UNDERSTANDING COMPLAINANT CREDIBILITY IN RAPE APPEALS: A CASE STUDY OF HIGH COURT JUDGMENTS AND JUDGES’ PERSPECTIVES IN INDIA

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Despite the growing number of reported cases of rape and sexual assault against women in India, there is an insufficient understanding of the perspectives and responses of the Indian Criminal Justice System in general and the judiciary in particular. By employing a framework of ‘complainant credibility’, this paper examines High Court judgments and judges’ perspectives in rape appeals. In placing a robust and systematic focus on one aspect of the Indian jurisdiction, this paper sheds light on how competing realities are understood by the judiciary to inform decision making about complainant credibility and suspect’s guilt in affirming or overturning trial court decisions.

Keywords: rape, appeals, judiciary, High Court, complainant credibility

Introduction

Sexual violence against women is widely recognized as a universal phenomenon. Over the last 150 years, feminist and human rights movements have strived to introduce and strengthen anti-rape laws, and called for greater support and justice for victims (Kumar 1993). Debates about the importance of the symbolic value of the law in protecting women and girls, are juxtaposed alongside feminist discourses that express doubt about the ability of patriarchal structures to implement laws in a fair and just fashion (Brownmiller 1975; Kelly 1988; Das 1996; Baxi 2005; Ellison and Munro 2009).

Complainant credibility is a key theoretical notion at the heart of patriarchal legal structures and processes that deal with rape cases (Brereton 1997). This paper advances the notion of complainant credibility by focusing on the Indian judiciary, through an examination of High Court judgments and direct interviews with judges. The paper seeks to make a novel contribution and bolster previous knowledge derived from experimental research in this area.

The argument that patriarchal legal frameworks serve to regulate women’s sexuality, and enforce social control rather than offer protection and support from sexual violence, is reflected in the notion of complainant credibility. Complainant credibility is defined here as a narrative that attests to the veracity of the crime of rape in ways that are consistent with the perspectives of the criminal justice system. The police, jurors, judges and medical profession may be viewed as those who are, in effect, in a position to comment on the evidence, and therefore on the credibility of a rape victim’s testimony. Generally speaking, relevant evidence comprises the victim’s testimony of the incident, but also other factors such as whether she can demonstrate having sustained a physical

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injury during the incident, whether she reported the event in a timely manner and whether it can be proved she provided ‘consent’ to the crime. Intertwined with such factors are, of course, a myriad of rape myths, which serve as powerful societal beliefs. Examples of such pervasive myths include the belief that a victim’s clothing at the time of the rape has a bearing on the veracity of her claim, whereas others place importance on where the crime took place, the time of the day the rape took place and her previous sexual history. Such myths wield an enormous amount of power, serving to discredit the rape victim and undermine the truth of her allegations.

Scholarly literature has expressed a long-standing concern about how the criminal justice system perceives false allegations as common (Gregory and Lees 1996; Temkin 2002; Kelly 2010; Levitt and Crown Prosecution Service Equality and Diversity Unit 2013). In a study of police and crown prosecutors, Saunders (2012) makes a distinction between the perspectives of those on the front-line, and senior criminal justice figures and policy makers. She argues that the latter ‘frequently and publically castigate police officers and prosecutors for their sceptical attitudes towards rape complainants’ (Saunders 2012: 2). In India, women’s rights activists have expressed concern about Indian police’s misuse of authority and lack of accountability (Human Rights Watch 2009). It would appear that such patriarchal structures fail to give recognition to rape victim’s narratives and result in re-trauma, as well as leading to the reproduction of male-dominated power (Brownmiller 1975; Baxi 2005).

Constructions of complainant credibility in rape court trials are at the heart of the decision-making process regarding guilt and conviction. Scholars have pointed to social and cultural assumptions that cause victims to be perceived as blameworthy and responsible for the act of rape (Anderson and Doherty 2008). Bryden and Lengnick (1997: 1380) have argued, however, that just as in civil contracts cases, in consent-defence rape cases, there is ‘no way to engage in this inquiry without examining both parties’ alleged behavior’. Similarly, in a comparative study of 94 court trials (rape = 48, assault = 46), Brereton (1997) found that assault victims were just as likely to experience an attack on their character and credibility. Here, although complainant credibility and veracity are inevitably under scrutiny in adversarial structures and processes, it is important to understand that such notions do not operate in a vacuum, but rather, are influenced by gender relations, power and patriarchal ideology. Feminist researchers have argued that in incidents of rape, complainant credibility is invariably under scrutiny in ways that seek to reproduce patriarchal power relation, and control women’s sexuality (Page 2008; Ellison and Munro 2009; McCabe et al. 2010; Lynch et al. 2013; Sperry and Siegel 2013). Indeed, Brereton’s (1997) comparative study showed that consent in the rape cases was often a thorny issue, and that rape victims were likely to spend twice as long in the witness box during the process of cross-examination and were significantly more likely to be questioned about their previous sexual history. It could be argued that neo-liberal conceptions of responsibility, where the onus is placed on the individual to minimize risk, are applied to rape complainants, thus apportioning blame in ways that lead to ‘social and legitimate constructions of rape’, within a ‘rape-supportive culture’ (Anderson and Doherty 2008).

In previous experimental research, complainant credibility is often conceptualized in limited ways to help focus research questions in a given specific area. For example, in a study of British mock jurors’ perceptions of complainant credibility, conceptualized in terms of ‘lack of physical resistance’, ‘delayed reporting’ and ‘calm demeanour’, Ellison
and Munro (2009: 214) argue that their study ‘testifies to the falsity of any suggestion that jurors in rape cases can be entrusted to leave their personal prejudices and stereotypical preconceptions behind them when they enter the courtroom’. The findings of Ellison and Munro support similar conclusions reached elsewhere, which attest that there was no consistency in the ways in which jurors reacted to the victim’s demeanour in court (Taylor and Joudo 2005). In other words, ‘upset’ or ‘calm’ demeanour led to interpretations which questioned the victim’s credibility. Other research points to differences in the perceptions of jurors and judges. Wessel et al. (2006:227) asked Norwegian judges to rate three simulations of complainant’s demeanour following an incident of rape. They conclude that ‘the emotions displayed by a rape victim do not determine the judges’ credibility judgments’. Such research is supported by other work, which holds that unlike jurors, judges are better able to analyze the information presented to them for its relevance, accuracy and veracity (Horowitz et al. 1996; Rishikof 2001).

Given that much of the previous research evidence is experimental in its reporting of the perceptions of mock jurors, and judges, our study is novel in its access to High Court judges and actual High Court judgments. It is also evident that in an adversarial system of law, courts are presented with the opposing and competing realities of victims and alleged perpetrators.

Our reading of the rape trial literature and the Indian jurisdiction (discussed below) led us to a formulation of complainant credibility, which comprised five key components. These were identified as ‘false allegations’, ‘consent’, ‘delays in reporting’, ‘medical evidence’ and ‘victim’s testimony’. Research evidence shows that police and medical records are crucial in rape cases (Baxi 2005). In the High Courts in India, in addition to such evidence, the construction of reality by the different actors (including the defence counsel, the state and the victim) paints a picture, which is interpreted and understood by the judge. The notion of complainant credibility and judicial interpretations lay at the heart of this process. In the section below, we provide an overview of the Indian jurisdictional context in relation to rape.

Rape and the Indian Criminal Justice System

Given the paucity of academic research about the Indian jurisdiction, it is imperative to focus on legal frameworks and key rulings that have emerged from within this context to understand their broader impact and significance in relation to complainant credibility. A key unstated assumption read in the light of the Indian Evidence Act was that ‘women of good moral character’ will not be making false allegations. Even though, a woman’s ‘moral’ character, and evidence of physical resistance and injury continued to be given key prominence in rape trials, courts emphasized that the social repercussions of rape for a woman in India were too grave for her to make false allegations of rape. For example, in 1952, in Rameshwar v. State of Rajasthan, the Supreme Court reasoned against corroboration of the rape victim’s testimony by distinguishing rape victims in India, and in the Western World in the following words:

Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile.
In spite of such significant rulings, however, which privileged the uncorroborated testimony of the rape victim, case law evidence suggests that the reality has been rather different. Indeed, complainant credibility has been very much on trial as observed in the horrific judgment of the Supreme Court of India in *Tukaram v. State of Haryana* in 1979. The social and legal impact of this case is evident in the outcry by the Open Letter to the Chief Justice of India (Baxi *et al.* 1979) and the campaigning work by non-state actors in women's movements, which led to legal changes (Sarkar 1994; Baxi 2000). As well as this, the 19th-century colonial rape laws witnessed some amendments in 1983. Further changes have been introduced over the last few decades, with the latest legislative framework (The Criminal Law [Amendment] Act 2013) following the horrific rape and subsequent death of a Delhi student in December 2012 (Barn 2013; Verma Committee Report 2013).

An interesting trend of the last few decades, however, is that although the Indian legal framework continued to point to the ‘general immoral character’ of the woman in judicial decision making in rape cases, the Supreme Court emphasized in numerous judgments that she was not to be treated as an accomplice, that the sole testimony of the complainant is sufficient to convict the accused and that no corroboration was required if her testimony was reliable (see e.g. *Om Prakash v. State of UP* decided on 11 May 2006; *K. Hashim v. State of Tamil Nadu*, decided on 17 November 2004; *Bhupinder Sharma v. State of Himachal Pradesh* decided on 16 October 2003; *State of Maharashtra v. Chandraprakash Kewal Chand Jain* decided on 18 January 1990).

It is expected that changes in the law, with severe punishments for rape, will have an impact on the incidence of rape. However, the reported incidents of rape in India have grown steadily since 1972, the year in which such statistics first began to be collated by the National Crime Record Bureau. The pattern of increase in the incidences of reported rape did not change with the change in the law in 1983. The figure for reported crimes of rape stood at 24,923 in 2012—up from 2,605 in 1972 (see Figure 1). Notably, during 2012, the total number of rape cases before the courts in India was 101,041. A total 14,717 cases were disposed by the court, resulting in convictions in 3,563 cases and acquittal in 11,154. More than 85 per cent cases remained pending before the courts, whereas 0.3 per cent cases were withdrawn or compounded. Arguably, the delay in disposal of cases and low rate of conviction after women have gone through the ordeal of adversarial proceedings does not reflect women-friendly procedures and outcomes.

Crucially, these are just the reported rapes. We know from literature around the world that the social construction of shame and stigma, resulting from the violation of a woman’s body, as seen in rape, is such that in the vast majority of cases, (8 out of 10 incidents) rape goes unreported (Prasad 1999; Logan *et al.* 2005; Weiss 2010). Notwithstanding this, we can see that despite the growing number of reported cases of rape and sexual assault against women in India, there is a lack of sufficient academic understanding of the perspectives and responses of the Indian Criminal Justice System in general and the judiciary in particular.

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1 This case led to the acquittal of two policemen of charges of rape when the court refused to believe that the 17-year-old tribal girl, Mathura, was raped by the policeman even though sexual intercourse with her in the police station by the police constable was proven.
Study Aims and Methods

The primary aims of this study were to contribute to the theoretical and empirical literature through an analysis of empirical data relating to High Court judgments and judges’ perspectives. The study was granted ethical approval and it adhered to the standards laid down by the British Sociological Association. The research adopted a mixed-methods approach to undertake a content analysis of High Court judgments regarding rape cases in one large metropolitan city for the year 2012 (n = 55); and in-depth semi-structured interviews with High Court judges (n = 8). A number of key areas were explored, including the nature and outcome of appeals, and judicial perspectives towards the crime of rape.

The judicial decisions were searched with the key word ‘rape’. A total of 80 cases relating to the year 2012 were found. Preliminary scrutiny resulted in the de-selection of 25 cases, which did not deal with the offence of rape but the word had occurred primarily in the precedents quoted in those cases dealing with matters other than rape. From the remaining 55 judgments, 42 were written by male judges, 11 by female judges and 2 were written by a bench of 1 male and 1 female judge.

The length and written quality of the judgments varied quite considerably. The shortest judgment was less than two pages, whereas the longest amounted to almost 30 pages. Some judgments reproduced verbatim accounts of trial court case details, whereas others presented them in a digested form. References to previous cases and relevant academic research were evident in some judgments, particularly those involving children as victims of rape. All judgments were written in English. On occasion, some Hindi words were used to express the original verbatim words of the victim, for example, ‘galat kaam’ (wrongdoing) or ‘ganda kaam’ (bad deed). Both the expressions are used to denote sexual intercourse in colloquial usage by individuals from the lower economic and educational strata. Notably, however, the use of such phrases by child victims has been known to result in acquittals on the grounds of imprecision, as it has been argued in court that such expressions could refer to inappropriate touching or kissing, and do not confirm penetration, which is the essential element for rape conviction.

The 55 judgments were analyzed principally by employing the complainant credibility framework and its five key components identified above. Thus, references to false allegations, consent, reporting of the incident, medical evidence and the victim’s...
testimony were considered to be of key importance. A particular focus was also placed on other associated factors including rape by acquaintance vs stranger, gang rape vs individual act, clothing of the victim, and judge’s written perceptions about rape and rape victims and perpetrators. The final decision of the High Court and the reasons for this decision were also identified. We also sought to capture the socio-economic profile of the victim and the perpetrator; however, there were many gaps in the recording of such information.

A total of 10 judges were selected for an in-depth interview by reference to four or more judgments given by them during that period, or if they were known for their decisions in the area of rape law. The challenges of researching elite groups have been discussed elsewhere (Harvey 2010). Despite our best efforts, we were not able to secure an interview with 2 of the 10 judges. Interviews with the eight judges were conducted using a semi-structured interview schedule. A few of these were audio-recorded with the consent of the participants and extensive notes were taken during and after the interviews. Interviews ranged in duration from 40 to 90 minutes. All interviews were carried out with the informed consent of the research participants.

A systematic analysis of the narratives was undertaken to analyze the qualitative data. Each interview was subjected to a framework analysis informed by the notion of complainant credibility. This comprised a five-stage approach, including familiarization, identifying a thematic framework, indexing, charting and interpretation (Ritchie and Spencer 1994). The process included coding for an identification of themes; development of provisional categories and a relationship between these; and refinement of themes and categories against a backdrop of pre-existing knowledge and theory to develop new meanings and theory. Thus, a focus was placed on judges’ conceptualizations of rape; social values and norms regarding gender roles and the position of women in modern India; perceived nature and prevalence of sexual violence, and explanations for this prevalence; response of the criminal justice system, and areas for improvement.

**Findings**

This section draws on both quantitative and qualitative research evidence to discuss the notion of complainant credibility in relation to High Court judgments in the Indian context. Firstly, relevant findings from the High Court judgments are outlined to help construct a context for the wider discussion of complainant credibility. Here, the nature and source of appeals is outlined. Following this overview, each of the five components—‘false allegations’, ‘consent’, ‘delay in reporting’, ‘medical evidence’ and ‘victim testimony discrepancies’—are explored and discussed in turn by drawing upon our research evidence.

Notably, the highest number of appeals were from the convicted ($n = 34$), or accused ($n = 8$) seeking bail or quashing of their first incident report (FIR). Appeals from the state ($n = 9$) and the complainant ($n = 4$) were less common. Many judges reported that the convict’s automatic right of appeal and legal aid provisions made such appeals possible and rather more common than others. The lengthy and cumbersome nature of state appeals and the fact that the ‘burden of the state in filing an appeal in cases of acquittals is graver as it has to prove the grounds of appeal such as gross omission of evidence, appreciation of evidence’ resulted in a smaller number of such appeals. In 2010,
the Code of Criminal Procedure (Amendment) Act allowed the complainant the right to lodge an appeal against acquittal of the accused, or conviction for a lesser offence, or imposing inadequate compensation. It is feasible that ‘appeals (from complainants) against acquittals are likely to increase substantially’, given this relatively new right.

As far as the outcome of these cases in the High Court is concerned, the State fared better than the convicts. The State was granted leave to appeal in all the five cases. The four state appeals against acquittal, decided on merit, resulted in upholding of acquittal in two cases and conviction in two cases. However, of the 33 appeals filed against the order of conviction by the Sessions Court, 22 were dismissed by the High Court, and 8 appeals resulted in acquittals. A further three appeals by the convicts were still pending decision. From the four appeals filed by complainants, two were allowed and two were dismissed.

Analyses of the 55 cases showed that only 3 cases were disposed by the sessions court within a year; 9 cases took 1–2 years; 17 cases were disposed in 2–5 years; 6 cases took 5–10 years for disposal; and 3 cases took more than 10 years. Information on time taken for disposal by the sessions court from the date of offence was missing in 17 cases.

In spite of the Supreme Court rulings mentioned earlier in this paper, which de-emphasized a focus on false allegations, delay in reporting and the character of the victim, we found that the vast majority of the cases filed with the High Court in 2012 stressed all of these areas as a line of defence (24). Other prominent defences included arguments such as that the ‘victim was a consenting party’ (10); the ‘medical evidence was not reliable’ (10); and that there were ‘discrepancies between the statement of the victim and other evidence on record’ (10). Age of the victim was also raised as a defence in case of statutory rape in which the victim was alleged to be below the age of 16 years, which was the age of consent at that time in 2012 (3). Arguably, in an adversarial system of justice, such a line of argument that seeks to discredit the victim may be expected.

Our analysis of the High Court judgments and the interviews with the judges reveal that a number of key factors are responsible for low rates of conviction and also for the number of appeals that may be filed with the High Court. We explore the context in which complainant credibility is on trial, and examine the way in which this can result in an environment that reduces confidence in the victim, and may have wider repercussions. Using our empirical findings, we explore the key components of complainant credibility below.

The contested realities presented in the High Court were those of the convicts/suspects, the State and the complainant. In the majority of the cases, trial court judges had already made decisions about the verdict of the case, which led to convictions or acquittals. Notably, such decisions were made by a single judge as there is no jury system in India. Similarly, when some of these cases reached the High Court in the form of an appeal, in most cases a judgment was reached by a single High Court judge. As already discussed, many of the appeals were lodged by men who had been convicted of the crime of rape. Invariably, these men and their legal team focused on the victim and her behaviour and actions before and after the crime, and thereby the victim became the subject of scrutiny in the High Court. The role of the police and the medical profession were also paramount in the court process.

False allegations

The claim of ‘false allegations’ was common in many of the appeals from the convicted/accused. Many of the accusatory claims discussed below, such as, delay in reporting,

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alleged consensual nature of the act, age of the victim and discrepancies in the victim’s statement, were all used to allege that the allegations were false (Wheatcroft and Walklate 2014). Interestingly, as discussed above, Indian law gives precedence to the uncorroborated evidence of the victim, and Supreme Court judgments have held that the unique social milieu of Indian society and culture prevents false allegations. Many of the judges we interviewed strongly held this view and believed that false allegations were rare, but were invariably used as a form of defence. In dismissing an appeal relating to a rape conviction under Section 376, Indian Penal Code 1860, one judge asserted thus:

It is unimaginable that a young girl in Indian society would concoct an untruthful story and level charges of rape for the purposes of blackmail, animosity or revenge. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the leveling of false accusations of rape. Ours is a conservative society, and therefore, a girl and more so a young girl will not put her reputation at peril by alleging falsely about forcible sexual assault. Moreover, no parents would smear the image of their daughter in the society by making false allegation of rape against any person.

Although the general belief was that false allegations were uncommon, the view that an unsuspecting male may be framed was in evidence:

A large number of cases are being reported. Most of the cases are genuine. Sometimes, there can be fake cases...for example, once a lady made an allegation against her 78 year old father-in-law.

The above quote appears to suggest that a 78-year-old man is by definition incapable of rape, thereby reinforcing a rape myth and stereotype of false allegation in such a circumstance (Page 2008). Notably, there were other type of cases, which were seen as possibly good examples of false allegations including ‘property disputes’, ‘enmity between the parties’, and so-called ‘love cases’ or ‘elopement cases’. Our findings reveal that, at times, judges were making a distinction between these sorts of cases and what was termed ‘real rape’. Cases involving strangers were described as ‘real rape’, and yet reported incident data from India and around the world is clear that the majority of rapes are carried out by someone known to the victim (NCRB 2012; Raphael 2013).

Cases of elopement, discussed in the section below on consent, were also understood as ones where false allegations could occur:

Many times a rape charge is cooked up when the parents put pressure in elopement cases, or if there is a problem after promise of marriage is not kept or some other dispute is there.

However, one instance shared by a judge demonstrated the range of circumstances that put pressure on the victims for changing their statements even when there was a ‘real’ rape. He mentioned that an application for quashing of the FIR in a rape case was moved before him suggesting that it was a love case. When the judge called the victim to his chamber to ask her the real story, she mentioned that even though she was really raped, she was under pressure to withdraw her complaint from her family, as a proven charge of rape will affect her chances of marriage. The association of shame and stigma that is attached to the crime of rape is a powerful construct that helps to preserve patriarchal power structures (Das 1996). The permeation of such stigma from the victim to their family and community is evident in the FIR quashing example given above and may also help to understand rates of attrition in rape cases around the world.
Consent

The notion of consent in the crime of rape may be clearly defined in the law; however, it remains a hugely contested area in practice (Tadros 2006). Many of the appeals from the convicted/accused positioned ‘consent’ as a robust line of defence and attempted to persuade the judge that the victim was a willing partner. Such willingness was framed within an understanding, which purported to make many claims to impugn complainant credibility. These included that the victim was ‘habituated to sex’, she was ‘over the age of 16’, she ‘willingly accompanied the accused’, she was ‘acquainted to one of the accused’, she did not ‘shout or scream or put up any resistance’ and ‘she has no physical injuries’.

In defining consent, judges used terms such as ‘voluntariness’, ‘active participation’, ‘free of threat and inducement’ and ‘free from duress’. Although a nuanced understanding, that encompassed a context of coercion in a family relationship, workplace, and social class and caste settings was emphasized by some, others emphasized the importance of context in a different light:

Consent does not require any interpretation by us. It all depends on the case. She may be a major…her mental age, her mental growth may not be adequate…so that is not consent. So many things are taken into account for example, where the offence was committed, her place or his place? Hotel? Mode of transport? Her behavior after the incident?

The above quote is rather paradoxical. On the one hand, it is claimed that no interpretation is required by the judge, whereas on the other hand, a number of scenarios are presented, which suggest an interpretation is taking place. Research evidence suggests that rape myths and stereotypes about the victim’s demeanour serve to cast doubt on the veracity of her narrative (Page 2008; Ellison and Munro 2009).

One key area where consent was conceptualized as rather challenging was the so-called ‘love cases’. With the process of urbanization and the accompanying social, cultural and economic changes, it was argued that men and women increasingly find themselves in contexts where gender relations are being re-negotiated. Judges identified that when sexual relationships between couples become problematic, disputes arise, which can also involve the wider family. Here, it was reported that ‘due to family pressure or personal reasons’, complaints are filed but that the courts do not generally believe such cases.

Pressure from the family was said to lead to a different presentation of the self to maintain dignity and honour in front of the family, that is, where the complainant was willing to go along with the family’s stance of a ‘rape allegation’. The central idea being presented in such cases is that such relationships are consensual and only become labelled as abusive when the parents are on the scene:

In teenagers, elopement is there when families don’t agree. She takes a U-turn when parents are on the scene.
When parents complain, after sometime, the girls change their statements. Children need their parents’ support and they soon give in under their pressure. When we call them in our chamber and ask, they tell us the truth. It is a very difficult scenario.

Notions of shame and stigma are universal (Weiss 2010). However, in the Indian context, the gendered meaning ascribed to the crime of rape and its associated stigma,
the perceived or actual indelible stain on the victim, is illustrated on a number of different levels (Goffman 1963). This seemed to permeate in many of the components of complainant credibility. For example, notions of shame and stigma were used to explain ‘delayed reporting’, ‘not visiting a doctor for a medical examination’, ‘not making false allegations’ and ‘withdrawing rape allegations’. The latter was said to occur in ‘love cases’ involving teenagers and young adults where the notions of shame and stigma were described as too powerful and which led to parents asking their daughters to withdraw rape allegations to avoid the stigma of rape. Conversely however, it seemed that judges were also describing some parents as pressurizing their daughters to provide rationalization of rape, when in the eyes of the ‘victim’ and the ‘perpetrator’, their relationship was consensual but did not meet parental approval. The ‘love case’ examples of ‘withdrawing rape allegations’ or ‘making rape allegations’ demonstrate the complexity and the subjective reality of shame and stigma. Crucially, the need to understand that each rape case will be different, and the ways in which shame and stigma are understood and applied to one’s own situation will depend on one’s own context, social values and mores. Given that the new age for consensual sex is now set at 18, the dominant ideologies surrounding gender and sexuality are likely to lead to an increase in the work of the courts, as more ‘love cases’ are reported by families.

Importantly, some judges reported to us that the rape conviction rate would be a lot higher if the elopement cases were taken out of the equation. Prior to enactment of the Protection of Children from Sexual Offences Act 2012, the age of consent for sexual intercourse was 16 years for unmarried girls and judges conceptualized ‘consensual sex’ with a girl below the specified age as ‘technical rape’ complaints. Invariably, such cases result in acquittal as the victim resiles from her statement in the court after having made the allegation under apparent parental pressure. There is a widespread perception and apprehension that the number of ‘technical rape’ cases will increase exponentially with the raise in the age of consent to 18 years by the Criminal Law (Amendment) Act 2013.

Among our 55 judgments, it is difficult to know how many cases would be described as ‘technical rapes’ as mentioned above. Remarkably, age of the victim was mentioned in only 27 judgments. From these, in 11 cases the victim was below the age of 12 years. However, over half of these (6) resulted in acquittal or conviction for a lesser offence. In seven cases, the victims were in the age group of 12–16 years. In one of these cases after convicting the accused, ‘love’ between the victim and accused was given as the special reason for giving him less than the mandatory minimum sentence. In three cases, the victims were in the age group of 16–18 years, and in four cases, the victim was above 18 years of age. However, the age of the accused was not mentioned in the judgments. Hence, it is unclear whether victims in the 10 cases involving girls in the age group of 12–18 years were in romantic relationship with men closer to their age or whether these adolescent girls were enticed into exploitative sexual relationships by older men. In line with previous research evidence, our study documents a preponderance of acquaintance rape (39 out of 55 cases, Stern Review 2010) and child rape (21 out of 25 cases in which age of the victim was mentioned).

**Delay in reporting**

Research evidence from around the world shows that 8 out of 10 cases of rape/sexual violence are never reported to the police (Prasad 1999; Logan et al. 2005; Stern Review 2010; Weiss 2010); in other cases, due to a variety of reasons/pressures,
there may be some delay before a case is actually reported (Temkin 1999; Jordan 2001; Murray 2012). In our analysis of the High Court judgments, we found that delay in reporting was a common line of defence to discredit the victim. The written judgments and our interviews with the judges reveal that they themselves give less importance to such delays. We found judges to be sensitive to a victim’s situation, showing understanding and empathy to ‘the social pressure and the stigma attached to the crime’ and the ‘circumstances in which the victim is under fear or she is in trauma’.

In one such case where the appellant had been convicted of rape and sentenced to 7 years, he challenged the evidence on the basis of delay in reporting, and that the young woman was a consenting party as there was no use of force. On weighing the evidence, the judge challenged the appellant’s contestations and concluded:

In the present case the prosecutrix (complainant) has deposed that few of her relatives had advised them not to complain. Thus, the social pressure and the stigma attached to the crime existed on the prosecutrix. Hence, the delay in lodging the FIR is sufficiently explained. No evidence has been placed on record by the Appellants to prove their defence that the girl was a consenting party. Merely not shouting and raising hue and cry does not cast a doubt upon the testimony of the prosecutrix as she has categorically deposed that she was threatened by the Appellant. Further both the prosecutrix and her mother have stated that the mouth of the prosecutrix was gagged. In fact, as per the mother, she took out the cloth piece from the mouth of the prosecutrix. Thus, on the basis of clear and cogent evidence against the Appellants, the offences charged are clearly made out against the Appellants. The appeals and applications are dismissed accordingly.

In another case, the defence’s questioning of the lateness in lodging the FIR was explained by the judge by drawing on the particular details of the case where the young woman and her family felt threatened. The judge was unequivocal in asserting that delay in reporting ‘cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity’.

Although judges rationalized delays in reporting within the framework of shame and stigma, concerns were also expressed about the police and policing. It was held that a combination of inefficiency, incompetence and/or bias in policing resulted in delays in the recording of the incident and that such delays provided ammunition for the defence to impeach complainant credibility:

It is very difficult to lodge FIR. It takes days for the victim to lodge the FIR. She goes and the Police refuses to lodge it. Finally when it is recorded, the issue of delay in filing the FIR is raised against her.

Several strands highlighted here suggest the male-dominated nature of the police, their inefficiency and their lack of sensitivity to the rape victim. Historical cases involving custodial rape, as well as daily reports in the media, which attest to the police dragging their feet before recording the crime of rape, undoubtedly, play an influential role in shaping opinion. Although some scholars have stressed the need for all-women police stations to help achieve effectiveness and efficiency (Natarajan 2012), others in different contexts have called for general overall improvements in policing to prevent re-trauma and re-abuse of the victim and strive for a more gender-sensitive service (Temkin 1997; Jordan 2001; Hanmer et al. 2013).
Medical evidence

Although the uncorroborated testimony of the victim is regarded as paramount in the law, it was evident that the existence and availability of medical evidence was deemed important by the judges:

If medical evidence is available, it is very useful but most important is the Victim’s statement. Her uncorroborated testimony is reliable if she is creditworthy. We look for contradictions, discrepancies, whether supported by other evidence, witnesses. The total evidence together tells us if the witness is creditworthy.

Although numerous problems were identified with medical evidence, namely the inefficiency with which it was collated, stored, processed, it was, nevertheless, regarded as crucial in the act of corroboration of the victim’s testimony. Although some optimism was demonstrated about the increasing use of DNA evidence, the police and the medical profession were criticized in the way in which they handled medical evidence. It was argued that the availability of good medical evidence helps lend credence to the victim’s narrative. A common view seemed to be that without medical evidence, it was difficult to secure a conviction. It was also stressed that although the delay in reporting the crime was understandable because the victim may be ‘under fear or she is in trauma’, the need to collect medical evidence was essential.

…the timing of the examination and then as to the immediate circumstances which, you know, existed at that time….and a tremendous amount of weightage is given to the medical reports.

Judges emphasized that a rape victim stood to ‘lose out much more by making a rape allegation without the medical evidence’. It was stressed that in the absence of medical evidence, there must be other corroborating evidence, for example, that a ‘visit to a doctor took place, or that there was the existence of sms messages’.

The most typical forms of medical evidence perceived by judges to be credible was ‘injuries, semen; if the victim has become pregnant, DNA test; hair sample, blood in nails…”

Research evidence suggests that victims do not necessarily demonstrate resistance, and thus lack of forms of resistance may mean that there is no medical evidence of physical injuries (Kelly et al. 2005). Crucially, the incompetence and the inefficiency of the medical system were identified as key concerns by the judges. As one judge put it:

FSL (forensic science laboratory) report doesn’t come for 2 years….you keep on adjourning it because the report is not there.

Notably, adjournments as a result of key reports not getting to the courts in a timely fashion have been shown to lead to rates of attrition (Kelly et al. 2005). Research literature into the Indian situation regarding sexual violence suggests that there is a general paucity of academic writings—both in terms of theory and empirical findings on medico-legal interface (Nayak et al. 2003; Baxi 2010). There is some literature that explores the perceptions of the medical profession in their dealings of cases involving rape allegations. For example, Pitre (2005: 2) argues that given the crucial importance of medical evidence in rape trials, good coordination is needed ‘between the medical establishment, law enforcement and prosecution’.

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A swift response in ‘examination and investigation’ is described as essential in avoiding evidence-tampering. Interestingly, Pitre identifies not inefficiency, but bias within the Indian medical profession as a key problem. She holds that there is ‘unwarranted bias against the victims themselves’. Such bias is said to arise from long held, prejudiced beliefs about gender roles and the position of women in Indian society. It is argued that the notion of ‘false charges of rape’ is not an uncommon belief among medical professionals. Pitre cites a popular textbook from 1988 into Forensic Medicine to support this assertion:

…it is not possible for a single man to hold sexual intercourse with a healthy adult female in full possession of her senses against her will (Modi 1988: 510).

Baxi (2014) reports that such statements in the medico-legal textbooks were often repeated in her interviews with lawyers in the trial courts in Ahmedabad. The medico-legal view that an able bodied woman cannot be raped by an unarmed man is illustrated in a powerful quote from a male lawyer in her study who claimed:

…you try it with a girl friend. It is very difficult for an unarmed man to rape a woman single-handed. You try doing this with your friend and you will understand (Male lawyer, Baxi 2005: 272).

Medical opinion continues to reinforce these beliefs. In 2014, a senior professional in the All India Institute of Medical Sciences was asked if the above-mentioned paragraph in Modi’s Jurisprudence still exists in the latest editions of the book. He sent the following response to the authors of this paper:

The paragraph you have mentioned is scientifically correct. It is not possible for a man to do complete sexual intercourse with a woman against her will if she resists fully. Rural women/labourers/household servants have more power than able bodied man. If they fight it off, genitalia of man would greatly hurt. I have seen powers of these women when I have done a case for CBI. Of course urban women who work in office have less powers.

In most of cases, women surrender and allow man to do sexual act as they fear injuries or shame or social pressure of detection.

Please remember

1. 25 percent cases of rape involves sexual act by consensus.
2. Rape is announced when caught.
3. Real rape cases are very less as they are not reported because of social pressure or fear.

When asked to clarify if his observations were based on statements in the medical textbooks or were coming from his experience, he replied:

It was all based on my experience of 30 years in this field. Most of the books do not mention the paragraph you sent.

I do not know whether this is in latest edition of Modi or not. Other books have not mentioned it. Most of the books do not suspect the victim but we do mention that false cases also occur.

The above picture of a perspective from the medical profession is useful in helping to understand ‘traditional male definitions of force’ that can potentially influence legal interpretations (Rao et al. 2013). Research literature shows that the female body and behaviour are subjected to an intense gaze and scrutiny to the point that the victim becomes problematized (Prasad 1999; Baxi 2005; Contractor et al. 2011). In other words, through a process of subjecting female body and behaviour to examination, consent as a
notion becomes medicalized. Thus, the timing of the reporting of the alleged rape (i.e. immediately after the incident or several weeks/months later), the time of day/night of the alleged rape, the nature of distress manifested in the victim, whether the victim has been in a previous consensual sexual relationship and the ‘two-finger’ test all contribute to an ideology of falsity and hence question complainant credibility. The latter test holds that if two or more fingers are easily admissible into the vagina, the woman’s character is questionable. Thus, concerns about her chastity and virginity are raised—again leading to questions of consent and falsity. Jagadeesh (2014) has noted that though references to past sexual history of the victim are prohibited, ‘such insensitive things are being documented in medical practices/protocols in the form of documenting two-finger test, old hymenal injuries, past abortions, past contraceptive practices’.

In High Court judgments, the presence of medical evidence seems to have an association with conviction. Notably, reference to medical evidence was made in 21 of the judgments under study. Sixteen of these cases resulted in conviction and five in acquittal. In three other cases, reference was made to two-finger tests, and all the three resulted in acquittal of the accused. Out of the remaining 31 cases in which there was no reference to medical evidence, 13 resulted in conviction.

**Victim testimony discrepancies**

I believe that courts do give far greater credibility to a (rape) victim’s sole testimony than to an accuser in maybe other crimes.

Given that the uncorroborated testimony of the victim is considered to be paramount in Indian anti-rape laws, identifying discrepancies between the statement of the victim and other evidence on record was a common form of defence on the part of the convicted/accused. Judges reported that ‘a lot of cases depend entirely on the testimony of the victim’. And they stressed that a single judge sitting in a trial court was unable to make sense of this without an expert evaluation of such testimony. It was believed that a psychiatric professional would be able to evaluate the trauma experienced by the victim and add weight to such testimony. Arguably, an expert evaluation of the veracity of the victim’s testimony is what is being proposed here. Such an approach could, in theory, support a victim’s account. However, research evidence suggests that there is no single way for a rape victim to behave, and cautions against interpretations that may serve to militate against their best interests (Wessel *et al.* 2006; Ellison and Munro 2009). Moreover, there is a risk that the presentation of a victim’s testimony through a psychiatric lens could be misused to impeach complainant credibility (Ellison 2009).

In regard to discrepancies within the victim’s testimony, interestingly, judges located the problem in the way the evidence was collected by the police. Gender of the investigating officer was identified as one key challenge for the rape victim.

The female victim may feel unable to narrate before a male officer. You have to make the victim feel there is someone there to help her, not to take pleasure from her unsavoury experience. She needs to feel reassured that there is a dedicated team to deal with her grievances.

In more procedural and practical terms, it seems that the police maintain an inner court diary to record day-to-day progress in the investigation and also record statements of possible witnesses under Section 161 of the Code of Criminal Procedure. These
statements are not recorded verbatim, and modifications are made in the records, as
the extra-legal processes cannot be part of the official records (Baxi 2014). The state-
ments recorded under Section 161 cannot be relied upon by the prosecution but can be
used by the defence to point out the contradictions between the statements recorded
under Section 161 and those given in the court. A common narrative among the judges
was that since victim statements were not written verbatim and the fact that there were
two statements at different points in time, this process led to inevitable contradictions
and discrepancies. It was stressed that due to their problematic nature, Section 161
statements should not be recorded and should not be part of the Court records. These
statements are recorded only for the purpose of telling the Accused what the case
against him is and who the witnesses are in the case:

After her statement u/S.161 is recorded with the modifications as mentioned earlier, and after a
long time when she comes to the Courts and states the truth, it is contradicted by reference to S.161
statements.

It was suggested by judges that instead of Section 161 statement, statement under
Section 164 should be recorded. The statements under Section 164 are made before a
magistrate and are properly recorded in question–answer format:

This statement should be taken as the statement in Examination-in-Chief. This will prevent the need
for stating the same thing in the environment of the court. The victim then should be cross-exam-
ined only on the basis of S.164 statement.

Summary and Conclusion

This paper set out to explore the theoretical notion of complainant credibility in rape
trials in relation to the Indian context. A key contribution of this paper is that it helps
to shed light on an under-researched jurisdiction. In doing so, it adds to the literature
on complainant credibility and rape. More importantly, however, and given that elite
groups are traditionally harder to research, by focusing on actual High Court judg-
ments and direct interviews with judges, the paper makes a novel contribution to the
literature by going beyond experimental/hypothetical research. The findings of the
study signal both optimism and concern.

A key optimistic finding is that the starting position of the judges reflects a belief that
the victim must be genuine because the associated shame and stigma is so powerful that
it obviates false reports. Further optimism may be gleaned by the reluctance of judges
to give undue weight to delays in the reporting of rape. Although only 55 High Court
judgments were scrutinized, it would appear that appeals from the convicted appellants
were less likely to succeed. Clearly, it is not possible to draw general conclusions regard-
ing this, but further research in this area is needed. Given the low number of victim
appeals in this study, and also the fact that since 2010, the Code of Criminal Procedure
(Amendment) Act has allowed the victim the right to lodge an appeal against acquit-
tal of the accused, a study to explore the nature, extent and outcome of such appeals
would be useful.

Of concern in this study, is the tendency of High Court judges to develop or imply
a categorization of rape. Our analysis of the 55 judgments and interviews point to an
implicit categorization of rape and ultimately a ‘pecking order’. This is demonstrated in
the language of ‘real’ rape, ‘technical’ rape and ‘love case’. Such categorization is prob-
lematic and runs the risk of undermining victims and their credibility, and ultimately
appeals outcomes. The notion of ‘love case’ is particularly perplexing. Several judges
reported that rape conviction charges would be higher if these cases were taken out of
the equation. The apparent role of parents in these cases was also highlighted in the
so-called labelling of such cases as rape. Given the high number of young victims in our
study, further research is needed to understand the complexities of such loves cases and
particularly how sexual consent is understood (Coy et al. 2013).

Our findings identify a number of key concerns with policy and practice implications
in other domains that impact the work of the courts—namely policing and medical
examinations. Principally, these concerns include the need for an improvement in the
ways in which rape reporting and victim’s testimony are recorded, and the need for
timely and reliable medical evidence to avoid delays in the legal processing of court
cases. Our study also shows that many of the judgments were reached by a single judge.
It is evident that a solitary assessment places a significant burden on a judge, and hence
there seems to be a desire to obtain medical assessment of the victim’s testimony from
other professionals such as psychiatrists. As the paper has noted, this is not without
risk to the complainant in the context of ‘normative post-rape behavior’ (Ellison and
Munro 2009).

Although it is accepted that a fundamental tenet of the Indian judicial system is that,
it is adversarial in nature, and that it is to be expected that complainant credibility will
be under scrutiny, the research presented here outlines a framework that delineates the
component parts to provide a useful analysis of High Court judgments and the appeals
process in rape trials. What is also clear is that there is an inter-dependency between
these component parts. For example, consent is closely associated with medical evi-
dence, that is, the idea that the lack of consent should ideally be demonstrated through
medical evidence of ‘blood under nails’, or physical injury (Baxi 2005). Similarly, delays
in reporting and victim testimony discrepancies are invariably linked with false allega-
tions—namely the belief that the complainant would have made an immediate and
prompt report, and with consistency, if the incident had really occurred. Such thinking
fails to understand the complexity and trauma of rape.

This exploration of rape in the Indian jurisdiction has helped shed light on the appeals
process to help understand how complainant credibility is constructed. Although the
findings of this study may not be generalizable within or outside India, they reveal a
picture that is consistent with previous literature from around the world. Moreover, the
rich narrative accounts of the judges help provide an understanding of the modern
Indian judiciary about the notion of complainant credibility in a context of increasing
reported incidents of rape.

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