implausible or improbable?
7. What has been your experience in judging 'promise to marry' cases? Are you satisfied with the legal framework in these cases? If not, what do you think we need to change?
8. What has been the impact of the recent changes that have been made in relation to rape prosecutions? Specifically, could you comment on:

a. The introduction of fast track courts and the requirement to conduct rape trials on a day to day basis (S 309, Code of Criminal Procedure 1973)
b. Prohibition on adducing sexual history evidence of the prosecutrix (S 53A, Indian Evidence Act 1872)
c. Criminalising the police failure to record information in sexual offences cases (S 166A of the Indian Penal Code 1860)
d. Introduction of lawyers from the Delhi Commission for Women (DCW) to support the victim
e. Prohibition on the use of the two finger test

9. How would you describe the role of the several lawyers now present in court and their relationship with each other?

a. Prosecutor
b. DCW lawyer
c. Victim's counsel privately engaged by victim

10. Would you say prosecutions in rape cases, particularly cross-examination of the prosecutrix, are conducted with due sensitivity?

Conclusion: What other feedback or comments do you hav

4. APPENDIX 4: TABLES USED TO ANALYSE TRIAL COURT JUDGMENTS

4.1 Table A: Used for cases involving untraceable or hostile victim-witnesses

Case code	Name of the case	Date of the incident	Date of the FIR	Date of the order framing charges	Date the case was reserved for judgment	Date of the judgment	Reasons the complaint was delayed (if any)

(Table A continued)

Which Section 375 clause does the case fall under?	Age of the victim	Age of the defendant	Marital status of parties	Relationship between the victim and the accused	Additional information	Grounds for acquittal	Judge/ Court

4.2 Table B: Used for promise to marry cases

Case code	Name of the case	Date of the incident	Date of the FIR	Date of the order framing charges	Date the case was reserved for judgment	Date of the judgment	Reasons the complaint was delayed (if any)	Were there grounds for a rape charge apart from the promise of marriage?

(Table B continued)

Age of the victim	Age of the defendant	Marital status of parties	Relationship between the victim and the defendant	Was there an additional property dispute?	Additional information	Grounds for acquittal/conviction	Judge/ Court

4.3 Table C: Used for contested cases

Case code	Name of the case	Date of the incident	Date of the FIR	Date of the order framing charges	Date the case was reserved for judgment	Date of the judgment	Age of the victim	Age of the defendant	Relationship between the victim and the defendant	Location of the incident

(Table C continued)

Medical evidence	Which Section 375 clause does the case fall under?	What was the evidence relating to victim resistance? How was it treated?	What was the evidence relating to delay in filing complaint? How was it treated?	What was the defence raised?	Additional information	Grounds for acquittal/conviction	Judge/ Court

5. APPENDIX 5: LIST OF PROCEDURAL EXEMPTIONS MADE FOR RAPE VICTIMS UNDER INDIAN LAW[969]

5.1 Special measures available to adult rape victims pre-trial

Special measure	Relevant legal provision or case law
A woman police officer is to lodge the complaint.	Section 154(1), CrPC
When the incident is reported, the police will immediately invite a member of the Crisis Intervention Cell run by the Delhi Commission for Women and the Delhi Police in order to assist the victim.	Delhi Police Guidelines[970]
In case of a disabled victim, the complaint is to be recorded in a place convenient to the victim.	Section 154(1), CrPC
In case of a disabled victim, the complaint is to be recorded in the presence of a special educator or interpreter.	Section 154(1), CrPC
In case of a disabled victim, videographing of the complaint is may be carried out.	Section 154(1), CrPC
In case of a disabled victim, the police will get the victim's statement recorded in front of a judicial magistrate, as soon as possible.	Sections 154(1) and 164(5A), CrPC
There is a prohibition on the overnight detention of victim at the police station.	*Delhi Commission for Women v Delhi Police* (unless the offence is reported at night)[971]
In case of disabled victims, the victim's identification of the accused is to be supervised by a Judicial Magistrate to ensure that it is carried out using methods the victim is comfortable with.	Section 54A, CrPC
In case of disabled victims, the victim's identification of the accused is to be videographed.	Section 54A, CrPC
The police cannot require the victim to present herself at any place apart from her home, during the investigation.	Section 160(1), CrPC
The victim's statement to the police is to be recorded by a woman officer.	Section 161(3), CrPC
The victim's statement to the police may be videographed.	Section 161(3), CrPC

[969] The following tables are drawn heavily from the Appendix in Arushi Garg, 'Navigating through Age and Agency in Eera v State' (2018) 14 Socio-Legal Review 79. They cover special measures available to the victim specifically in Delhi.

[970] Delhi Police Guidelines (n 383) 3.

[971] *Delhi Commission for Women v Delhi Police* (n 383) [1].

In case of disabled victims, the judicial magistrate recording the victim's statement shall take the assistance of an interpreter or special educator.	Section 164(5A), CrPC
In case of disabled victims, the judicial magistrate recording the victim's statement shall videograph the statement.	Section 164(5A), CrPC

5.2 Rights during the trial

Special measure	Relevant legal provision or case law
A woman judge is to preside over the trial, as far as practicable.	Sections 26 and 327(2)
The judge is to ensure that the victim is not confronted by the defendant at trial, for instance, by the use of screens.	Section 273 ('as far as possible'), CrPC; *Sakshi v. Union of India*[972]
In case of disabled victims, the victim's pre-recorded statement to the Judicial Magistrate can be produced in lieu of her chief examination.	Section 164(5), CrPC
The trial is to be carried out *in camera,* although such persons may be allowed to stay as the judge deems fit.	Section 327(2), CrPC
The trial judge is to act as intermediary relaying the defence counsel's questions to the victim.	*Sakshi v. Union of India*[973]
The trial must be concluded within two months of the chargesheet being filed; day-to-day trials must be conducted.	Section 309(1), CrPC
The judge is to give breaks to the victim during the testimony, as needed.	*Sakshi v Union of India*[974]
Aggressive cross-examination or character assassination of the victim is prohibited.	*Punjab v Gurmit Singh*[975]
The judge can request for 'psychiatrists, psychologists and experts in sign language etc.'	*Delhi Commission for Women v Delhi Police*[976]
The court may dispense with the attendance of any witness and issue a commission to record their evidence, but only in case of 'unreasonable delay, expense or inconvenience.	Sections 284 to 290, CrPC

[972] *Sakshi v Union of India* (n 462) [32], [34].

[973] Ibid.

[974] Ibid.

[975] *Punjab v Gurmit Singh and Others* (n 168) [23].

[976] *Delhi Commission for Women v Delhi Police* (n 383) [1].

5.3 Rights relating to rehabilitation and protection

Special measure	Relevant legal provision or case law
Free medical treatment is to be provided to victims.	Section 357C
There is a witness protection programme that victims can avail themselves of.	*State v Sidhartha Vashisht*[977]; *Delhi Commission for Women v Delhi Police*[978]
The identity of the victim to be kept protected.	Section 327(3), CrPC; *Delhi Domestic Working Women's Forum v Union of India*;[979] Section 228A, IPC; *Punjab v Gurmit Singh and Others*[980]
The victim must be compensated.	Sections 357 and 357A, CrPC read with the Delhi Victims Compensation Scheme 2015;[981] under Article 32 as part of a writ petition[982]
The victim is entitled to assistance from a legal practitioner.	*Delhi Domestic Working Women's Forum v. Union of India*[983]
The victim is entitled to assistance from non-legal experts.	*Delhi Commission for Women v Delhi Police*[984]

[977] This judgment only covers such area as falls under the jurisdiction of the Delhi High Court: *State v Sidhartha Vashisht* 201 (2013) DLT 657 [113].

[978] *Delhi Commission for Women v Delhi Police* (n 383) [1].

[979] *Delhi Domestic Working Women's Forum v Union Of India and Others* (n 426) [15].

[980] *Punjab v Gurmit Singh and Others* (n 168) [26].

[981] Compensation for adults can be claimed through the Delhi Legal Services Authority under Section 357A of the CrPC. The compensation currently payable rests between 3 and 5 lakh rupees as per the Delhi Victims Compensation Scheme 2015.

[982] *The Chairman, Railway Board v Chandrima Das* (2000) 2 SCC 465.

[983] *Delhi Domestic Working Women's Forum v Union Of India and Others* (n 426) [14].

[984] *Delhi Commission for Women v Delhi Police* (n 383) [1].

6. APPENDIX 6: CASE NAMES FOR THE CODES USED IN TABLE 6.1

Case code	Case citation
X2	*State v Deepak Kumar* SC Number 20/14 (Special Fast Track Court, Dwarka Courts)
X9	*State v Yogesh Sharma* SC Number 139/13 (Special Fast Track Court, Dwarka Courts)
X11	*State v Karan and Others* SC Number 141/13 (Special Fast Track Court, Dwarka Courts)
X12	*State v Rakesh Kumar and Others* SC Number 149/13 (Special Fast Track Court, Dwarka Courts)
X17	*State v Raju and Others* SC Number 95/2013 (Special Fast Track Court (West), Tis Hazari Courts)
X20	*State v Vikash* SC Number 1/14 (Special Fast Track Court, Dwarka Courts)
X21	*State v Pankaj Kumar* SC Number 93/13 (Special Fast Track Court, Dwarka Courts)
X22	*State v Rohit Patel* SC Number 154/13 (Special Fast Track Court, Dwarka Courts)
X23	*State v Balbir Singh and Others* SC Number 98/13 (Special Fast Track Court, Dwarka Courts)
X24	*State v Amit Kumar and Others* SC Number 76/13 (Special Fast Track Court, Dwarka Courts)
X25	*State v Prashant Chouhan* SC Number 64/13 (Special Fast Track Court, Dwarka Courts)
X28	*State v Kapil* SC Number 88/13 (Special Fast Track Court, Dwarka Courts)
X30	*State v Balinder and Others* SC Number 77/15 (Special Fast Track Court, Dwarka Courts)
X31	*State v Mukesh Kumar Mourya and Others* SC Number 83/15 (Special Fast Track Court, Dwarka Courts)
X32	*State v Sachin Kumar Panchal and Others* SC Number 90/15 (Special Fast Track Court, Dwarka Courts)
X33	*State v Vijay* SC Number 92/15 (Special Fast Track Court, Dwarka Courts)
X41	*State v Dushyant Yadav* SC Number 435/16 (Special Fast Track Court, Karkardooma Courts)
X43	*State v Naushad* SC Number 966/16 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts)
X44	*State v Imran and Seema* SC Number 1195/16 (Special Fast Track Court (East, North East and Shahdara), Karkardooma Courts)
X45	*State v Om Prakash Nayak* SC Number 1253/16 (Special Fast Track Court (East, North East and Shahdara))

X49	*State v Jitender Kumar* SC Number 90/15 (Special Fast Track Court, Patiala House Courts)
X50	*State v Manbir Yadav* SC Number 122/15 (Special Fast Track Court, Patiala House Courts)
X52	*State v Shiv Dass* SC Number 54/15 (Special Fast Track Court, Patiala House Courts)
X54	*State v Kailash* SC Number 80/11 (Special Fast Track Court (West), Tis Hazari Courts)
X63	*State v Sahid Qurashi* SC Number 34/13 (Special Fast Track Court (Central), Tis Hazari Courts)
X64	*State v Mohd Sadiq* SC Number 52/12 (Special Fast Track Court (Central), Tis Hazari Courts)
X70	*State v Shailender* SC Number 26/2015 (Special Fast Track Court (Central), Tis Hazari Courts)

7. APPENDIX 7: TABLES USED TO ANALYSE CONTESTED CASES

7.1 Table A: Age of the victim in data set

Age group (in years)	Convictions	Acquittals
Statutory age for sexual consent – 20[985]	2	3
20 to 30	3	4
30 to 40	1	2
Undisclosed or unclear	7	16
Total number of cases	13	25

7.2 Table B: Age of the defendant in the data set

Age group (in years)	Convictions	Acquittals
20 to 30	1	1
30 to 40	1	2
Undisclosed	11	22
Total number of cases	13	25

[985] The statutory age for sexual consent refers to the age below which it is assumed women do not have the capacity to give sexual consent. The statutory age for sexual consent was 16 years before the Criminal Law (Amendment) Act 2013 and became 18 years after the Act came into force on 3 April 2013. The categories mentioned in the table exclude the upper limit. For example, where a victim was 20 years old she was counted as being '20 to 30' years old. A similar rule was applied in the next table about the defendant's age.

7.3 Table C: Location of the incident in the data set

Location		Convictions	Acquittals
Private places[986]	Defendant's residence	3	9
	Victim's residence	5	14
	Hotel room	0	2
	His car	2	1
	Another private place	1	4
	Total number of cases where the location was (alleged to be) a private place[987]	11	24
Public places		2	1
Unclear		0	0
Total number of cases		13	25

7.4 Table D: Relationship between the victim and defendant in the data set

Defendant's relationship with the victim	Convictions	Acquittals
Member of the victim's family	0	5
Friend or acquaintance	4	7
Neighbour	4	5
Landlord	0	4
Tenant	0	1
Employer	1	0
Colleague	2	2
Service provider	0	2
Otherwise known to the victim, though there was no personal interaction between them	2	1
Stranger	1	0
Unclear	0	2
Total number of cases[988]	13	25

[986] This includes private spaces located within public places, such as a car parked in a car (*State v Om Prakash Nayak* (n 823)). It also includes locations that were outdoors, but still private, such as a terrace located on the defendant's house (*State v Sunil Kumar* (n 855)).

[987] These totals are less than the sum of the individual categories since there were multiple incidents in some cases. In other cases, the same place fit multiple categories. For instance, both the victim and the defendant may reside in the same house. In these circumstances, the case will be double counted under 'defendant's accommodation' and 'victim's accommodation' (*State v Anil Kumar Yadav* (n 777), *State v Kailash* (n 842)).

[988] The total is less than the sum of individual categories because in some cases the victim was related to the defendant in multiple ways. For example, she knew him through a mutual friend and she was also his colleague (*State v Suraj Kumar* (n 895)). In other cases there were multiple defendants.

7.5 Table E: Delay in reporting in the data set

Delay	Convictions	Acquittals
No delay (reported to the police the same day)	4	6
Reported up to 5 days from the incident[989]	4	5
Reported after 5 days, but within 1 month of the incident	1	3
Reported after 1 month, but within a year of the incident	3	7
Reported after 1 year of the incident	1	2
Unclear	0	2
Total	13	25

[989] This was considered to be an appropriate categorisation since most forensic evidence is lost 96 hours after the incident (*see* Section 4.1 of Chapter Seven). Going by dates, rather than specific times, a delay of 96 hours will be either four or five days.

BIBLIOGRAPHY

'53% Rape Cases filed between April 2013 and July 2013 False: Delhi Commission of Women' (*DNA*, 2014) <www.dnaindia.com/india/report-53-rape-cases-filed-between-april-2013-and-july-2013-false-delhi-commission-of-women-2023334> accessed 24 April 2017

'Five Special Fast-track Courts for Sexual Assault Cases' (*DNA*, 19 December 2012) <www.dnaindia.com/india/report-five-special-fast-track-courts-for-sexual-assault-cases-1779429> accessed 19 December 2016

'Panel Discussion on Appointments to the Lower and Higher Judiciary' (*Campaign for Judicial Accountability and Reforms and Vidhi Centre for Legal Policy*, 9 September 2016) <vidhilegalpolicy.in/events-updates/2016/9/9/video-panel-discussion-on-appointments-to-the-lower-and-higher-judiciary> accessed 19 December 2016

Adams G, 'I Have Been in Torture Photos, Too' (*The Guardian*, 5 June 2004) <www.theguardian.com/politics/2004/jun/05/northernireland.northernireland> accessed 6 March 2019

Aebi MF, 'Measuring the Influence of Statistical Counting Rules on Cross-national Differences in Recorded Crime' in Aromaa K and Heiskanen M (eds), *Crime and Criminal Justice Systems in Europe and North America 1995-2004* (1st edn, European Institute for Crime Prevention and Control (HEUNI), Publication Series Number 55, Criminal Justice Press 2008)

Agarwal T, 'Gender and Caste-based Wage Discrimination in India: Some Recent Evidence' (2014) 47 Journal for Labour Market Research 329

Agnes F, 'Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law' (2002) 37 Economic and Political Weekly 844

——, 'Controversy over Age of Consent' (2013) 48 Economic and Political Weekly 10

——, 'Section 498A, Marital Rape and Adverse Propaganda' (2015) 50 Economic and Political Weekly 12

Ahmad Z, 'Muslim Caste in Uttar Pradesh' (1962) 14 The Economic Weekly 325

Ahmed-Ghosh H, 'Chattels of Society: Domestic Violence in India' (2004) 10 Violence Against Women 94

Ahrens CE, 'Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape' (2006) 38 American Journal of Community Psychology 263

Akumu CO, Amony I and Otim G, *Suffering in Silence: A Study of Sexual and Gender Based Violence (SGBV) in Pabbo Camp, Gulu District, Northern Uganda* (The Gulu District Sub-Committee on Sexual and Gender Based Violence (SGBV) 2005)

Althouse A, 'Thelma and Louise and the Law: Do Rape Shield Rules Matter?' (1991) 25 Loyala of Los Angeles Law Review 757

Ambedkar B, 'Annihilation of Caste' (*Dr Babasaheb Ambedkar: A Dalit Bahujan Media*, 1 December 1944) <www.ambedkar.org/ambcd/02.Annihilation%20of%20Caste.htm> accessed 2 March 2019

Amburg LV and Rechtin S, 'Rape Evidence Reform in Missouri: A Remedy for the Adverse Impact of Evidentiary Rules on Rape Victims' (1978) 22 Saint Louis University Law Journal 367

Amnesty International, *Bosnia - Herzegovina: Rape and Sexual Abuse by Armed Forces* (AI Index: EUR 63/01/93, 1993)

Amy M Buddie and Miller AG, 'Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims' 45 Sex Roles 139

Anand U, ''She Said I Love You, Kissed Him': Argument That Led to Reprieve for Mahmood Farooqui in SC' (*News18*, 19 January 2018) <www.news18.com/news/india/she-said-i-love-you-and-even-kissed-him-the-argument-that-led-the-sc-to-decide-in-favour-of-peepli-live-director-mahmood-farooqui-1636829.html> accessed 16 January 2019

Anderson S, McClain N and Riviello RJ, 'Genital Findings of Women after Consensual and Nonconsensual Intercourse ' (2006) 2 Journal of Forensic Nursing 59

Angelone D, Mitchell D and Grossi L, 'Men's Perceptions of an Acquaintance Rape: The Role of Relationship Length, Victim Resistance, and Gender Role Attitudes' (2015) 30 Journal of Interpersonal Violence 2278

Angelone D, Mitchell D and Smith D, 'The Influence of Gender Ideology, Victim Resistance, and Spiking a Drink on Acquaintance Rape Attributions' (2018) 33 Journal of Interpersonal Violence 3186

Anleu SR and Mack K, 'Performing Authority: Communicating Judicial Decisions in Lower Criminal Courts' (2015) 51 Journal of Sociology 1052

Anleu SR and others, 'Observing Judicial Work and Emotions: Using Two Researchers' (2016) 16 Qualitative Research 375

Annavarapu S, 'Hetero-normativity and Rape: Mapping the Construction of Gender and Sexuality in the Rape Legislations in India' (2013) 8 International Journal of Criminal Justice Sciences 248

Anthony AK and Danaher WF, 'Rules of the Road: Doing Fieldwork and Negotiating Interactions with Hesitant Public Figures ' (2016) 16 Qualitative Research 392

Arasu P and Thangarajah P, 'Queer Women and Habeas Corpus in India: The Love that Blinds the Law' (2012) 19 Indian Journal of Gender Studies 413

Arendell T, 'Reflections on the Researcher-Researched Relationship: A Woman Interviewing Men' (1997) 20 Qualitative Sociology 341

Arondekar A, 'Loitering as a Feminist Right' (2012) March - April Biblio 28

Atrey S, 'Lifting as We Climb: Recognizing Intersectional Gender Violence in Law' (2015) 5 Oñati Socio-legal Series 1512

——, 'Women's Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum' (2018) 40 Human Rights Quarterly 859

Bajoria J, *"Everyone blames me": Barriers to Justice and Support Services for Sexual Assault Survivors in India* (Human Rights Watch, 2017)

Ballakrishnen S, '"Why is Gender a Form of Diversity?": Rising Advantages for Women in Global Indian Law Firms ' (2013) 20 Indiana Journal of Global Legal Studies 1261

Barn R and Kumari V, 'Understanding Complainant Credibility in Rape Appeals: A Case Study of High Court Judgments and Judges' Perspectives in India' (2015) 55 British Journal of Criminology 435

Basheer S, 'Judging Judges by the Length of their Judgments is a Bad Idea' (*The Wire*, 16 June 2016) <thewire.in/43085/judging-judges-by-the-length-of-their-judgment-is-a-bad-idea/> accessed 19 December 2016

Basu S, 'Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory' (2011) 37 Feminist Studies 185

——, 'Family Law Organizations and the Mediation of Resources and Violence in Kolkata' in Roy S (ed), *New South Asian Feminisms: Paradoxes and Possibilities* (1st edn, Zed Books 2012)

Baudh S, 'Sodomy in India: Sex Crime or Human Right?' (2006) 37 IDS Bulletin 58

Bavinck M, '"A Matter of Maintaining Peace" State Accommodation to Subordinate Legal Systems: The Case of Fisheries along the Coromandel Coast of Tamil Nadu, India' (1998) 30 The Journal of Legal Pluralism and Unofficial Law 151

Baviskar A, 'Adivasi Encounters with Hindu Nationalism in MP' (2005) 40 Economic and Political Weekly 5105

Baxi P, 'Justice is a Secret: Compromise in Rape Trials' (2010) 44 Contributions to Indian Sociology 207

——, *Public Secrets of Law: Rape Trials in India* (1st edn, Oxford University Press 2014)

——, *'Carceral Feminism' as Judicial Bias: The Discontents around State v. Mahmood Farooqui* (Council for Social Development 2016)

——, 'Impractical Topics, Practical Fields Notes on Researching Sexual Violence in India' (2016) LI Economic and Political Weekly 80

Baxi P, Rai S and Ali SS, 'Legacies of Common Law: 'Crimes of Honour' in India and Pakistan' (2006) 27 Third World Quarterly 1239

Baxi U, 'Discipline, Repression and Legal Pluralism' in Sack P and Minchin E (eds), *Legal Pluralism Proceedings of the Canberra Law Workshop VII* (1st edn, Law Department, Australian National University 1985)

Beale SS, 'Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse' (1993) 4 Criminal Law Forum 307

Beaudry N, 'The Challenges of Human Relations in Ethnographic Enquiry - Examples from Arctic and Subarctic Fieldwork' in Barz GF and Coole TJ (eds), *Shadows in the Field: New Perspectives for Fieldwork in Ethnomusicology* (Oxford University Press)

Bentley A, 'The Role of In-laws as Perpetrators of Violence against Women in Mumbai' (2018) 3 International Journal of Social Sciences and Interdisciplinary Studies 4

Bernstein E, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns' (2010) 36 Signs 45

Berti D, 'Hostile Witnesses, Judicial Interactions and Out-of-Court Narratives in a North Indian District Court' (2010) 44 Contributions to Indian Sociology 235

——, 'Courts of Law and Legal Practice' in Clark-Deces I (ed), *A Companion to the Anthropology of India* (1st edn, Wiley-Blackwell 2011)

——, 'Binding Fictions - Contradicting Facts and Judicial Constraints in a Narcotics Case in Himachal Pradesh' in Berti D and Bordia D (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015)

——, ‘Local Powers and Judicial Constraints in a Case of Rape in India’ (2015) 60 Diogenes 97

Berti D and Bordia D, ‘Introduction’ in Berti D and Bordia D (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015)

Bhalla A and Vishnu G, ‘The Rapes Will Go On’ Tehelka Magazine 9(15) <archive.tehelka.com/story_main52.asp?filename=Ne140412Coverstory.asp> accessed 11 July 2017

——, ‘The Rapes will go on’ Tehelka Magazine <archive.tehelka.com/story_main52.asp?filename=Ne140412Coverstory.asp> accessed 26 May 2015

Bhardwaj RK, ‘The Indian Judicial System: Transition from Print to Digital’ (2013) 13 Legal Information Management 203

Bhat M and Wodda A, ‘Examining Legal Responses to Sexual Violence: A Review of Court Systems in India’ in Unnithan NP (ed), *Crime and Justice in India* (1st edn, Sage Law 2013)

Bhatia G, ‘ICLP Turns Three :: Thoughts on Legal Scholarship and Access to Courts’ (*Indian Constitutional Law and Philosophy*, 2 August 2016) <indconlawphil.wordpress.com/2016/08/02/iclp-turns-three-thoughts-on-legal-scholarship-and-access-to-courts/> accessed 19 December 2016

——, ‘The Supreme Court's Criminal Defamation Judgment: Glaringly Flawed’ (*Indian Constitutional Law and Philosophy*, 13 May 2016)

<indconlawphil.wordpress.com/2016/05/13/the-supreme-courts-criminal-defamation-judgment-glaringly-flawed/> accessed 19 December 2016

Bhattacharya S, 'What Delhi's New 'Two-Finger Test' Guidelines Really Say' *The Wall Street Journal* (8 June 2015) <blogs.wsj.com/indiarealtime/2015/06/08/what-delhis-new-two-finger-test-guidelines-really-say/> accessed 31 January 2019

Blunt A, 'Spatial Stories Under Siege: British Women Writing from Lucknow in 1857' (2000) 7 Gender, Place and Culture: A Journal of Feminist Geography 229

Bohlander M, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71 Journal of Criminal Law 412

Bohner G, *Vergewaltigungsmythen [Rape Myths]* (1st edn, Verlag Empirische Pa¨dagogik 1998)

Borah R and Nandi S, 'Reclaiming the Feminist Politics of 'SlutWalk'' (2012) 14 International Feminist Journal of Politics 415

Bosworth M, Hoyle C and Dempsey MM, 'Researching Trafficked Women: On Institutional Resistance and the Limits to Feminist Reflexivity' (2011) 17 Qualitative Inquiry 769

Bouillier V, 'From a Comparative Perspective - Criminal Cases involving South Asian People at French Assize Courts' in Berti D and Bordia D (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015)

Bows H, 'The 'Ideal' Rape Victim and the Elderly Woman: A Contradiction in Terms?' in Duggan M (ed), *Revisiting the 'Ideal Victim'* (1st edn, Policy Press University of Bristol 2018)

Boyd SB and Parkes D, 'Looking Back, Looking Forward: Feminist Legal Scholarship in SLS' (2017) 26 Social and Legal Studies 735

Brewis B, 'Sexual History Evidence and Impact on Belief in Consent' (2014) 78 The Journal of Criminal Law 290

Brinkmann S, 'Varieties of Interviewing: Epistemic and Doxastic' [2007] Tidsskrift for Kvalitativ Metodeudvikling 30

——, 'Unstructured and Semi-Structured Interviewing ' in Leavy P (ed), *The Oxford Handbook of Qualitative Research* (1st edn, Oxford University Press 2014)

Brockner J and Rubin J, *Entrapment in Escalating Conflicts* (1st edn, Springer-Verlag 1985)

Bronitt S and Misra A, 'Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law' (2014) 2 Griffith Asia Quarterly 37

Burrell DE, 'Myth, Stereotype, and the Rape of Black Women' (1993) 4 University of California Los Angeles Women's Law Journal 87

Burris C, 'Why Domestic Institutions are failing Child Brides: A Comparative Analysis of India's and the United States' Legal Approaches to the Institution of Child Marriage' (2011) 23 Tulane Journal of International and Comparative Law 151

Burt M, 'Cultural Myths and Supports for Rape 1980' (1980) 38 Journal of Personality and Social Psychology 217

Butler J, 'Burning Act: Injurious Speech ' (1996) 3 The University of Chicago Law School Roundtable 199

Buzuvis E, 'Caster Semenya and the Myth of a Level Playing Field' (2010) 6 The Modern American 36

Cameron D and Scanlon J, 'Introduction' in Cameron D and Scanlon J (eds), *The Trouble and Strife Reader* (1st edn, Bloomsbury Academic 2010)

Campbell R, 'Changing the Community Response to Rape: The Promise of Sexual Assault Nurse Examiner (SANE) Programmes' in Brown JM and Walklate SL (eds), *Handbook on Sexual Violence* (1st edn, Routledge 2011)

Caplow S, 'What If There Is No Client: Prosecutors as Counselors of Crime Victims' (1998) 5 Clinical Law Review 1

Carr M and others, 'Debunking Three Rape Myths' (2014) 10 Journal of Forensic Nursing 217

Chakravarti U, 'From Fathers to Husbands: Of Love, Death and Marriage in North India' in Welchman L and Hossain S (eds), *'Honour': Crimes, Paradigms and Violence Against Women* (1st edn, Zed Books 2005)

——, 'The Everyday and the Exceptional: Sexual Violence and Impunity in our times' in Chakravarti U (ed), *Fault Lines of History: The India Papers II* (1st edn, Zubaan Books 2017)

Chambers C and Watkins S, 'Postcolonial Feminism?' (2012) 47 The Journal of Commonwealth Literature 297

Chatterjee E, Krishnan S and Robb ME, 'Feeling Modern: The History of Emotions in Urban South Asia' (2017) 27 Journal of the Royal Asiatic Society, Series 3 539

Chaudhuri S and Fitzgerald S, 'Rape Protests in India and the Birth of a New Repertoire' (2015) 14 Social Movement Studies 622

Chennupati DB, Potluri RM and Mangnale V, 'India's Right to Information Act, 2005: A Catalyst for Good Governance ' (2013) 55 International Journal of Law and Management 295

Chevers N, *A Manual of Medical Jurisprudence for Bengal and the North Western Provinces* (1st edn, F Carbery, Bengal Military Orphan Press 1856)

Christie N, 'Conflicts as Property' (1977) 17 British Journal of Criminology 1

——, 'The Ideal Victim' in Fattah EA (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (1st edn, Macmillan 1986)

Ciotti M, 'After Subversion: Intimate Encounters, the Agency in and of Representation, and the Unfinished Project of Gender without Sexuality in India' (2011) 23 Cultural Dynamics 107

Clark H, 'Judging Rape: Public Attitudes and Sentencing' (2007) 14 Australian Centre for the Study of Sexual Assault Newsletter 17

Conaghan J, 'Sex, Gender and the Trans Debate' (*University of Bristol Law School Blog*, 18 December 2018) <legalresearch.blogs.bris.ac.uk/2018/12/sex-gender-and-the-trans-debate/> accessed 6 March 2019

——, ' The Essence of Rape' [2018] Oxford Journal of Legal Studies Advance Articles

Conaghan J and Russell Y, 'Rape Myths, Law, and Feminist Research: 'Myths About Myths'?' (2014) 22 Feminist Legal Studies 25

Condry R, 'Secondary Victims and Secondary Victimization' in Shoham SG, Knepper P and Kett M (eds), *International Handbook of Victimology* (1st edn, CRC Press 2010)

Conley JM and O'Barr WM, *Just Words - Law, Language and Power* (2nd edn, University of Chicago Press 2005)

Corbett C and Hobdell K, 'Volunteer-based Services to Rape Victims: Some Recent Developments' in Maguire M and Pointing J (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988)

Corbett C and Maguire M, 'The Value and Limitations of Victim Support Schemes' in Maguire M and Pointing J (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988)

Correndo C, 'Of Women and Myths: Revising Analytical Approaches to Gender Issues in India' (2016) 6 South Asian Chronicle 93

Cossman B, 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project' (1997) 2 Utah Law Review 525

Cowton CJ, 'The Use of Secondary Data in Business Ethics Research' (1998) 17 Journal of Business Ethics 423

Crenshaw K, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 Stanford Law Review 1241

Cretney A and Davis G, *Punishing Violence* (1st edn, Routledge 1995)

Crowe M, Inder M and Porter R, 'Conducting Qualitative Research in Mental Health: Thematic and Content Analyses' (2015) 49 Australian and New Zealand Journal of Psychiatry 616

Dave A, Pradhan Y and Srirama T, 'Changing Forms of Violence: Struggles in Non-Marital Intimate Relationships: A Study of the Experiences of Intervention at the Special Cells in Mumbai' Tata Insitutite of Social Sciences 2015 <www.esocialsciences.org/NeweSS/Articles/show_Article.aspx?qs=bGp0Ut9EHmCw/EpGtd/DaOq4y1LLX06ZTOar4K0Fq6M=> accessed 18 April 2017

Davies M, 'Unity and Diversity in Feminist Legal Theory' (2007) 2 Philosophy Compass 650

Davies M and Munro V, 'Editors' Note' in Davies M and Munro V (eds), *The Ashgate Research Companion to Feminist Legal Theory* (1st edn, Routledge 2013)

Davies P, 'Doing Interviews in Prison' in Davies P, Francis P and Jupp V (eds), *Doing Criminological Research* (2nd edn, Sage Publications 2011)

Davis AJ, *Arbitrary Justice: The Power of the American Prosecutor* (1st edn, Oxford University Press 2009)

Dean L and others, ''You're disabled, why did you have sex in the first place?' An Intersectional Analysis of Experiences of Disabled Women with regard to their Sexual and Reproductive Health and Rights in Gujarat State, India' (2017) 10 Global Health Action 33

Deckha M, 'Postcolonial Feminism Liberal Feminism's (Humanist) 'Sister'? ' in Barnes A (ed), *Feminisms of Discontent: Global Contestations* (1st edn, Oxford University Press 2015)

Desai S and Dubey A, 'Caste in 21st Century India: Competing Narratives' (2012) 46 Economic and Political Weekly 40

Devika J, 'Bodies Gone Awry: The Abjection of Sexuality in Development Discourse in Contemporary Kerala' (2009) 16 Indian Journal of Gender Studies 21

Devika J and others, 'Sharmila Rege (1964-2013): Tribute to a Phule-Ambedkarite Feminist Welder' (2013) 48 Economic and Political Weekly 22

Dhanda A, 'Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 Sur Revista Internacional de Direitos Humanos 42

Dickey S, 'Permeable Homes: Domestic Service, Household Space, and the Vulnerability of Class Boundaries in Urban India' (2000) 27 American Ethnologist 462

——, 'The Pleasures and Anxieties of Being in the Middle: Emerging Middle-Class Identities in Urban South India' (2012) [46] Modern Asian Studies 559

Dilley P, 'Conducting Successful Interviews: Tips for Intrepid Research' (2000) 39 Theory Into Practice 131

Driessen H and Jansen W, 'The Hard Work of Small Talk in Ethnographic Fieldwork' (2013) 69 Journal of Anthropological Research 249

Dube L, 'Caste and Women' in Rao A (ed), *Gender and Caste* (1st edn, Zed Books 2005)

Edwards SSM, 'The Crime of Retracting a Truthful Statement R v A [2012] EWCA Crim 434' (2012) 24 Denning Law Journal 141

Ellison L, 'Credibility in Context: Jury Education and Intimate Partner Rape' (2018) The International Journal of Evidence and Proof OnlineFirst 1

Ellison L and Munro VE, 'Reacting to Rape: Exploring Mock Jurors 'Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology 202

Engineer AA and Narang AS (eds), *Minorities and Police in India* (1st edn, Manohar Publishers 2006)

Engle K and Lottman A, 'The Force of Shame' in McGlynn C and Munro V (eds), *Rethinking Rape Law: International and Comparative Perspectives* (1st edn, Taylor and Francis 2010)

Enloe C, 'Wielding Masculinity inside Abu Ghraib: Making Feminist Sense of an American Military Scandal' (2004) 10 Asian Journal of Women's Studies 89

Estrich S, *Real Rape* (1st edn, Harvard University Press 1988)

Ferguson P, 'The Definition of Rape' (2002) 20 Scots Law Times 163

Few A and Rosen K, 'Victims of Chronic Dating Violence: How Women's Vulnerabilities Link to Their Decisions to Stay' (2005) 54 Family Relations 265

Filep B, 'Interview and Translation Strategies: Coping with Multilingual Settings and Data' (2009) 4 Social Geography 59

Fleming K, 'When Speech Isn't Free: Legal Barriers and Consequences of Reporting Sexual Violence' (Departmental Honors Projects Paper 21, Hamline University 2014)

Foucault M, *Discipline and Punish: The Birth of the Prison* (Sheridan A tr, 2nd edn, Vintage 2012)

Franklin J, 'Where Art Thou, Privacy: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for a Romeo and Juliet Exception in Illinois' (2012) 46 The John Marshall Law Review 309

Galliano G and others, 'Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates' (1993) 8 Journal of Interpersonal Violence 109

Gangoli G, 'The Right to Protection from Sexual Assault: The Indian Antirape Campaign' (1996) 6 Development in Practice 334

——, 'Controlling Women's Sexuality: Rape Law in India' in Westmarland N and Gangoli G (eds), *International Approaches to Rape* (1st edn, The Police Press 2011)

Gangoli G and Rew M, 'Mothers-in-Law Against Daughters-in-Law: Domestic Violence and Legal Discourses Around Mother-in-Law Violence Against Daughters-in-Law in India' (2011) 34 Women's Studies International Forum 420

Garg A, 'Attrition in Rape Cases in Delhi' (M Phil thesis, Faculty of Law, University of Oxford 2016)

——, 'Navigating through Age and Agency in Eera v State' (2018) 14 Socio-Legal Review 79

Garside R, *Crime, Persistent Offenders and the Justice Gap* (Crime and Society Foundation, King's College London, Discussion Paper Number 1, 2004)

Gaur KD, *The Indian Penal Code* (4th edn, Universal Law Publishing Company 2009)

George JL, 'Investigation: Where are the 'One Stop Centers' for Rape Survivors Promised by the Nirbhaya Fund?' The Ladies Finger <theladiesfinger.com/investigation-where-are-the-one-stop-centers-for-rape-victims-under-the-nirbhaya-fund/> accessed 29 January 2016

Gerger H and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggresive Behaviour 422

Ghai A, 'Disabled Women: An Excluded Agenda of Indian Feminism' (2002) 17 Hypatia 49

Goldberg-Ambrose C, 'Unfinished Business in Rape Law Reform' (1992) 48 Journal of Social Issues 173

Goldstein AS, 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 Mississippi Law Journal 515

Goli S, Singh D and Sekher T, 'Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-wide Survey' (2013) 44 Journal of Comparative Family Studies 193

Goswami N, 'Autophagia and Queer Transnationality: Compulsory Heteroimperial Masculinity in Deepa Mehta's Fire' (2008) 33 Signs 343

——, 'Autophagia and Queer Transnationality: Compulsory Heteroimperial Masculinity in Deepa Mehta's Fire' (2008) 33 Signs 343

Griffiths J, 'What is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1

Gross H, 'Rape, Moralism, and Human Rights' [2007] Criminal Law Review 220

Halai N, 'Making Use of Bilingual Interview Data: Some Experiences from the Field' (2007) 12 The Qualitative Report 344

Hall K and Donovan VO, 'Shifting Gender Positions among Hindi-speaking Hijras' in Bergvall V, Bing J and Freed A (eds), *Rethinking Language and Gender Research: Theory and Practice* (1st edn, Longman 1996)

Halley J, *Split Decisions: How and Why to Take a Break from Feminism* (1st edn, Princeton University Press 2006)

Hammer J, Aiyar Y and Samji S, 'Understanding Government Failure in Public Health Services' (2007) 42 Economic and Political Weekly 4049

Haskar N, 'Human Rights Lawyering: A Feminist Perspective' in Dhanda A and Parashar A (eds), *Engendering Law: Essays in Honour of Lotika Sarkar* (1st edn, Eastern Book Company 2007)

Hazel S, 'The Paradox from Within: Research Participants doing-being-observed ' (2016) 16 Qualitative Research 446

Headley ZE, ''The Devil's Court!' - The Trial of 'Katta Panchayat' in Tamil Nadu' in Berti D and Bordia D (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015)

Henderson A, Bartholomew K and Dutton D, 'He Loves Me; He Loves Me Not: Attachment and Separation Resolution of Abused Women' (1997) 12 Journal of Family Violence 169

Hendy H and others, 'Comparison of Six Models for Violent Romantic Relationships in College Men and Women' (2003) 18 Journal of Interpersonal Violence 645

Herring J, 'Mistaken Sex' [2005] Criminal Law Review 511

——, 'Human Rights and Rape: A Reply to Hyman Gross' [2007] Criminal Law Review 228

——, 'Rape and the Definition of Consent' (2014) 24 National Law School of India Review 62

Hester M and Westmarland N, *Tackling Domestic Violence: Effective Interventions and Approaches* (Home Office Research Study 290, Development and Statistics Directorate, 2005)

Hetherington A, 'Exploitation in Therapy and Counselling: A Breach of Professional Standards' (2000) 28 British Journal of Guidance and Counselling 11

Hinchy J, 'Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India' (2014) 38 Asian Studies Review 274

Hines S, 'The Feminist Frontier: On Trans and Feminism' (2019) 28 Journal of Gender Studies 145

Hofer HV, 'Crime Statistics as Constructs: The Case of Swedish Rape Statistics' (2000) 8 European Journal on Criminal Policy and Research 77

Holder RL and Daly K, 'Sequencing Justice: A Longitudinal Study of Justice Goals of Domestic Violence Victims' (2018) 58 The British Journal of Criminology 787

Hoyano L, 'Case Comment on R v Gjoni (Kujtim)' (2014) 10 Criminal Law Review 765

Hoyle C, Bosworth M and Dempsey M, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 Social and Legal Studies 313

Hoyle C and others, *Evaluation of the 'One Stop Shop' and Victim Statement Pilot Projects: A Report for the Home Office Research Development and Statistics Directorate* (Department of Law University of Bristol, 1998)

Hoyle C and Sanders A, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?' (2000) 40 British Journal of Criminology 14

Hunter RC, 'Gender in Evidence: Masculine Norms vs. Feminist Reforms' (1996) 19 Harvard Women's Law Journal 127

Hussain A, *Sometimes There is No Blood: Domestic Violence and Rape in Rural Sri Lanka* (International Centre for Ethnic Studies, 2000)

Hussain S, 'Breaking the Silence: Sexual Violence and Impunity in Jammu and Kashmir' in Chakravarti U (ed), *Fault Lines of History: The India Papers II* (1st edn, Zubaan Books 2017)

II JHS, 'Slipping Through the Front Door: Relevant Social Scientific Evaluation in the People of Color Century' (1999) 20 The American Journal of Evaluation 415

Irudayam A, Mangubhai J and Lee J, *Dalit Women Speak Out: Violence against Dalit Women in India (Overview Report of Study in Andhra Pradesh, Bihar, Tamil Nadu/Pondicherry and Uttar Pradesh)* (National Campaign on Dalit Human Rights, New Delhi, 2006)

Iyer S, 'Taking a Break from the State: Indian Feminists in the Legal Reform Process' (2016) 17 Journal of International Women's Studies 18

Jaffrelot C, 'Gujarat 2002: What Justice for the Victims? The Supreme Court, the SIT, the Police and the State Judiciary' (2012) 47 Economic and Political Weekly 77

Jain A, 'Asaram Bapu Gets Life Term in the 2013 Rape Case' (*Live Law*, 2018) <www.livelaw.in/breaking-asaram-bapu-gets-life-term-2013-rape-case/> accessed 16 July 2018

Jaising I, 'Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence' in Kannabiran K (ed), *Women and Law-Critical Perspectives* (1st edn, Sage Law 2014)

Jaoul N, 'A Strong Law for the Weak - Dalit Activism in a District Court of Uttar Pradesh' in Berti D and Bordia D (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015)

Jauregui B, 'Provisional Agency in India: Jugaad and Legitimation of Corruption' (2014) 41 American Ethnologist 76

——, *Provisional Authority: Police, Order and Security in India* (1st edn, University of Chicago Press 2016)

Jayawardena K and Alwis Md, 'Embodied Violence: Communalising Women's Sexuality in South Asia' (1996) 4 Reproductive Health Matters 162

Jewkes R, Sen P and Garcia-Moreno C, 'Sexual Violence' in Krug EG and others (eds), *World Report on Violence and Health* (1st edn, World Health Organisation 2002)

Johari A, 'Can Sex after a False Promise of Marriage be called Rape?' (*Scroll*, 18 April 2014) <scroll.in/article/661695/can-sex-after-a-false-promise-of-marriage-be-called-rape> accessed 18 April 2017

John ME, *Discrepant Dislocations: Feminism, Theory, and Postcolonial Histories* (1st edn, University of California Press 1996)

—— (ed), *Women Studies in India: A Reader* (1st edn, Penguin 2008)

John S and others, 'Addressing Stigma and Discrimination towards Mental Illness: A Community Based Intervention Programme from India' (2015) 2 Journal of Psychosocial Rehabilitation and Mental Health 79

Johnston MS, 'Men Can Change: Transformation, Agency, Ethics and Closure during Critical Dialogue in Interviews ' (2016) 16 Qualitative Research 131

Jolly J, 'Does India have a Problem with False Rape Claims?' (*BBC*, 8 February 2017) <www.bbc.co.uk/news/magazine-38796457> accessed 24 April 2017

Jordan J, 'Worlds Apart? Women, Rape and the Police Reporting Process' (2001) 41 British Journal of Criminology 679

——, 'Here We Go Round the Review-Go-Round: Rape Investigation and Prosecution — Are Things Getting Worse Not Better?' (2011) 17 Journal of Sexual Aggression 234

Kannabiran K, 'Pursuing Elusive Justice: Mass Crimes in India and Relevance of International Standards' (2014) 5 Journal of Indian Law and Society 256

——, 'Storytelling in the Time of Hate' (2015) 50 Economic and Political Weekly 77

Kapur R, ''A love song to our mongrel selves': Hybridity, Sexuality and the Law' (1999) 8 Social and Legal Studies 353

——, 'Too Hot to Handle: The Cultural Politics of Fire' (2000) 64 Feminist Review 53

——, 'Sexcapades and the Law' (*Seminar Magazine: Towards Equality—A Symposium on Women, Feminism, and Women's Movements*, 2001) <www.india-seminar.com/2001/505/505%20ratna%20kapur.htm> accessed 2 August 2018

——, ‘The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics’ (2002) 15 Harvard Human Rights Journal 1

——, ‘The Other Side of Globalization: The Legal Regulation of Cross-Border Movements’ (2003) 22 Canadian Woman Studies 6

——, ‘Revisioning the Role of Law in Women’s Human Rights Struggles’ in Meckled-García S and Çali B (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (1st edn, Routledge 2005)

——, ‘Out of the Colonial Closet, but Still Thinking inside the Box: Regulating Perversion and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns’ (2009) 2 National University of Juridical Sciences 381

——, ‘Pink Chaddis and SlutWalk Couture: The Postcolonial Politics of Feminism Lite’ (2012) 20 Feminist Legal Studies 1

——, ‘Gender Justice, Interrupted’ *The Hindu* (29 March 2013) <www.thehindu.com/opinion/lead/Gender-justice-interrupted/article12404830.ece> accessed 2 August 2018

——, ‘Feminism’s Estrangement Critical Reflections on Feminist Engagements with Law in India’ in Barnes A (ed), *Feminisms of Discontent: Global Contestations* (1st edn, Oxford University Press 2015)

Kapur R and Cossman B, *Subversive Sites: Feminist Engagements with Law in India* (1st edn, Sage Publications 1996)

Karthika M, 'I'm Queer And I Couldn't Care Less About Section 377' (*BuzzFeed*, 26 December 2017) <www.buzzfeed.com/meenakarthika/im-queer-and-i-couldnt-care-less-about-section-377?utm_term=.afnwD6YoV&utm_source=bffbdialoguebybuzzfeed&ref=bffbdialoguebybuzzfeed#.evgOalkDp> accessed 16 November 2018

Kejriwal O, 'Loopholes and Road Ahead' (2006) 41 Economic and Political Weekly 940

Khorakiwala R, 'Judicial Iconography in India' (2014) 1 Asian Journal of Legal Education 89

Kikon D, 'Memories of Rape: The Banality of Violence and Impunity in Naga Society' in Chakravarti U (ed), *Fault Lines of History The India Papers II* (1st edn, Zubaan Books 2017)

Kim D, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2018) 69 Crime, Law and Social Change 91

Kiyimba N and O'Reilly M, 'The Risk of Secondary Traumatic Stress in the Qualitative Transcription Process: A Research Note ' (2016) 16 Qualitative Research 468

Klarfeld J, 'A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law' (2011) 48 American Criminal Law Review 1819

Klatch R, *Women of the New Right* (1st edn, Temple University Press 1987)

Kolsky E, '"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860–1947' (2010) 22 Gender and History 109

——, 'The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–57' (2010) 69 The Journal of Asian Studies 1805

Kotiswaran P, 'A Bittersweet Moment: Indian Governance Feminism and the 2013 Rape Law Reforms' (2017) 52 Economic and Political Weekly 78

——, 'Governance Feminism in the Postcolony: Reforming India's Rape Laws' in Halley J and others (eds), *Governance Feminism: An Introduction* (1st edn, University of Minnesota Press 2018)

Krahé B, 'Myths about Rape Myths? Let the Evidence Speak: A Comment on Reece (2013)' <www.uni-potsdam.de/fileadmin01/projects/sozialpsychologie/images/pdf/Comment_Reece_Paper.pdf> accessed 11 July 2017

Krishnan S, 'Agency, Intimacy, and Rape Jokes: An Ethnographic Study of Young Women and Sexual Risk in Chennai' (2016) 22 Journal of the Royal Anthropological Institute 67

Krishnaswamy S, Sivakumar SK and Bail S, 'Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches' (2014) 2 Journal of National Law University, Delhi 1

Kumar N, 'Karkardooma Courts Tighten Security, Restrict Entry' (*The Hindu*, 8 January 2016) <www.thehindu.com/news/cities/Delhi/Karkardooma-courts-tighten-security-restrict-entry/article13988356.ece> accessed 19 December 2016

Lacey N, 'Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?' in Lacey N (ed), *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1st edn, Hart Publishing 1998)

Laird K, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' (2014) 7 Criminal Law Review 492

Law CfCat, *Report of Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi* (National Law School of India, University, Bangalore, 2016)

Lea SJ, Lanvers U and Shaw S, 'Attrition in Rape Cases: Developing a Profile and Identifying Relevant Factors' (2003) 43 British Journal of Criminology 583

Leahy S, 'Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland' (2014) 14 Irish Journal of Applied Social Studies 18

Lees S, *Carnal Knowledge: Rape on Trial* (2nd edn, The Women's Press Limited 2002)

Lens V, 'Engaging Parents in Family Court: Lessons from an Observational Study of Child Protection Cases' (2017) 17 Journal of Social Work 129

Letizia C, 'The 'Secularism Case' - Prosecution of a Hindu Activist before a Quasi-judicial Authority in the Nepal Tarai' in Berti D and Bordia D (eds), *Regimes of Legality: Ethnography of Criminal Cases in South Asia* (1st edn, Oxford University Press 2015)

Lewis R and Mills S, 'Introduction' in Mills R and Lewis S (eds), *Feminist Postcolonial Theory: A Reader* (1st edn, Routledge 2003)

Liang L, 'Jana Gana Mana and the Danger of Passing Sentiment as Law' (*The Wire*, 2016) <thewire.in/83606/jana-gana-mana-dangers-passing-sentiment-law/> accessed 19 December 2016

Liebling A, 'Doing Research in Prison: Breaking the Silence?' (1999) 3 Theoretical Criminology 147

Lokniti, *Key Highlights from the CSDS- KAS Report 'Attitudes, Anxieties and Aspirations of India's Youth: Changing Patterns'* (Centre for the Study of Developing Societies and Konrad Adenauer Stiftung, 2017)

Lund R, Panda SM and Dhal MP, 'Narrating Spaces of Inclusion and Exclusion in Research Collaboration – Researcher-Gatekeeper Dialogue' (2016) 16 Qualitative Research 280

Lutz-Priefert M, 'A Call for a More Permanent International Definition of Rape' (2015) 6 Creighton International and Comparative Law Journal 85

MacKinnon CA, *Feminism Unmodified: Discourses on Life and Law* (1st edn, Harvard University Press 1987)

——, *Towards a Feminist Theory of the State* (1st edn, Harvard University Press 1989)

MacLean L, Meyer M and Estable A, 'Improving Accuracy of Transcripts in Qualitative Research' (14) 1 Qualitative Health Research 113

Macrae CN and Shepherd JW, 'Do Criminal Stereotypes Mediate Juridic Judgements?' (1989) 28 British Journal of Social Psychology 189

Magolda P, 'Being at the Wrong Place, Wrong Time: Rethinking Trust in Qualitative Inquiry' (2000) 39 Theory Into Practice 138

Maguire M and Corbett C, *The Effects of Crime and the Work of Victim Support Schemes* (1st edn, Gower 1987)

Maier SL, '"I have heard horrible stories . . ." Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System' (2008) 14 Violence Against Women 786

Majumdar C, 'Attitudes towards Premarital Sex in India: Traditionalism and Cultural Change' (2018) 22 Sexuality and Culture 614

Mäkinen K, 'Uneasy Laughter: Encountering the Anti-immigration Debate' (2016) 16 Qualitative Research 541

Mandal S, 'The Impossibility of Marital Rape' (2014) 29 Australian Feminist Studies 255

Mangubhai JP, 'Violence and Impunity in a Patriarchal Caste Culture: Difference Matters' in Chakravarti U (ed), *Fault Lines of History: The India Papers II* (1st edn, Zubaan Books 2017)

Mason J, *Qualitative Researching* (2nd edn, Sage Publications 2002)

Matoesian GM, 'Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial' (1995) 29 Law and Society Review 669

Mawby R, 'Victim Support in England and Wales: The end of an era?' (2016) 22 International Review of Victimology 203

Mazumdar V, 'Political Ideology of the Women's Movement's Engagement with Law' in Dhanda A and Parashar A (eds), *Engendering Law: Essays in Honour of Lotika Sarkar* (1st edn, Eastern Book Company 2007)

McFarlane A, 'Spells and Hate Speech: Linguistic Violence and Vulnerability in the Harry Potter Series' (2012) 34 Reason Papers 145

McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81 The Journal of Criminal Law 367

McGregor J, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (1st edn, Ashgate 2005)

McLean I and others, 'Female Genital Injuries Resulting from Consensual and Non-consensual Vaginal Intercourse' (2011) 204 Forensic Science International 27

Mehra M, *The Rape Law and Constructions of Sexuality* (Partners for Law in Development, 2018)

Mehra U, *Report of Justice Usha Mehra* (Ministry of Home Affairs, New Delhi, 2013)

Menon N, 'The Gap Between the Feminist Understanding of Sexual Violence and the Law' (*The Wire*, 24 February 2019) <thewire.in/women/sexual-violence-rape-law-india> accessed 13 March 2019

——, 'Sexuality, Caste, Governmentality: Contests over 'Gender' in India' (2009) 91 Feminist Review on South Asian Feminisms: Negotiating New Terrains 94

——, *Seeing Like a Feminist* (1st edn, Penguin UK 2012)

Mercier J, 'Eliminating Child Marriage in India: A Backdoor Approach to Alleviating Human Rights Violations' (2006) 26 Boston College Third World Law Journal 377

Merry SE, 'Legal Pluralism' (1988) 22 Law and Society Review 869

Mezey G, 'Reactions to Rape: Effects, Counselling and the Role of Health Professionals' in Maguire M and Pointing J (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988)

Miklian J and Carney S, 'Corruption, Justice and Violence in Democratic India' (2013) 33 SAIS Review of International Affairs 37

Miles M and Huberman M, 'Drawing Valid Meaning from Qualitative Data: Toward a Shared Craft' (1984) [13] 5 Educational Researcher 20

Mitra D, 'Critical Perspectives on SlutWalks in India' (2012) 38 Feminist Studies 254

Mitra D and Satish M, 'Testing Chastity, Evidencing Rape' (2014) 49 Economic and Political Weekly 51

Mody P, 'Love and the Law: Love-Marriage in Delhi' (2002) 36 Modern Asian Studies 223

Mohanty CT, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61

Mont JD, Miller K-L and Myhr TL, 'The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women' (2003) 9 Violence Against Women 466

Mookherjee M, 'Affective Citizenship: Feminism, Postcolonialism and the Politics of Recognition' (2005) 8 Critical Review of International Social and Political Philosophy 31

Moore SF, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 Law and Society Review 719

Morgan J and Zedner L, 'Researching Child Victims - Some Methodological Difficulties' (1993) 2 International Review of Victimology 295

Morrison C, 'Social Organization at the District Courts: Colleague Relationships among Indian Lawyers' (1969) 3 Law and Society Review 251

Morriss L, 'Dirty Secrets and being 'Strange': Using Ethnomethodology to Move beyond Familiarity' (2016) 16 Qualitative Research 526

Muehlenhard CL and others, 'Definitions of Rape: Scientific and Political Implications' (1992) 48 Journal of Social Issues 23

Mullally S, ''As nearly as may be': Debating Women's Human Rights in Pakistan' (2005) 14 Social and Legal Studies 341

Munro VE, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' in Davies M and Munro V (eds), *The Ashgate Research Companian to Feminist Legal Theory* (1st edn, Routledge 2013)

Nalla MK and Madan M, 'Determinants of Citizens' Perceptions of Police–Community Cooperation in India: Implications for Community Policing' (2012) 7 Asian Criminology 277

Narayan U, 'Cross-Cultural Connections, Border-Crossings, and "Death by Culture"' in Narayan U (ed), *Dislocating Cultures: Identities, Traditions, and Third-World Feminism* (1st edn, Routledge 1997)

Natarajan M, 'Police Culture and the Integration of Women Officers in India' (2014) 16 International Journal of Police Science and Management 124

Newark M, 'The Hostile Witness and the Adversary System' [1986] Criminal Law Review 441

Oakley A, 'Interviewing Women - A Contradiction in Terms' in Roberts H (ed), *Doing Feminist Research* (1st edn, Routledge 1981)

Ohayi SR and Ezugwu EC, 'Prevalence and Pattern of Genital Injuries among Adolescent Rape Victims attending Enugu State University Teaching Hospital, South East Nigeria' (2019) 39 Journal of Obstetrics and Gynaecology 190

Orenstein A, 'No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials,' (1998) 49 Hastings Law Journal 663

——, 'Special Issues Raised by Rape Trials' (2007) 76 Fordham Law Review 1585

Oxford Pro Bono Publico, *Public Access to Court Documents* (Oxford Human Rights Hub, 2015)

Palermo T, Bleck J and Peterman A, 'Tip of the Iceberg: Reporting and Gender-based Violence in Developing Countries' (2013) 179 American Journal of Epidemiology 602

Palkar V, 'Failing Gender Justice in Anti-Dowry Law' (2003) 23 South Asia Research 181

Pande R, ''I arranged my own marriage': Arranged Marriages and Post-colonial Feminism' (2015) 22 Gender, Place and Culture 172

Pandey G, 'Deepika Bhardwaj: The Woman who Fights for Men's Rights' (*BBC*, 20 January 2017) <www.bbc.co.uk/news/world-asia-india-38647822> accessed 18 April 2017

Patel V, 'Campaign Against Rape by Women's Movement in India' (*Ca' Foscari University of Venice*, 2014) <www.unive.it/media/allegato/dep/n24-2014/Ricerche/03_Patel.pdf> accessed 26 May 2015

Patil V, 'Narrating Political History about Contested Space: Tourism Websites of India's Northeast' (2011) 38 Annals of Tourism Research 989

Petkov MP and Kaoullas LG, 'Overcoming Respondent Resistance at Elite Interviews Using an Intermediary ' (2015) 16 Qualitative Research 411

Phadke S, 'Thirty Years On: Women's Studies Reflects on the Women's Movement' (2003) 38 Economic and Political Weekly 4567

——, ''You Can Be Lonely in a Crowd': The Production of Safety in Mumbai' (2005) 12 Indian Journal of Gender Studies 41

——, 'Dangerous Liaisons: Women and Men: Risk and Reputation in Mumbai' (2007) 42 Economic and Political Weekly 1510

——, 'Unfriendly Bodies, Hostile Cities: Reflections on Loitering and Gendered Public Space' (2013) 48 Economic and Political Weekly 50

Phadke S, Khan S and Ranade S, *Why Loiter?: Women And Risk On Mumbai Streets* (1st edn, Penguin 2011)

Phadke S, Ranade S and Khan S, 'Invisible Women' (2013) 42 Index on Censorship 40

Phadke S and Roy A, 'Women Walk Out' (2017) 46 Index on Censorship 50

Phipps A and others, 'Rape Culture, Lad Culture and Everyday Sexism: Researching, Conceptualizing and Politicizing New Mediations of Gender and Sexual Violence' (2018) 27 Journal of Gender Studies 1

Ponzoni E, 'Windows of Understanding: Broadening Access to Knowledge Production through Participatory Action Research' (2016) 16 Qualitative Research 557

Popping R, 'Analyzing Open-ended Questions by Means of Text Analysis Procedures' (2015) 128 Bulletin de Me´thodologie Sociologique 23

Prasad BD, 'Call Centre as an Emerging Work Space: A Study of its Workers in Indian Context' Working Paper Number 11, Centre for Social Studies, September 2011 <www.css.ac.in/download/english/CSS%20Working%20Paper%20No.%2011.pdf> accessed 27 April 2017

Prasad S, 'Medicolegal Response to Violence Against Women in India' (1999) 5 Violence Against Women 478

Prenzler T and Sinclair G, 'The Status of Women Police Officers: An International Review' (2013) 41 International Journal of Law, Crime and Justice 115

Prison Reform Trust, *International Good Practice: Alternatives to Imprisonment for Women Offenders* (2013)

Quah JS, 'Curbing Corruption in India: An Impossible Dream?' (2008) 16 Asian Journal of Political Science 240

Rachlinski JJ and others, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 Notre Dame Law Review 1195

Radcliffe P, Hunter G and Vass R, *The Development and Impact of Community Services for Women Offenders: An Evaluation* (The Institute for Criminal Policy Research, School of Law, Birkbeck College, 2013)

Raghuram P, 'Caste and Gender in the Organisation of Paid Domestic Work in India' (2001) 15 Work, Employment and Society 607

Rajan RS and Park Y-m, 'Postcolonial Feminism/Postcolonialism and Feminism' in Shwarz H and Ray S (eds), *A Companion to Postcolonial Studies* (1st edn, Blackwell Publishing 2000)

Rajasekaran R, 'NCRB Follows International Practice to Count Crime' (*The Hindu*, 17 September 2013) <www.thehindu.com/opinion/op-ed/ncrb-follows-international-practice-to-count-crime/article5135345.ece> accessed 21 February 2019

Ramanathan U, 'Images (1920 - 1950): Reasonable Man, Reasonable Woman and Reasonable Expectations' in Dhanda A and Parashar A (eds), *Engendering Law: Essays in Honour of Lotika Sarkar* (1st edn, Eastern Book Company 2007)

Rao A, 'Understanding Sirasgaon: Notes Towards Conceptualising the Role of Law, Caste and Gender in a Case of "Atrocity"' in Rao A (ed), *Gender and Caste* (1st edn, Zed Books 2005)

Rao N, *'Good Women do not Inherit Land': Politics of Law and Gender in India* (1st edn, Routledge 2018)

Rapley TJ, 'The Art(fulness) of Open-ended Interviewing: Some Considerations on Analysing Interviews' (2001) I Qualitative Research 303

Rath J, 'Training to be a Volunteer Rape Crisis Counsellor: A Qualitative Study of Women's Experiences' (2008) 36 British Journal of Guidance and Counselling 19

Ravindran S, 'Halting the Blow of Domestic Violence in India' (*Al Jazeera*, 4 August 2016) <www.aljazeera.com/indepth/features/2016/07/halting-blow-domestic-violence-india-160701121800822.html> accessed 18 April 2017

Reddy V, 'The Nationalization of the Global Indian Woman' (2006) 4 South Asian Popular Culture 61

Reece H, 'Is Elite Opinion Right and Popular Opinion Wrong?' (2013) [33] 3 Oxford Journal of Legal Studies 445

——, ‘Debating Rape Myths’ LSE Law, Society and Economy Working Papers 21/2014, London School of Economics and Political Science Law Department <www.lse.ac.uk/collections/law/wps/WPS2014-21_Reece.pdf> accessed 11 July 2017

Reed A, ‘Strict Liability and the Presumption of Innocence Criminal’ (2009) 173 Criminal Law and Justice Weekly 409

Rees G, ‘‘It is not for me to say whether consent was given or not’: Forensic Medical Examiners’ Construction of ‘Neutral Reports’ in Rape Cases’ (2010) 19 Social and Legal Studies 371

Rege S, ‘A Dalit Feminist Standpoint’ in Rao A (ed), *Gender and Caste* (1st edn, Zed Books 2005)

Reinharz S and Chase SE, ‘Interviewing Women’ in Holstein J and Gubrium JF (eds), *Inside Interviewing - New Lenses, New Concerns* (1st edn, Sage Publications 2003)

Rich A, ‘Notes Towards a Politics of Location’ in Lewis R and Mills S (eds), *Feminist Postcolonial Theory: A Reader* (1st edn, Routledge 2003)

Richter-Montpetit M, ‘Empire, Desire and Violence: A Queer Transnational Feminist Reading of the Prisoner ‘Abuse’ in Abu Ghraib and the Question of ‘Gender Equality’’ (2007) 9 International Feminist Journal of Politics 38

Rock P, ‘Witnesses and Space in a Crown Court’ (1991) 31 British Journal of Criminology 266

Roy A, ‘Critical Events, Incremental Memories and Gendered Violence: The ‘Delhi Gang Rape’’ (2014) 29 Australian Feminist Studies 238

Roy S, '#MeToo Is A Crucial Moment to Revisit the History of Indian Feminism' (*EPW Engage*, 20 October 2018) accessed 15 November 2018

——, 'Breaking the Cage' (2016) 63 Dissent 74

——, 'Enacting/Disrupting the Will to Empower: Feminist Governance of "Child Marriage" in Eastern India' (2017) 42 Signs 867

Roychowdhury P, 'Victims to Saviors: Governmentality and the Regendering of Citizenship in India' (2015) 29 Gender and Society 792

Ryan N and Westera N, 'The Effect of Expert Witness Testimony and Complainant Cognitive Statements on Mock Jurors' Perceptions of Rape Trial Testimony' (2018) 25 Psychiatry, Psychology and Law 693

Sa'ar A, 'Postcolonial Feminism, the Politics of Identification, and the Liberal Bargain' (2005) 19 Gender and Society 680

Sacks M, Ackerman AR and Shlosberg A, 'Rape Myths in the Media: A Content Analysis of Local Newspaper Reporting in the United States' (2018) 39 Deviant Behavior 1237

Sæther E, 'Fieldwork as Coping and Learning' in Heimer M and Thøgersen S (eds), *Doing Fieldwork in China* (1st edn, NIAS Press 2006)

Safri TS, 'Prevalence of Rape Myths in Contemporary India' (2015) 3 International Journal of Research – Granthaalayah 147

Saha K, 'The Relevance of Bad Character in Indian Law' (*The Proof of Guilt*, 13 February 2015) <theproofofguilt.blogspot.com/2015/02/guest-post-relevance-of-bad-character.html> accessed 6 March 2019

Saha R, Bala S and Saha R, 'Looking Beyond Law: A Review of the Indian Sex Workers' Movement' (2008) 4 NALSAR Student Law Review 1

Sahgal G and Yuval-Davis N, 'The Uses of Fundamentalism' (1994) 5 Women Against Fundamentalism 7

Saikia N, 'Rape Laws: Why the Supreme Court Must Read Down Section 377 – But Not Strike It Down in Its Entirety' (*Scroll*, 12 July 2018) <scroll.in/article/886189/rape-laws-why-the-supreme-court-must-read-down-section-377-not-strike-it-down-in-its-entirety> accessed 7 March 2019

Sakhrani M, 'Reading Rape Post Mathura' (2016) 23 Indian Journal of Gender Studies 260

Sakshi, 'The Lack of Real Data Stands in the Way of Tackling Punjab's Drug Problem' (*The Wire*, 15 July 2016) <http://thewire.in/51368/data-drug-usage-punjab/> accessed 19 December 2016

Sampath G, 'Is Kissing in Public an Obscene Act?' (*LiveMint*, 4 November 2014) <www.livemint.com/Opinion/5DKL9wuITBg8LosTQFFX8O/Is-kissing-in-public-an-obscene-act.html> accessed 10 November 2018

Samtani S, 'Tackling Moral Policing in Mumbai: A Human Rights Approach' (*Oxford Human Rights Hub*, 4 September 2015) <ohrh.law.ox.ac.uk/tackling-moral-policing-in-mumbai-a-human-rights-approach/> accessed 10 November 2018

Sankaran M, 'Mens Rea in Rape: An Analysis of Reg v Morgan and Sections 375 and 79 of the Indian Penal Code' (1978) 20 Journal of the Indian Law Institute 438

Sarkar T, 'The Woman as Communal Subject: Rashtrasevika Samiti and Ram Janmabhoomi Movement' [1991] Economic and Political Weekly 2057

Satish M, 'Comments on PLD's Study on Rape Trials in Delhi' (Report Launch by Partners for Law in Development: Pre-Trial and Trial Stages of Rape Prosecutions in Delhi, New Delhi, 1 September 2017)

——, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (1st edn, Cambridge University Press 2017)

Schafran LH, 'Eve, Mary, Superwoman: How Stereotypes about Women Influence Judges' (1985) 24 The Judges' Journal 12

Scheppele KL, 'Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth ' (1992) 37 New York Law School Law Review 123

Schmitt FE and Martin PY, 'Unobtrusive Mobilization by an Institutionalised Rape Crisis Center: "All We Do Comes from Victims"' (1999) 13 Gender and Society 364

Schmitthener S, 'A Sketch of the Development of the Legal Profession in India' (1969) 3 Law and Society Review 337

Schuller RA and Wall AM, 'The Effects of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault' (1998) 22 Psychology of Women Quarterly 555

Sebastian J, 'The Opposite of Unnatural Intercourse: Understanding Section 377 through Section 375' (2017) 1 Indian Law Review 232

Seetharam S and Chandrashekaran S, *eCourts in India - From Policy Reform to Implementation* (Vidhi Centre for Legal Policy, 2016)

Seitz S, 'Pixilated Partnerships, Overcoming Obstacles in Qualitative Interviews via Skype: A Research Note' (2016) 16 Qualitative Research 229

Sekhri A, 'Hiding in Plain Sight: The Relevance of Character Evidence in Indian Criminal Law' (*The Proof of Guilt*, 29 December 2018) <theproofofguilt.blogspot.com/2018/12/hiding-in-plain-sight-relevance-of.html> accessed 6 March 2019

Selkin J, 'Protecting Personal Space: Victim and Resister Reactions to Assaultive Rape' (1978) 6 Journal of Community Psychology 263

Selokar D and others, 'Occupational Stress among Police Personnel of Wardha City, India' (2011) 4 Australas Medical Journal 114

Semmalar GI, 'Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India' (2014) 42 Women's Studies Quarterly 286

Semmens N, 'Methodological Approaches to Criminological Research' in Davies P, Francis P and Jupp V (eds), *Doing Criminological Research* (2nd edn, Sage Publications 2011)

Sengupta A, 'Concept, Category and Claim: Insights on Caste and Ethnicity from the Police in India' (2010) 33 Ethnic and Racial Studies 717

Shapland J and Hall M, 'Victims at Court: Necessary Accessories or Principal Players at Center Stage?' in Bottoms A and Roberts JV (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the Stage* (2nd edn, Routledge 2011)

Sharangpani M, 'Browsing for Bridegrooms: Matchmaking and Modernity in Mumbai' (2010) 17 Indian Journal of Gender Studies 249

Sharma A, 'Public Prosecutors, Victims and the Expectation Gap: An Analysis of Indian Jurisdiction' (2017) 13 Socio-Legal Review 87

Sharma E, 'Role Stress Among Doctors' (2005) 7 Journal of Health Management 151

Sharma M, '"She Has Come from the World of the Spirits…": Life Stories of Working-Class Lesbian Women in Northern India' in *Women's Sexualities and Masculinities in a Globalizing Asia* (1st edn, Palgrave Macmillan 2007)

Sharpe A, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] Criminal Law Review 207

——, 'Expanding Liability for Sexual Fraud Through the Concept of 'Active Deception': A Flawed Approach' (2016) 80 The Journal of Criminal Law 28

Shelley TOC, Morabito MS and Tobin-Gurley J, 'Gendered Institutions and Gender Roles: Understanding the Experiences of Women in Policing' (2011) 24 Criminal Justice Studies 351

Shen FX, 'How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform' (2011) 22 Columbia Journal of Gender and Law 1

Shrinivasan R, 'There's A Fatal Flaw At The Heart Of India's Crime Records Data That Needs Urgent Fixing' (*Huffington Post*, 7 July 2017) <www.huffingtonpost.in/2017/07/07/theres-a-fatal-flaw-at-the-heart-of-indias-crime-records-data_a_23020554/> accessed 23 February 2019

——, 'India Officially Undercounts All Crimes Including Rape' (*The Hindu*, 13 September 2013) <www.thehindu.com/news/national/india-officially-undercounts-all-crimes-including-rape/article5121114.ece> accessed 21 February 2019

——, ‘Rape Statistics: A Number Crunching Story’ (*The Hindu*, 18 August 2014) <www.thehindu.com/opinion/blogs/blog-datadelve/article6327818.ece> accessed 3 November 2016

Siddiqi D, ‘Blurred Boundaries: Sexuality and Seduction Narratives in Selected 'Forced Marriage' Cases from Bangladesh’ in Gupte M, Awasthi R and Chickerur S (eds), *Honour and Women’s Rights: South Asian Perspectives* (1st edn, Masum Press 2012)

Silverman D, *Doing Qualitative Research* (1st edn, Sage Publications 2000)

Singh P and Pandey A, ‘Women in Call Centres Source’ (2005) 40 Economic and Political Weekly 684

Singh S, Sharma E and Dubey M, ‘A Critique of Causes and Measures of Rape: A Systematic Review of Literature’ (2018) 18 Language in India 293

Sinha M, ‘Giving Masculinity a History: Some Contributions from the Historiography of Colonial India’ (1999) 11 Gender and History 445

——, ‘Gendered Nationalism - From Women to Gender and Back Again?’ in Fernandes L (ed), *Routledge Handbook of Gender in South Asia* (1st edn, Routledge 2014)

Smith O, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (1st edn, Springer 2018)

Smith O and Skinner T, ‘Observing Court Responses to Victims of Rape and Sexual Assault’ (2012) 7 Feminist Criminology 298

Sommers I and Baskin D, ‘The Influence of Forensic Evidence on the Case Outcomes of Rape Incidents’ (2011) 32 The Justice System Journal 314

Spencer B, 'The Impact of Class and Sexuality-based Stereotyping on Rape Blame' (2016) 2 Sexualization, Media and Society 1

Spencer J, 'The Victim and the Prosecutor' in Bottoms A and Roberts JV (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (2nd edn, Routledge 2011)

Staff S, 'Marriage Does Not Oblige a Woman to Have Sex with Her Husband, Says Delhi High Court' (*Scroll*, 18 July 2018) <scroll.in/latest/886975/marriage-does-not-oblige-a-woman-to-have-a-physical-relationship-with-her-husband-says-delhi-hc> accessed 14 March 2019

Stanko EA, 'Hidden Violence Against Women' in Maguire M and Pointing J (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988)

Stannard J, 'The Emotional Dynamics of Consent' (2015) 79 Journal of Criminal Law 422

Staples J, 'At the Intersection of Disability and Masculinity: Exploring Gender and Bodily Difference in India' (2011) 17 Journal of the Royal Anthropological Institute 545

Stewart A, 'Debating Gender Justice in India' (1995) 4 Social and Legal Studies 253

Sturges JE and Hanrahan KJ, 'Comparing Telephone and Face-to-Face Qualitative Interviewing: A Research Note' (2004) 4 Qualitative Research 107

Subramanian S, 'From the Streets to the Web: Looking at Feminist Activism on Social Media' (2015) 50 Economic and Political Weekly 71

Sullivan JR, 'Skype: An Appropriate Method of Data Collection for Qualitative Interviews?' (2012) 6 The Hilltop Review 54

T A, 'Feminist Responses to Sexual Abuse: The Work of the Birmingham Rape Crisis Centre' in Maguire M and Pointing J (eds), *Victims of Crime: A New Deal* (1st edn, Open University Press 1988)

Tabassum S and Sadashivam T, 'Right to Information Act in India: An Overview' (2015) 6 Journal of the Knowledge Economy 665

Tamanaha BZ, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review 375

Tandon U, 'Constitutional Justice and Social Integration with Special Reference to Women: An Indian Experience' (2015) 5 Yonsei Law Journal 97

Taslitz AE, *Rape and the Culture of the Courtroom* (1st edn, New York University Press 1999)

Taylor SC and Gassner L, 'Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-reporting of Sexual Offences' (2010) 11 Police Practice and Research: An International Journal 240

Teltumbde A, 'Delhi Gang Rape Case: Some Uncomfortable Questions' (2013) 48 Economic and Political Weekly 10

Temkin J, *Rape and the Legal Process* (2nd edn, Oxford University Press 2002)

Temkin J and Ashworth A, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Criminal Law Review 328

Temkin J and Krahé B, *Sexual Assault and the Justice Gap* (1st edn, Hart Publishing 2008)

Temple B and Young A, 'Qualitative Research and Translation Dilemmas' (2004) 4 Qualitative Research 161

Thakur R, *Real Estate Brokers in the Rental Housing Market: A Study of Vijay Nagar, a Student Area near Delhi University* (Centre for Civil Society Working Paper Number 273, 2012)

Tharu S, 'The Impossible Subject: Caste and the Gendered Body' (1996) 31 Economic and Political Weekly 1311

——, 'The Dalit Woman Question' (2014) 1 India@logs 152

The Legal System Reforms Project, 'The Problems with Official Crime Data in India' (*Hub for Law and Policy, Azim Premji University*, 18 October 2016) <thelsr.wordpress.com/2016/10/18/the-problems-with-official-crime-data-in-india/> accessed 21 February 2019

The Legal System Reforms Project, 'The Need for Crime Victimisation Surveys in India' (*Hub for Law and Policy, Azim Premji University, Bangalore*, 30 November 2016) <thelsr.wordpress.com/2016/11/30/the-need-for-crime-victimisation-surveys-in-india/> accessed 21 February 2019

Towns A and Scott H, ''I couldn't even dress the way I wanted.' Young Women talk of 'Ownership' by Boyfriends: An Opportunity for the Prevention of Domestic Violence?' (2013) 23 Feminism and Psychology 536

Vandello J and others, 'Stand by Your Man Indirect Prescriptions for Honorable Violence and Feminine Loyalty in Canada, Chile, and the United States ' (2009) 40 Journal of Cross-Cultural Psychology 81

Vathek, 'Hostile Witness- India' (2011) 15 Evidence and Procedure 176

Vatuk S, 'The "Women's Court" in India: An Alternative Dispute Resolution Body for Women in Distress' (2016) 45 The Journal of Legal Pluralism and Unofficial Law 76

Venema RM, 'Making Judgments: How Blame Mediates the Influence of Rape Myth Acceptance in Police Response to Sexual Assault' [2016] Journal of Interpersonal Violence 1

——, 'Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports' (2016) 31 Journal of Interpersonal Violence 872

Verma A, 'Cultural Roots of Police Corruption in India' (1999) 22 Policing: An International journal of Police Strategies and Management 264

Vetten L, 'Unintended Complicities: Preventing Violence Against Women in South Africa' (2016) 24 Gender and Development 291

Vezzadini S, 'Being (Almost) Invisible: Victims of Crime in the Italian Juvenile Criminal Justice System' (2014) 17 Temida 87

Vindhya U, '"Dowry Deaths" in Andhra Pradesh, India: Response of the Criminal Justice System' (2000) 6 Violence Against Women 1085

Vishwanath N, 'The Shifting Shape of the Rape Discourse' (2018) 25 Indian Journal of Gender Studies 1

Viswambharan AP and Priya KR, 'Documentary Analysis as a Qualitative Methodology to Explore Disaster Mental Health: Insights from Analysing a Documentary on Communal Riots' (2016) 16 Qualitative Research 43

Wakefield A, 'Undertaking a Criminological Literature Review' in Davies P, Francis P and Jupp V (eds), *Doing Criminological Research* (2nd edn, Sage Publications 2011)

Walker MA, 'Some Problems in Interpreting Statistics Relating to Crime' 146 Journal of the Royal Statistical Society, Series A (General) 281

Walkowitz JR, 'The Politics of Prostitution and Sexual Labour' (2016) 82 History Workshop Journal 188

Wasamba P and Muchiri J, 'Reflections of Two African Researchers on Oral Testimony Fieldwork in South Korea ' (2015) 8 The Nairobi Journal of Literature 51

Weis K and Borges SS, 'Victimology and Rape: The Case of the Legitimate Victim' (1973) 8 Issues Criminology 71

West A, 'Tougher Prosecution When the Rapist is Not a Stranger: Suggested Reform to the California Penal Code' (1994) 24 Golden Gate University Law Review 169

Westera NJ, Kebbell MR and Milne B, 'It is Better, But Does It Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence' (2013) 19 Psychology, Crime & Law 595

Westmarland N, 'Co-ordinating Responses to Domestic Violence' in Brown JM and Walklate S (eds), *Handbook on Sexual Violence* (1st edn, Routledge 2012)

Williams R, 'Deception, Mistake and Vitiation of the Victim's Consent' (2008) 124 Law Quarterly Review 132

Withrow BL, *Research Methods in Crime and Justice* (1st edn, Routledge 2014)

Xaxa V, 'Women and Gender in the Study of Tribes in India' (2004) 11 Indian Journal of Gender Studies 345

Zaviršek D, 'Pictures and Silences: Memories of Sexual Abuse of Disabled People' (2002) 11 International Journal of Social Welfare 270