

ETHNOGRAPHIC STUDY OF RAPE ADJUDICATION IN LUCKNOW'S TRIAL COURT¹

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Criminal law has been a significant site of reform in the context of sexual violence in India. Beginning with the amendments in 1983, several Supreme Court decisions and legislations have brought changes to the rape law. The paper uses findings from an eight-week long ethnographic study of rape trials in Lucknow's Fast Track Court to argue that the legal changes have had little impact on the trial discourse. The author observed 95 rape trials, interviewed 12 lawyers, and conducted focus group discussions at 12 police stations in Lucknow. The paper exposes a chasm between the written formal law and the operational law in Lucknow's lower court. The paper also demonstrates the narrow understanding of 'real' rape amongst lawyers and police personnel involving stranger rapes resulting in serious injuries. Further, the paper uses two case studies from the ethnography to reveal the normalization of sexual violence in acquaintance rapes, resulting from a narrow conception of what constitutes 'real' rape. It is finally argued that the transformative potential of criminal law for sexual violence is rather limited. The paper concludes by advocating for strategies outside of criminal law to combat sexual violence.

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I. INTRODUCTION

Criminal law has primarily driven the legal reforms on sexual violence in India. Beginning with the Criminal Law (Amendment) Act of 1983, significant changes have been made to both the substantive and procedural aspects of the law through various Supreme Court decisions² and legislative amendments.³ This paper exposes the limited role that the changes in formal criminal law have had on the trial discourse in rape cases. This is done by relying on findings from an ethnography of a Fast Track Court (‘FTC’) created in Lucknow for adjudication of rape cases, for eight weeks in April and May 2015. Courtroom ethnographies allow one to understand the interaction between social and legal processes and the manifestation of it in everyday legal practices. The paper also relies on semi-structured interviews with 12 lawyers and Focus Group Discussions (‘FGDs’) conducted at 12 police stations in Lucknow.

The findings from this ethnography reveal a chasm between the written law and the spoken law in the FTC in Lucknow. In doing so, it corroborates findings from Pratiksha Baxi’s ethnographic work on rape trials in Gujarat, in reference to which she suggests that, “state law is transformed in its localization, often to the point of bearing little resemblance to written law.”⁴ The actors within the criminal justice system continue to be guided by ‘phallogocentric’ notions of sexual violence, which consequently impacts the way rape cases are argued and adjudicated in the trial court of Lucknow. By ‘phallogocentric’, I do not merely imply sexist notions. Instead, I refer to a “specific disqualification of women and women’s sexuality” in rape trials in Lucknow.⁵ More than half of the trials I observed during the ethnographic period corresponded to criminalization of the exercise of sexual autonomy by a woman in choosing

² *Delhi Domestic Working Women’s Forum v Union of India* (1995) 1 SCC 14 (Supreme Court of India); *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490 (Supreme Court of India); *State of Punjab v Gurmit Singh* (1996) 2 SCC 384 (Supreme Court of India); *Railway Board v Chandrima Das* (2000) 2 SCC 465 (Supreme Court of India); *Sakshi v Union of India* (2004) 5 SCC 518 (Supreme Court of India); *Independent Thought v Union of India* (2017) 10 SCC 800 (Supreme Court of India).

³ Indian Evidence (Amendment) Act 2003; The Code of Criminal Procedure (Amendment) Act 2005; Code of Criminal Procedure (Amendment) Act 2008; Criminal Law (Amendment) Act of 2013; Criminal Law (Amendment) Act of 2018; The Protection of Children from Sexual Offences (Amendment) Act 2019.

⁴ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (OUP 2014) 27.

⁵ Carol Smart, *Feminism and the Power of Law* (Routledge 2002) 26.

a partner. 52 of the 95 trials involved runaway marriages between consenting couples, followed by a criminal complaint of rape against the man by the parents/guardian of the woman. Cases of acquaintance rape were subjected to the stranger rape framework and resultantly, reinforced problematic notions of consent.

The paper is divided into five parts. The first part discusses the significance of the methodology in offering an insight into the limited transformative potential of criminal law. The second part lays out the ethnographic site- an FTC, where all rape cases from the district were adjudicated. The third part describes the manner of conduct of rape trials in the FTC. The fourth part discusses the phallogocentric notions about sexual violence and rape survivors that were revealed in the interviews and FGDs with lawyers and police personnel. This notion is bolstered by the empirical reality that more than 50% of the cases that I observed, that were being adjudicated as rape trials, were actually cases of runaway marriages involving consenting couples. The last part discusses the negative impact of the overarching narrow conception of what constitutes 'real' rape on trial discourse in the FTC.

The paper argues that changes in criminal law, without any efforts to address the social context of deep-seated structural inequalities which influence how law operates, are unlikely to bring any meaningful change in the trial discourse in rape cases. In doing so, the paper also acknowledges the limited role of criminal law in bringing about social change and advocates for conversations on alternative approaches outside of criminal law to address sexual violence.

II. EMPLOYED METHODS OF STUDY

A. Background

This paper is an extract from a larger study undertaken in 2015, which focused on understanding the construction of rape as a crime within the current legal discourse. The idea was to examine what the category of 'rape' encompassed in a given space and time, given the amendments to the rape law at that time. This was done by undertaking the ethnography of a courtroom that dealt exclusively with rape trials in the Lucknow district.

It is important at this point to reveal that most of the ongoing rape trials in the FTC during the ethnographic period corresponded to crimes committed before the coming into force of the Protection of Children from Sexual Offences (Amendment) Act of 2019 ('POCSO') and the Criminal Law Amendment Act ('CLA') of 2013. With the coming into force of the POCSO Act, cases where the survivor was a child (below the age of 18 years) were

heard in a special courtroom designated under the Act. However, since there were many pending cases with incidents prior to 2012, all such cases with child survivors were still being heard in the FTC. Most cases in the FTC corresponded to First Information Reports ('FIRs') dated as old as the year 2008. Therefore, the findings of this study cannot comment on the impact of the CLA 2013.

B. Methods and Tools

Ethnography primarily entails the researcher participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, and/or asking questions through informal and formal interviews, collecting documents and artefacts— gathering whatever data is available, to throw light on the issues that are the emerging focus of inquiry.⁶ Conventional ethnography therefore requires that the researcher spend an extended period of time in the field of study, which I was unable to do. To overcome the constraint of time, I used the method of focused or micro-ethnography. Focused ethnography is a method of research wherein a particular setting or topic is chosen and studied, instead of portraying the entire culture.⁷ It compensates for the shorter duration of field study with a more intense specific topic of study.⁸ The ethnography for this study focused on one particular courtroom in the District and Sessions Court, Lucknow in India, for a period of eight weeks from April 1, 2015 to May 31, 2015. Since all rape cases in the district were being adjudicated in this courtroom, the ethnography is comprehensive and representative of the whole district. But the period of eight weeks was not enough to track the journey of a case, since each case was, on an average, listed once a month, given the workload of the FTC. The time period, however, was nonetheless very instructive to understand the local practices and attitudes of the prosecutors, defence lawyers, and the presiding judge.

During the ethnographic period, I was a non-participant observer of proceedings in one courtroom, throughout the working hours, from 11 am to 4 pm, for a period of eight weeks. I took field notes using pen and paper. The selection of the courtroom for the purpose of ethnography was based on the area of research. This study focuses on rape trials, and there was just one courtroom at that time in the District and Sessions Court of Lucknow District, which heard and decided rape cases. I obtained consent from the presiding judge to observe the proceedings.

⁶ Martyn Hammersley and Paul Atkinson, *Ethnography: Principles in Practice* (Routledge 2007) 3.

⁷ Harry F Wolcott, 'Making a Study "More Ethnographic"' (1990) 19(1) *Journal of Contemporary Ethnography* 44, 64.

⁸ Hubert Knoblauch, 'Focused Ethnography' (2005) 6(3) *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* <<http://www.qualitative-research.net/index.php/fqs/article/view/20/43>> accessed 15 January 2020.

Another tool of data collection used for this study was in-depth, semi-structured interviews with lawyers. I conducted the interviews in a mix of English and Hindi, depending on the ease of the participant lawyers. Informed consent was taken from the participants. I made a conscious attempt to not use a fixed interview schedule, but asked participants to engage with broad themes and narrate and reflect critically on the subject matter. I interviewed 12 lawyers, which included 2 prosecutors who were posted in the FTC at the time, and 10 private lawyers who had represented both survivors and accused in rape trials. Two out of the 12 lawyers were women, including one prosecutor and one private lawyer. The selection of private lawyer participants was based on purposive snowball sampling. The duration of the interviews ranged from 30 minutes to an hour. The interviews were recorded after obtaining consent from the participants. One of the private lawyers did not consent to his interview being audio recorded. The interviews with the prosecutors were conducted in the courtroom, after working hours. The interviews with the private lawyers were conducted with them in their chambers, after the working hours of the court i.e. after 4 pm and over the weekends.

I used FGDs as a method of data collection while interacting with the police participants. In-depth interviews with investigating officers in rape cases would only give a partial understanding of such cases. This is because it is not just the investigating officer, but also the other staff at the police station who are involved in a case in different capacities. The criminal law is set into motion by lodging of the complaint by the clerical staff, followed by an investigation by several sub-inspectors and constables, headed by the investigating officer, along with the police officers who facilitate the recording of statements of witnesses and medical examination of the survivor. Hence, FGDs were chosen over in-depth interviews while collecting data from the police participants. FGDs allow a researcher to tap into the natural processes of communication, such as arguing, joking, boasting, teasing, persuasion, challenge, and disagreement. FGDs help to avoid decontextualization by providing an opportunity to examine how people engage in generating meaning, how opinions are formed, expressed, and modified within the context of discussion and debate with others. This was particularly insightful in understanding the opinions, notions, and myths held by the police in the context of rape cases.⁹ The FGDs were conducted in the Hindi language. The selection was done so as to be comprehensive and representative of the entire district. Hence, police stations were selected from the old, new, and rural parts of the district. Five police stations from the new part of the city,¹⁰ four from the old part,¹¹ and three from the

⁹ Sue Wilkinson, 'Focus Groups: A Feminist Method' (1999) 23(2) *Psychology of Women Quarterly* 221, 224-225.

¹⁰ Vibhuti Khand, Hazratganj, Mahila thana, Mahanagar, and Ghazipur.

¹¹ SGPGI, Talkatora, Saadatganj, and Bazaarkhala.

rural part¹² of the district were selected. I noted my observations using pen and paper, since the informants were not comfortable with audio recording.

C. Relevance of Trial Courts as Sites of Study

The relevance of this study lies in the fact that it uses sociological methods to detail the processes of law, unlike most existing literature on rape in the Indian context which have critiqued the legal discourse through textual analyses of higher court judgments. This study details the processes of law in a trial court in Lucknow. Trial courts are an important site to understand how the state law is transformed in its localization, often to the point of bearing little resemblance to written law.¹³ Empirical studies on sexual violence located in trial courts have been rather limited in India. Pratiksha Baxi's (2014) work on the trial courts of Gujarat was the first ethnographic work in the area. Besides this, Partners for Law in Development, based in New Delhi, undertook a study of 16 rape cases at the pre-trial and trial stages in Delhi, between January 2014 and March 2015.¹⁴ However, this study was published in May 2017, a year after I had completed the current study. This study was the first ever empirical ethnographic study to be located in a trial court in the state of Uttar Pradesh.

III. FAST TRACK COURT, LUCKNOW

Lucknow is the capital city of one of the most populous states - Uttar Pradesh - in India. According to the latest crime statistics by the National Crime Records Bureau, Uttar Pradesh, with 59,853 cases, recorded the highest numbers of crimes against women in India.¹⁵ Amongst 19 cities including Delhi, Lucknow took the fifth spot in the category of crimes against women, with 2,425 crimes being reported in 2019.¹⁶ The city of Lucknow has one District and Sessions Court complex where all civil and criminal matters within its geographical limits are adjudicated. The ethnography was undertaken in one courtroom in this complex which was designated as an FTC. They are essentially meant for speedy disposal of cases since pendency of cases is a big concern in the Indian judicial system. All rape trials in Lucknow were adjudicated in the FTC. This court did not deal with cases involving sexual offences against children. In 2012, a special legislation, the Protection

¹² Nigoha, Nagram, and Gosaiganj.

¹³ Baxi (n 4) 340.

¹⁴ 'Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi' (Partners for Law in Development January 2014 - March 2015) <<https://doj.gov.in/sites/default/files/PLD%20report.pdf>> accessed 16 March 2020.

¹⁵ 'Crime in India 2019: Statistics Volume-1' (National Crime Records Bureau 2019) 195 <<https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>> accessed 6 December 2020.

¹⁶ *ibid* 265.

of Children from Sexual Offences Act ('POCSO') was legislated for crimes against children, along with a designated special court. Therefore, the FTC only dealt with cases involving adult women and cases involving children corresponding to incidents before 2012.

The court staff comprised a presiding judge, one stenographer, one clerk, two attendants, one police constable, and three prosecutors, including one woman and two men. The courtroom was approximately 240 square feet in size. The presiding judge sat on a raised platform in the centre. The clerk sat at a distance of five feet from him on the right side. One-fourth of the courtroom was used as a record room. The *almirahs* (a cupboard) functioned as walls between the two rooms. On the opposite side, near the entrance, in the left corner of the room, there was a large table with chairs around it. The prosecutors occupied three of these chairs and the remaining were occupied by visitors. I sat on one of these chairs throughout the ethnographic period. In the right corner, there was an enclosed space created for accused persons where they were made to stand during trials. Right after this space, on the outside, a table and chair was placed for the constable.

The working hours of the FTC were from 11 am to 4 pm, with an hour long lunch break between 1 pm and 2 pm. An average of 20 cases were put up for trial every day. The cases put up on trial were listed on a soft board on a sheet of paper outside the courtroom in illegible handwriting. There was a practice of calling out the cause title of the case when it was being taken up for hearing. Cases were never called out in any order, unless the witnesses in a particular case came up to the prosecutors and informed them of their presence. Once a witness informed the prosecutor of his/her presence, the case was called out to inform the accused and the defence lawyer that it was being taken up for hearing. Out of the nearly 20 cases that would be listed every day, proceedings would take place in an average of five to six cases within the limited number of working hours.

During the working hours there was absolute chaos in the courtroom. It was filled with litigants and defence lawyers enquiring about the status of their cases, phones ringing, and people conversing. It was difficult to observe and understand a trial proceeding if one were seated on the chairs. I often had to stand close to where the judge sat to make sense of the proceedings. A peculiar feature of this FTC was simultaneous proceedings in two cases, with the judge recording the evidence manually or hearing the arguments in a case and the clerk recording the evidence in another case. The prosecutors would often not be present when the prosecution witnesses were being cross-examined by the defence lawyer. An average of twenty people were present in the court at all times during the working hours.

I observed a total of 95 rape trials during the ethnographic period. Less than 10 of the total cases involved rape by unknown perpetrators. 52 of the 95 trials involved runaway marriages between consenting individuals.

IV. MANNER OF CONDUCT OF TRIALS

In eight weeks, I observed that survivors were almost always accompanied by their family members. Most survivors and other prosecution witnesses appeared extremely anxious and intimidated. Most survivors and accused persons appeared to be from the lower socio-economic strata with little or no education. The law in India mandates rape trials to be conducted in a closed court to ensure confidentiality of the survivor and to provide a friendly environment to allow her to easily depose about the incident. However, the FTC rape trials were conducted in an open court, contrary to the law.¹⁷ *In camera* rape trials were unknown to the Lucknow courts, and therefore no concerns were raised about it. I enquired about the same from lawyers in my interviews. They seemed to be unaware of the concept of *in camera* trials and told me that even cases under the POCSO Act 2012 were tried in open courts. One possible reason for this that I could gather, after spending eight weeks in the FTC, was the quantum of workload. Adjudicating one trial at a time in a closed courtroom may have severely affected the disposal rate of the FTC, so the requirement was conveniently ignored.

Cases of survivors who had engaged private lawyers were given preference over the others and taken up for hearing first, since the cases were listed in no particular order. Accused persons faced the same situation. The ones who had engaged senior and successful defence lawyers were treated with more respect than most others who were visibly poor (but still had engaged a private and not a legal aid lawyer). Thus, the socio-economic status of the survivors and the accused persons played out as a very significant category in the courtroom.

The recording of evidence was often contrary to the provisions of the Indian Evidence Act 1872. During deposition, witnesses' oral statements were reformulated to be recorded in a written report.¹⁸ The reformulation has the effect of changing the original intended meaning of the statements. This has been explained in greater detail using a case study, in the next section of the paper. The word rape or *balatkaar* (Hindi word for rape) was not a prevalent one. Instead, *bura kaam* (bad act) was the used vocabulary for rape in the FTC. The lawyers and the survivors were hesitant to name the offence. This practice is indicative of the notions of honour and shame that are associated with sexual violence.

¹⁷ The Code of Criminal Procedure 1973, s 327(2).

¹⁸ Daniela Berti, 'Hostile Witnesses, Judicial Interactions and Out-of-Court Narratives in a North Indian District Court' (2010) 44(3) *Contributions to Indian Sociology* 235, 246.

During cross-examination of the witnesses, questions relating to the survivor's previous sexual experience, though prohibited by law under Section 53 of the Indian Evidence Act 1872,¹⁹ were posed to the survivor.

The level of preparation at the public prosecutors' end was extremely poor. When the survivor's examination-in-chief was recorded, the prosecutor would first ask her about the incident. This would also be a way of acquainting themselves with the facts of the case. They did not prepare for the case in advance, before the day of the hearing. One possible reason for this was the enormous workload of the prosecutors. However, in cases where the survivors had engaged a private lawyer, there was thorough preparation of the witnesses. It is important to iterate here that the socio-economic background of the survivor had an obvious bearing on their ability to engage private lawyers.

V. PHALLOCENTRIC NOTIONS OF SEXUAL VIOLENCE

Considerable amount of feminist analyses on sexual violence has demonstrated the phallocentric notions that surround it. As early as 1986, Susan Estrich examined the connections between the rape law as written by the legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors. She argued that the rape law envisions rape by strangers as 'real' rape, when in reality, acquaintance rape without extra violence was more common. In addition, she problematized the interpretation of consent in law and argued that it should be defined in a way that 'no means no'. According to her, a study of rape law is an illustration of sexism in the criminal law.²⁰ Similarly, Carol Smart has argued that the entire rape trial is a process of disqualification of women and celebration of phallocentrism. She identified women's bodies as a sexualized terrain which becomes a prime site of disqualification in rape trials. Her work elaborated that in a rape trial, a woman knows that she must name parts of her body, parts which in the very naming, openly reveal their sexual content.²¹ Catharine MacKinnon saw the law of rape divide women into spheres of consent according to indices or relationship to men. She argued that the category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. According to her, in rape jurisprudence, the meaning of the act is always derived from the perspective of the accused. While the injury in the rape lies in the meaning of the act

¹⁹ A new provision, s 53A, was inserted by the CLA 2013 which deals with 'evidence of character or previous sexual experience'. As per this section, in a prosecution for an offence of rape, where the question of consent is in issue, evidence of the character of the survivor or of such person's previous sexual experience with any person shall not be relevant on the question of such consent or quality of consent.

²⁰ Susan Estrich, 'Rape' (1986) 95(6) *The Yale Law Journal* 1087.

²¹ Carol Smart, 'Law's Power, the Sexed Body, and Feminist Discourse' (1990) 17(2) *Journal of Law and Society* 194.

to its victim, the standard of criminality lies in the meaning of that act to the accused.²²

Indian scholarship on sexual violence reveals a similar assessment of the rape jurisprudence. Veena Das' seminal text looks at the judicial processes through which sexual and physical violence through the mechanism of rape is 'normalized' in Indian society. She argues that the 'consent' of the woman turns out to be the most significant category for distinguishing between non-punishable sexual commerce with a woman and the offence of rape against her. She assesses that consent is read as the absence of consent and non-consent as consent, depending upon where the woman stands in the system of alliance. She analyzes various High Court judgments to show how judges interpret the absence of injuries in a rape trial depending upon their understanding of the character of the woman and whether a woman 'habituated to sexual intercourse' is strongly bound within the structure of alliance or whether she can be treated as someone outside it. During judicial verification, courts construct the category of young males who are acting out their impulses and 'irrepressible sexual urges' when they rape women. She argues that it is not the protection of women from such men on the hunt, which is the purpose of the judicial intervention. According to her, through intervention, courts define the category of women on whom these urges may be acted out and separate them from the women on whom these acts may not be committed. The former are defined as women of 'easy virtue', while the latter are women who, in the future, may be integrated into the system of alliance or are already within it.²³ In her review of rape laws enacted during the 1980s, Flavia Agnes argued that the judgments of the post-amendment period reflected the same old notions of chastity, virginity, premium on marriage, and fear of female sexuality.²⁴ Pratiksha Baxi's book based on the ethnography of rape trials in Gujarat reveals multiple ways in which rape trials inscribe extreme indignity and humiliation on women's bodies. It exposes the localization of rape law in trial courts to an extent that it bears little resemblance to written law. Rather than bringing justice to the survivor, Baxi argues that rape trials reinforce deeply entrenched phallogocentric notions of justice.²⁵

Findings from my interviews with lawyers (including the two public prosecutors at the FTC) and the FGDs at police stations were consistent with the concerns that have been highlighted in the existing feminist scholarship on sexual violence. The conversations exposed a very strong notion that most rape

²² Catharine Mackinnon, 'Rape: On Coercion and Consent' in Katie Conboy, Nadia Medina, and Sarah Stanbury (eds), *Writing on the Body: Female Embodiment and Feminist Theory* (Columbia University Press 1997) 42.

²³ Veena Das, 'Sexual Violence, Discursive Formations and the State' (1996) 31 (35-36-37) *Economic and Political Weekly* 2411, 2420.

²⁴ Flavia Agnes, 'Protecting Women Against Violence? Review of a Decade of Legislation, 1980-89' (1992) 27(17) *Economic and Political Weekly* WS19.

²⁵ Baxi (n 4).

cases where women actually engage in consensual sex are false. The fact that a significant number of rape cases in the district were actually cases of runaway marriages where women were consenting parties bolstered this notion.²⁶

In runaway cases, couples elope to get married. Their families are opposed to it because they belong to the same *gotra* (considered to be equivalent to a clan. Marriage within the same *gotra* is prohibited by custom as it is regarded as incest) or to a different caste or religion.²⁷ In response to this, the woman's parents invoke the law by lodging a complaint of kidnapping against the partner, often stating that their daughter is a minor (even if she was an adult).²⁸ This method is adopted because it only requires proving that the 'child' was taken out of parental custody, and her own will is considered irrelevant in law. Otherwise, the intention of the accused would have to be proved, which would make conviction that much harder.²⁹

The Indian Supreme Court in *Lata Singh v State of Uttar Pradesh* ruled that:

... this is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate

²⁶ The interpretation of runaway marriages as rape cases is not unique to the FTC, Lucknow. Rukmini S, 'The Many Shades of Rape Cases in Delhi' *The Hindu* (29 July 2014) <<http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>> accessed 15 January 2020; Bharti Ali, Maharukh Adenwalla, and Sangeeta Punekar, 'Implementation of the POCSO Act: Goals, Gaps and Challenges' (HAQ: Centre for Child Rights and Forum Against Sexual Exploitation of Children 2017) 101 <<http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>> accessed 31 October 2020; 'Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues, 2018' (Centre for Child and the Law, National Law School of India University, Bangalore 2018) <<https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues-1.pdf>> accessed 15 January 2020; Preeti Pratishruti Dash, 'Rape Adjudication in India in the Aftermath of Criminal Law Amendment Act, 2013: Findings From Trial Courts of Delhi' (2020) 4(2) *Indian Law Review* 1; Madhu Mehra and Amrita Nandy, 'Why Girls Run Away To Marry: Adolescent Realities And Socio-Legal Responses In India' (Partners for Law in Development 2019) <https://www.academia.edu/40718265/WHY_GIRLS_RUN_AWAY_TO_MARRY_ADOLESCENT_REALITIES_AND_SOCIO-LEGAL_RESPONSES_IN_INDIA> accessed 16 March 2020.

²⁷ Prem Chowdhry, 'Private Lives, State Intervention: Cases of Runaway Marriage in Rural North India' (2004) 38(1) *Modern Asian Studies* 55.

²⁸ Indian Penal Code 1860, s 363 deals with the punishment for kidnapping. It states that 'whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine'.

²⁹ Chowdhry (n 27).

acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.³⁰

Despite this ruling, patriarchal, familial, and legal forces continue to collude to frame consenting women as ‘victims’ under criminal law by contesting their majority.³¹

My observation of runaway cases as rape trials, and interviews with lawyers and police personnel about which I have written in detail elsewhere,³² corroborated Prem Chowdhry’s analyses in the context of Haryana. In the 52 such cases that I observed in the ethnographic period, the woman’s family was opposed to the marriage because the man belonged to the same *gotra*, different caste, or different religion. The opposition took the form of a criminal complaint through which, as argued by Chowdhry, the state colluded with the patriarchal family in controlling females and in maintaining the caste and kinship ideology which governs marriage alliances.³³ The ambiguities in the legal system were used to sidestep the rights of individuals. In doing so, there was blurring of love and rape, or consent and lack of consent, in such cases.³⁴

For the purposes of this paper, my reference to runaway cases is limited to highlighting its role in impacting the discourse on rape that became increasingly evident through my conversations with lawyers and police personnel. The fact that more than half of the cases at the ethnographic site were runaway cases involving consenting couples had the impact of such cases being identified as a ‘typical’ rape case and thereby bolstering the notion that most rape cases are false. While speaking to me about rape cases, lawyers and police personnel only used examples of cases involving runaway marriages. Women were tagged as ‘habitual liars’ and many police participants spoke about the

³⁰ *Lata Singh v State of Uttar Pradesh* (2006) 5 SCC 475 (Supreme Court of India).

³¹ The increase in the age of consent from 16 to 18 years with the POCSO Act has increased the possibility of young men being convicted as ‘rapists’. The new Juvenile Justice (Care and Protection of Children) Act 2015 allows children aged between 16-18 years accused of heinous crimes like rape, murder, arson, etc. to be tried as adults under the Indian Penal Code. According to the Amendment, the Juvenile Justice Board (‘JJB’) will make an assessment of the mental state of the juvenile, and whether the crime was committed with an understanding of its consequences. Based on this assessment, the Board will determine whether to try the child as a juvenile or as an adult through the procedure laid down in the Code of Criminal Procedure 1973. Changes in the age were made despite the recommendations of the Parliamentary Standing Committee, which advised against reducing the age of juvenility based on established international human rights standards contained in the Convention on the Rights of the Child. The amendment to the age of juvenility was made despite major opposition from child rights groups, who have consistently emphasized the need for reform of juvenile offenders instead of retribution through adult incarceration. This increases the probability of young boys in consensual relationship with minor girls being convicted of rape.

³² Neetika Vishwanath, ‘The Shifting Shape of the Rape Discourse’ (2018) 25(1) *Indian Journal of Gender Studies* 1.

³³ Chowdhury (n 27).

³⁴ Baxi (n 4) 3235.

need to ‘control’ women. My probes on the fact that it was actually the parents of the women misusing the rape law were repeatedly dismissed. The only female private lawyer I interviewed told me that it was ‘impossible’ to rape an adult woman (unless it was a brutal gang rape), and in all cases of rape filed by an adult woman, she was always a consenting party.³⁵ Similar views were expressed by a constable who said that, “it is unbelievable that a woman above the age of 18 years could be raped.”³⁶ One of the woman constables at Nigoha police station said that women were always at fault because they were a consenting party in most cases.³⁷

In the eight weeks that I spent in the courtroom around public prosecutors, it became evident to me that trials involving rape of (almost) adult women by former sexual partners or known persons were often characterized as ‘fake’ cases. In reference to a trial involving rape by a former partner, one of the male prosecutors remarked, “First you roam around with him and then you lodge a complaint of rape against the same person. How can this be allowed?”³⁸ On another occasion, an ongoing trial involving gang rape of a college-going girl by her boyfriend and his friends was characterized as ‘fake’ to me. I was told by the female public prosecutor that it was impossible for a survivor to appear so calm and composed in a courtroom with her rapists around. The prosecutor was convinced that this was a case of consensual activity.³⁹

Such views also find mention in a book on medical jurisprudence by Modi, which states that:

In the majority of rape cases of an adult woman, the charge is made with the object of blackmail, or the act is done with the consent of the woman but when discovered, to get herself out of the trouble, she does not scruple to accuse the man of rape. If the complaint is made a day or two after the act, the case is probably one of concoction. It is also necessary to note the previous character of the female, and her relations with the accused.⁴⁰

³⁵ Interview conducted on 16 May 2015.

³⁶ FGD conducted at *Ghazipur* Police Station on 11 May 2015.

³⁷ FGD conducted at *Nigohathana* on 27 May 2015.

³⁸ This comment was made by one of the male prosecutors on 13 April 2015 in connection to a case that was listed for hearing – *State of UP v Narendra Tripathi*.

³⁹ *State of UP v Ujjwal Handa* Crime No. 37 of 2014 and Sessions Case 742 of 2014 (District and Sessions Court, Lucknow).

⁴⁰ Jaising Prabhudas Modi, *Modi’s Textbook of Medical Jurisprudence and Toxicology* (NM Tripathi 1969) 253-254.

This particular textbook occupies a very important place in rape trials in India and is widely used by lawyers and judges.⁴¹ The section of the book on sexual offences was recently revised to overcome misinformation and negative stereotypes relating to sexual violence and survivors thereof. However, I found defence lawyers in the FTC still using and citing the older version of the book which contains such problematic text. This found no opposition from the prosecutors or the judge, possibly because they also subscribed to a similar understanding of sexual violence.⁴²

Medico-legal certificates ('MLCs') in rape cases in India comment on injuries and the status of the survivor's hymen. This can be attributed to the narrow understanding of sexual violence involving penetrative violent rape with the assumption of a 'virgin' survivor.⁴³ The condition of the hymen is seen as indicative of the woman's sexual history.⁴⁴ In cases involving runaway marriages, since the couple has been sexually active, most MLCs record the condition of the hymen as "old, torn and healed". The hymen being "old, torn and healed" is interpreted to mean that 'real' rape cases are violent and result in injury to the hymen. This found iteration in the interviews and the FGDs.

Runaway cases forming a significant proportion of rape cases in the district also contributed to a very problematic understanding of what constituted 'real' rape in the minds of the lawyers (including prosecutors) and police officers. Susan Estrich writes that 'real' rape is constituted by a sudden, surprise attack by an unknown perpetrator. It occurs in an isolated, but public location, and the survivor sustains serious physical injury, either as a result of the violence or as a consequence of her efforts to resist the attack.⁴⁵ Cases that depart from the defining features of this paradigm are less likely to be accepted as genuine cases.⁴⁶

⁴¹ Durba Mitra and Mrinal Satish, 'Testing Chastity, Evidencing Rape' (2014) 49(41) *Economic & Political Weekly* 51, 53.

⁴² It is difficult to say with certainty whether there was lack of knowledge about the existence of an updated publication. But in the eight weeks I spent at the FTC at Lucknow, I found a general indifference amongst the lawyers and judges to keep themselves updated about legal developments. The use of an outdated version of Modi's textbook was one such instance.

⁴³ Based on her analysis of the judicial discourse on rape through High Court judgments, Veena Das argues that rape trials display a binary classification between women who are virgin and those that are sexually experienced. Virgin women and women in matrimonial alliances (good women) are seen as ideal victims who deserve the protection of the law. However, women who are 'habituated to sexual intercourse' with men who are not their husbands (bad women) do not have rights to the protection of the state. See Das (n 23) 2418.

⁴⁴ Mitra and Satish, 'Testing Chastity, Evidencing Rape' (n 41) 56.

⁴⁵ Mrinal Satish found that absence of injury in rape cases or cases entailing rape by a stranger were among the prime factors considered in rape sentencing. While absence of injury has the impact of lessening the quantum of sentence, stranger rapes are necessarily considered more traumatic than acquaintance rape and result in harsher sentences. See Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press 2016).

⁴⁶ Susan Estrich, *Real Rape* (Harvard University Press 1987) 1179.

Five lawyer participants spoke about the significance of medical evidence in a rape case. According to them, it was crucial in defence to show that the woman was habituated to sex and thus was a consenting party to the act. One private lawyer who had also represented survivors in rape cases was of the view that it was easier to get a conviction in a case of rape if the woman had suffered injuries. He used the word 'preferred' for such evidence because it made his task 'easier'. Similar views were expressed by barristers in a study conducted by Temkin. Strong medical evidence of injury was regarded as particularly important, indicating that stranger rape cases with injuries were easier for securing a conviction.⁴⁷

VI. THE NARROW UNDERSTANDING OF RAPE IN TRIAL DISCOURSE

This overarching narrow understanding of rape among actors within the criminal justice system had a damning impact on the everyday legal practices in the FTC. All cases that were listed in the FTC were subjected to a 'real' rape framework, which assumes an unknown perpetrator. This was at odds with the fact that less than 10 cases in the FTC involved rape by strangers. Even nationally, 93% of rapes against both women and children involve known perpetrators.⁴⁸ However, it was a 'real' rape framework of stranger violence that all cases were subjected to, in the way evidence was recorded and the witnesses were cross-examined. Cases involving children were exceptions to this: in these cases, the question of age was determinative of the outcome irrespective of the consent. Cases involving rape of adult women by known perpetrators revealed the deep-rooted phallogocentric notions that plague the rape discourse.⁴⁹

The practice in the FTC was that the deposition of the survivor would begin with the prosecutor asking her about the incident, the response to which would be reformulated and recorded in the form of a statement. There would be follow-up questions on resulting injuries, resistance offered by the survivor, and her conduct immediately after the offence. The evidence was often a replica of the complaint submitted to the police, with no new facts, and a complete absence of the complexities of sexual violence. In the end, the prosecutor would ask the survivor to identify if the accused person(s) was present in the courtroom and point in that direction. The defence strategy across trials focused on imposing their version of events on the evidence. Irrespective of the facts of the case, the defence lawyers asked a similar set of questions

⁴⁷ Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219, 224.

⁴⁸ 'Crime in India 2017, Tables 3A.4 and 4A.10' (National Crime Records Bureau 2017) <<http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>> accessed 15 January 2020.

⁴⁹ Das (n 23); Baxi (n 4).

in cross-examination. In cases involving known perpetrators, and such cases were often the norm, they posed leading questions to the survivor, to bring into evidence the fact that the accused and survivor were known to each other. Defence lawyers asked questions to establish that the survivor did not 'resist' enough and therefore consented to the act. In cases where the MLCs recorded no injury and noted the hymen to be 'old, torn and healed', this was also used against the survivor to show consent on her part. This line of reasoning corresponded with the views expressed by them in the interviews with me.

I will now use two case studies from the ethnography to discuss the normalization of sexual violence in acquaintance rape, which results from a narrow conception of what constitutes 'real' rape. This will be done by detailing the processes of recording of evidence, which often does not make it to the official court records or judgments.

A. State of Uttar Pradesh v Raj⁵⁰

I observed this case during the ethnographic period. A 19/20 year old girl was raped by a neighbour. The survivor was in court to testify. I sat next to her and the female prosecutor that day, in the morning. The moment the survivor saw the accused enter the courtroom, she started shivering and crying in fear. The female prosecutor asked the survivor what had happened. With a lot of difficulty, she managed to state that the accused had done *bura kaam* (the literal meaning of the term is 'bad act'. Here, the term is used to mean that the accused had raped her). Once the testimony was recorded in a few lines with utmost difficulty, the cross-examination was conducted.⁵¹

Question 1: Did the accused do a bad thing to you on his own or did you ask for it? [*Aapke saath battameezi khud se ki thi ya aapne kaha tha?*]

Answer 1: He did it forcefully. [*zabardasti.*]

Question 2: Did you ask the accused to marry you? [*aapne usse kaha tha shaadi karo?*]

Answer 2: I did not say that, I told him that I did not want to marry him. [*Humne nahi kaha, humne kaha hum shaadi nahi karenge.*]

Question 3: How old were you? [*Umra kitni hai aapki?*]

⁵⁰ Crime No. 261 of 2014. The text in this section within square brackets is the text in the original language Hindi.

⁵¹ Cross-examination conducted on 14 April 2015.

Answer 3: 20 years. [*Bees saal.*]

Question 4: Do you still want to get married to the accused ?
[*Aap abhi isse shaadi karna chahti hain?*]

Answer 4: No. [*Nahi.*]

Question 5: When he engaged in a bad act with you, what did you do? [*Yeh bataiyye jab isne aap ke saath galat kaam kiya, toh aapne kya kiya?*]

Answer 5: I told him to stop. [*Maine mana kiya tha.*]

The cross-examination was stopped at this point as the survivor was visibly nervous and was not doing too well. These short set of questions during the cross-examination are enough of an insight into the cultural assumptions that make their way into the trial discourse. Question 2 and 4 are of special significance in this analysis as they are good examples of how leading questions from the defence lawyers allow for their version of events to find a way into the evidence. In this case, it being the fact that the survivor had, at some point, wanted to get married to the accused. It is pertinent to note that while this was how the cross-examination was conducted, the recording of the same is in the form of a statement. Therefore, a response to Question 4 would be recorded by the clerk roughly as, “No, I don’t want to get married to the accused (now)”. Question 4 is an example of what has, in existing literature, been characterized as a ‘declarative portion’ or ‘presupposition’ of the defence lawyer’s question.⁵² These presuppositions allow for the creation of a powerful ideological lens through which the events in question are then understood. In this case, it was the fact that the survivor at some point wanted to marry the accused. Mrinal Satish’s work on rape sentencing in India demonstrates that such ‘extra-legal’ factors often make their way into the sentencing stage, resulting in lesser sentences.⁵³ In other instances, they may also become the basis for dismissal of rape charges altogether - by implying that if the survivor had wanted to marry the accused at some point in time, she may also have consented to the sexual act.

⁵² Susan Ehrlich, ‘Perpetuating—And Resisting—Rape Myths in Trial Discourse’ in Elizabeth Sheehy (ed), *Sexual Assault Law, Practice, and Activism in a Post-Jane Doe Era* (University of Ottawa Press 2012) 396.

⁵³ Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (n 45).

B. State of Uttar Pradesh v Kallu⁵⁴

This case was decided during the ethnographic period, and I had a chance to observe the trial and study the case file once the judgment was delivered. The entire defence strategy rested on establishing an existing relationship between the survivor and the accused, to discredit the charge of rape.

The incident dated April 2010 and the complaint of rape was lodged after four weeks, in May 2010. The accused was the survivor's neighbour and a distant relative. He had entered her house finding an opportunity when her parents had gone out, and then raped her. Following the rape, he threatened her not to tell anyone about it, or else he would kill her parents. The survivor, who was also the complainant in the case, was an illiterate woman. In the complaint submitted to the police, she was stated to be 16 years old at the time of the incident.

According to the prosecution, the police refused to lodge a complaint on the day of the incident. It took a month and the survivor had to approach a senior-ranking police officer to get the police station to register the complaint of rape. The mother of the survivor was one of the prosecution witnesses. She spoke about pressure from the accused's family to 'compromise' (*samjhauta*).⁵⁵ The survivor's father, who was also a prosecution witness, mentioned that the complaint was lodged only after the matter could not be 'settled' in the *panchayat* (village council). The *panchayat* had allegedly suggested that the accused marry the survivor as a punishment, to which he did not agree.

The medical examination of the survivor included the two-finger test. The test involves insertion of two fingers into the vagina of the rape survivor to note the presence or absence of the hymen and the size and laxity of the vagina. The state of the hymen is also inaccurately used to form an opinion on whether women are habituated to sexual intercourse or not. Kalpana Kannabiran refers to the two-finger test as a "demonstration of the patriarchal encoding of the female body".⁵⁶ The test has been held as inhumane and barbaric by the Supreme Court,⁵⁷ and is forbidden as per the 'Guidelines and Protocols: Medico-Legal Care of Survivors/Victims of Sexual Violence' issued by the Ministry of Health and Family Welfare in 2014.⁵⁸ In my time at

⁵⁴ *State of UP v Kallu* Crime No. 191 of 2010, Sessions Trial No. 1105 of 2010, decided on 7-4-2015 (Fast Track Court, District and Sessions Court, Lucknow).

⁵⁵ Pratiksha Baxi, 'Justice is a Secret: Compromise in Rape Trials' (2010) 44(3) *Contributions to Indian Sociology* 207, 209-211.

⁵⁶ Kalpana Kannabiran, 'Sexual Assault and the Law' in Kalpana Kannabiran and Ranbir Singh (eds), *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India* (Sage 2008) 79.

⁵⁷ *Lillu v State of Haryana* (2013) 14 SCC 643 (Supreme Court of India).

⁵⁸ 'Guidelines and Protocols: Medico-Legal Care of Survivors/Victims of Sexual Violence' (Ministry of Health and Family Welfare, Government of India March 2014) 28 <<https://main>.

the FTC, I observed that there had been a change in the pro forma for medical examination after the coming into force of the CLA, 2013. Pro formas in cases instituted after the CLA no longer made mention of the two-finger test. This led me to conclude that perhaps the test was no longer part of the medical examination of survivors. However, in my conversations with at least seven defence lawyers it emerged that the two-finger test was still being routinely conducted. The only change in status being that this information was not being recorded now. This is one of many instances that expose the chasm between the written law and the practices in lower courts. Except that in this case, survivors will continue to be violated by the invasive two-finger test conducted on them without it ever making it to the official records.

In the present case, the MLC noted that the survivor's hymen was old, torn, and healed. The survivor was also subjected to an ossification test to determine her age, since she did not have any documentary evidence of her age.⁵⁹ The age was determined as more than 18 years at the time of the incident.

The deposition of the survivor recorded the happening of the offence with much emphasis on the fact that the survivor had tried to resist the violence and raise an alarm, despite the fact that the accused had stuffed her mouth with a piece of cloth.

The defence characterized the charges as false by presenting the existence of a sexual relationship between the accused and the survivor in the past. It was the defence's case that the survivor's family lodged this case of rape to extract money from the accused person's family.

While reading the case file, I managed to record a portion of the cross-examination of the survivor, which is very instructive for the purposes of this paper.

I didn't know these people from before, my parents did.

When Kallu raped me, I did not scream.

(Then she mentioned how Kallu came in and said that he had come to meet her parents and kept waiting for an hour).

mohfw.gov.in/sites/default/files/953522324.pdf> accessed 9 October 2020.

⁵⁹ This test is conducted when there is no documentary evidence of age, as per the requirements of the Juvenile Justice (Care and Protection of Children) Act 2015. The test is an opinion on the approximate age of the woman based on the fusion of her wrists, elbows, and knees based on the X-ray examination conducted by a radiologist. A margin of error of two years is normally accepted in this test.

(The survivor is illiterate and it is evident from the record that she had a lot of trouble answering questions around her age and the date of the offence and complaint, etc.)

I was not wearing bangles on the day of the incident.

(She then added that the accused had come to give money to her parents.)

I have 6 siblings and everyone goes out to work.

Kallu had a piece of cloth which he stuffed in my mouth. I did not push him out of the house even though Kallu got a piece of cloth with him. (This was asked three times and hence mentioned thrice in the record)

I am not giving a statement against the accused because of the people from my locality. They do want the accused to be punished. (The record seems to indicate that the survivor did not understand the question properly)

I know that the accused wears underwear.

I did not bleed even though the accused raped me.

What the accused did with me did not make me feel good, he did a bad act with me.

It is wrong to say that I have filed this case to extort money from the accused persons' families. (Before this, the cross-examination focused extensively on the fact that the survivor's family was extremely poor.)

I am 20 years old. I was supposed to be married to Kallu. It is wrong to say that because I had a questionable character, Kallu refused to marry me and I have filed this case to get back at him.

The excerpts from the cross-examination reveal the encoding of damaging cultural mythologies into the declarative portions of questions. The defence lawyer has used these myths to cast doubt on the allegations of rape. The question around the piece of cloth is meant to introduce a doubt about 'utmost' resistance to the act from the survivor. The lack of bleeding is meant to suggest that the survivor was habitual to sexual intercourse and therefore, may have engaged in the act consensually. This is further supported by the

introduction of the fact that the accused and the survivor were once to be married to each other.

This case was decided during the ethnographic period in April 2015 after 131 hearings and resulted in an acquittal. The court relying on the ossification test held the survivor to be an adult. On the question of consent, the court concluded that, “the lack of consent could not be presumed in this case because the accused and the survivor were in a relationship in the past”.⁶⁰ The fact that, irrespective of a relationship in the past, a sexual partner could rape a woman, was completely delegitimized by the FTC. The court did not even bother to enter this exceedingly contentious terrain and conveniently relied on an extremely patriarchal approach to dismiss the sexual violence in the case.

The above-mentioned case studies are two amongst the many that revealed a strong influence of the stranger ‘real’ rape framework on the trial discourse at the FTC, Lucknow. The lack of nuance in approaching the deposition of the survivor in an acquaintance rape trial had a damning impact on the prosecution. The prosecutor prepared the survivor for the testimony by urging them to emphasize on the *bura kaam* and on the fact that the accused did it forcefully and that she tried her level best to resist or raise an alarm. However, the context and complexities in which acquaintance rape often occurs was completely kept out of the testimony. There was overemphasis on detailing the survivor’s attempt to resist the act and raise an alarm, to show that she in no way “asked for it”. The prosecution’s questions served to highlight that the survivor tried everything in her capacity to actively resist the sexual violence. It was almost as if the prosecutor anticipated a certain kind of blame allocation from the defence, which was attempted to be tackled by the survivor’s emphasis on utmost resistance to the act. The prosecution’s unwillingness to break out of the stranger ‘real’ rape framework in a trial allowed the defence to operate within the same context.

Writing about similar concerns in the Canadian context, Susan Ehrlich proposes to break out of the questionable cultural assumptions that circulate in acquaintance rape trials. She proposes the introduction of competing alternative narratives through the direct examination of the survivor by the prosecution. She uses a case study to display one such alternative approach. The (direct) examination by the prosecution in this case contextualizes the survivor’s actions within a sense-making framework. This approach acknowledges the structural inequalities that can characterize male-female sexual relations and the effects of such inequalities in shaping women’s strategies of resistance.⁶¹ However, the introduction of similar narratives in acquaintance rape trials in India first requires a fundamental shift in the patriarchal mindset that

⁶⁰ *State of UP v Kallu* Crime No. 191 of 2010, Sessions Trial No. 1105 of 2010, decided on 7-4-2015 (Fast Track Court, District and Sessions Court, Lucknow).

⁶¹ Ehrlich (n 52) 408.

equally affects the prosecutors, like the other actors within the criminal justice system.

VII. CONCLUSION

In this paper, I rely on the findings from non-participant observation of courtroom proceedings for eight weeks to reveal the scant impact of rape law reforms on the trial discourse in Lucknow's FTC. Further, I demonstrate the narrow understanding of 'real' rape prevalent amongst actors within the criminal justice system, through the interviews and the FGDs, and its resultant impact on the rape trials in the FTC. To set the context for the reader, I also offer a detailed description of the methods used and lay out the ethnographic field.

There is a wide dissonance between the written law and the operational spoken law in the FTC, Lucknow. Despite significant criminal law reforms, rape trials remain sites of phallogocentric notions with an extremely narrow understanding of what constitutes 'real' rape. The treatment of acquaintance rape cases within the stranger 'real' rape framework has the effect of normalizing acquaintance rape, which in turn results in a differential treatment of 'good' and 'bad' women, as theorized by Veena Das.⁶² The empirical reality that most rape cases are in fact runaway marriages between consenting adults further adds to the belief in stranger rape as 'real' rape.

Changes in the formal criminal law, without factoring in and addressing the social context ridden with biases, has no real impact in making the criminal justice system more accessible and effective for women survivors of sexual violence. In fact, the biggest gaps for rape survivors relate to the pre-trial stage, starting with reporting the complaint at the police station, lack of support and guidance to the survivor during the investigation and pre-trial stage, through to trial stages.⁶³ The extremely low conviction rate in rape cases in India is one important indicator of the failure of criminal law in addressing sexual violence.⁶⁴

The findings of the ethnography also warn against the creeping hegemony of criminal law in addressing sexual violence against women. The fact that

⁶² Das (n 23) 2417-2418.

⁶³ 'Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi' (Partners for Law in Development January 2014 – March 2015) <<https://doj.gov.in/sites/default/files/PLD%20report.pdf>> accessed 16 March 2020.

⁶⁴ Crimes in India, NCRB 2018, reported the conviction rate in rape cases as 27.2%. 'Crime in India 2018: Statistics Volume I' (National Crime Records Bureau 2018) xv <<https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>> accessed 31 October 2020.

most rape cases being adjudicated in Lucknow correspond to the use of criminal law by parents to restrict the sexual autonomy of their daughters raises grave concerns. Not only do such cases dilute the rape discourse, they further a problematic notion about acquaintance rapes being false. In a context where more than 94% of the rape cases involve known perpetrators, it is perhaps time to also focus our energies outside of criminal law to combat sexual violence against women. Further, addressing sexual violence against women needs to be part of the larger movements to address caste-based violence, violence against religious and sexual minorities, class hierarchies, and violence against persons with disabilities. Unless there is an attack on these deep rooted structural inequalities which are created, sustained, and promoted by the society, criminal law will not play even the limited role it can, in addressing sexual violence.⁶⁵

⁶⁵ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage Publications 1996).