Rape experiences and the limits of women’s agency in contemporary post-reform Vietnam
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CHAPTER 6

In search of justice: The rape plaintiff’s hazardous road

Chờ được và thì mà dâng sung

[Vn.: While the grass grows the horse starves]

A Vietnamese saying

Introduction

This chapter focuses on the ways in which gender and sexuality are produced in a range of legal discourses that are used to make sense of allegations of rape. It also deals with the principles and practices of the criminal justice system, regarding particular social and cultural obstacles that prevent cases from proceeding to a formal adjudication in court. The intention is not to engage in a legal discussion about either procedural rules or codes of rape and punishable conduct; instead, I wish to reflect upon how certain aspects of the legal definition of rape constitute a significant barrier to bringing a case to trial and securing a conviction.

Yet at the outset, it might be necessary to provide some background information about the criminal procedures used by Vietnamese courts, but before that I will touch briefly on the legal systems of Vietnam and their evolution since the pre-colonial period. As Carol Rose (1998) points out, “imperial” premodern Vietnam’s laws imbued with neo-Confucian ethics emphasizing on state authority were incongruent with the individual rights-based legal system introduced by the French during the colonial period (about 1862 to 1954). The five codes were civil, civil procedure, criminal, criminal procedure, and commercial. Since the establishment of the Democratic Republic of Vietnam in 1945 (which became the Socialist Republic of Vietnam in 1976 after reunification of North and South) a labor code replaced the commercial code due to

63 By the criminal justice system I refer to the police, the public prosecutor, and the courts.
Soviet influence. Vietnam’s criminal code and criminal procedure code particularly places emphasis on protecting the integrity of the socialist state and punishing political acts against the regime.

Vestiges of the French legal system also linger in Vietnam. The former hierarchy of statutory laws, for example, reflects the French model. It is worth noting that even during the Resistance War against the French (1946-1954), the Democratic Republic of Vietnam stipulated that those law codes dating back to the French rule which were not incompatible with national sovereignty in the area of civil and criminal matters, for example, would remain in effect. In fact during the two long wars against the French and against the Americans, the Democratic Republic of Vietnam promulgated many written laws and regulations, far surpassing those in China (Ta, 2006).65

With regard to criminal procedures, surprisingly some aspects of the jury system, a particular feature of the Anglo-American legal system, are found in the court system of Vietnam as Tai Van Ta remarks (2006). Judges serve together with hội thẩm (Đinh Văn Quê, 2005) - also known as thẩm phán nhân dân [Vn.: citizen jurors (Quinn, 2003), or people’s assessors (Nicholson, 1999; Ta, 2006)] - on a panel, consisting of one professional judge and two jurors for criminal trials. Judges together with the “people’s assessors,” must decide cases based upon a majority vote (Quinn, 2003; Đinh Văn Quê, 2005; Ta, 2006). Thus, it appears that Vietnamese law assigns an important role to members of the public in the administration of justice. However at a closer look one can see that these jurors/assessors - each serving a five-years term - are not selected randomly as in the West but are hand-picked by the Fatherland Front,66 a Party front organization, whose selection criteria places emphasis on political loyalty and reliability.67 This fact alone is bound to color the judgements of these “jurors/assessors” who are supposed to be independent and act strictly in accordance with the law.

66 Item 1 of Article 38, Chapter 4 of the Pháp lệnh Thẩm phán và Hội thẩm Tòa án Nhân dân năm 2002 [Vn.: Ordinance on Judges and Assessors of the People’s Courts 2002].
Against this background, an examination of rapees’ experiences with the criminal justice process may help in illuminating the assumptions of “normal” rape in the Vietnamese context and in uncovering factors that affect the likelihood that sexual assault will be reported to the authorities. Following this line of reasoning, the first part of the chapter considers the problem of bias from a different perspective, focusing on these pervasive questions: how the legal system handles an allegation of rape; to what extent is the difficulty of securing convictions, especially in acquaintance rape cases, due to the prosecution’s burden of proof; which women, as a result of this procedure, have been seen as “credible” victims, and which men as “probable” perpetrators. There is a need to explore how rape cases have been adjudicated in court and whether perpetrators have been convicted; and if so, are there discrepancies in the severity of the sentences in similar cases? Another major question that needs to be addressed is what constitutes an apparent strategy in some rapees’ active involvement in the process of prosecuting their assailants?

By describing the rapees as socially situated persons with regard to age, ethnicity, social background as well as educational level who, together with their friends and families, draw on their various resources to tackle the legal process, the second part of the chapter attempts to show that these women are not always passive. In fact, some women can be said to develop agency to the extent that they initiate preparatory activities as a means to achieve justice, knowing that they will have to deal with difficult situational power relations in the process.

These issues are considered in the light of my interviews with ten female rapees whose cases were reported and/or prosecuted, as well as with members of their family. A scrutiny of their narratives may provide insights into how gender and ethnicity interact with mainstream criminal justice. Of the two dropped cases, in one case the man accused of rape tried an out-of-court settlement with the rapee’s family; the other case was delayed because the police failed to catch the suspect. Apart from the two pending cases, there were six cases that resulted in full trials.

In addition to the interviewed cases, I also rely on the statistics of cases involving sex-related crimes from 1995 to 2006. Although one may raise questions about the reliability of these quantitative data, given the tendency among rapees to be reluctant to
file formal charges, these statistics are useful as a descriptive indication of trends over a period full of social, cultural and economic upheavals.

1. Legal definitions: An overview

1.1. Understandings of rape

Before I proceed to discuss aspects of the criminal justice system that often make prosecution difficult and painful for the women involved, I shall outline what rape is in the context of the current law.

In the Vietnamese legal parlance, rape is defined as an act committed by someone who, through means of violence or a threat of violence or by taking advantage of the victim’s helplessness or other means, forces the victim to have sexual intercourse against her will. It carries a punishment of imprisonment for (a term of) two to seven years (Article 111, Chapter 12 of the new 1999 Luật Hình Sự [Vn.: Penal Code], hereafter cited as 1999 P.C). Besides, the convicted offender is forbidden to take up any position of responsibility, or doing certain kinds of jobs, for a subsequent period of one to five years. Depending on the severity of the crime, however, the maximum punishment may vary considerably, i.e. it can also produce lengthy prison terms of up to twelve or twenty years, life imprisonment or even death (for a detailed treatment of the legal aspects of the rape problematic in the Vietnamese context, see Nguyễn Thu Hường, 2006).

It should be mentioned here that at first sight a notion of gender neutrality seems to be present in the definitions of rape in Vietnamese law through the use of the word người nào [Vn.: whoever], which gives the impression that both females and males as potential victims (or perpetrators) of rape (e.g., Art.111;112;113;114). As Pauwels (1998) points out, a gender-neutral rape law (in Western countries) represents an attempt to obtain a “linguistic equality” of sexes by minimising or disregarding gender-specific expressions and constructions. In practice, in rape cases in Vietnam, only men can be convicted as principal offenders, although women can be convicted as accessories (Art. 111; 112; 113). In this respect the law appears to be gender neutral on the surface, but is in fact very much gendered underneath.  

68 In the legal context of Vietnam the subjects of the crime of rape (those who carry out the act of sexual intercourse) are understood to be males and the victims are females. According to a judge of the People’s
When accompanied by a rigorous application of the requirement that a person who is subjected to the criminal liability for the act of having sex with a child must be an adult - meaning eighteen years of age or older and can be both male or female - the law is open to the possibility of prosecuting an adult woman for either child molestation (Art.116) or having sex with a child (Art.115; 150), because the law takes the view that there is an element of consent to have sex on the (male) victim’s part (Art.115). Duong Tuyet Miен (2007) suggests in this case that the intention of the statute is for the protection of children, even though the child may act on his/her own free will. However, in view of its serious consequences to society, this form of sexual relations is criminalized. The child in this case must not be under thirteen and not older than sixteen because if the child is under thirteen the crime will be considered as statutory child rape.

This brings us to the other central concept of the rape law. According to the definition of rape in the Giáo trình Luật Hình Sự Việt Nam [Vn.: Syllabus of the Vietnam Penal Code], “the elements of the crime of rape require that the perpetrator must have sexual intercourse with the victim, but do not require that the act of sexual intercourse to have been completed physiologically” (2004:326). The proper interpretation should be that the grounds for a conviction require the act of sexual intercourse to have occurred regardless of whether that act has been completed or not physiologically.

In reality, in rape-related statutes, focus is placed on the word giao cấu [Vn.: coitus] which is considered to be a determining element of the crime (i.e. Art.111-1; Art.112-4; Art113-1; Art.115-1; Art.150), whereas the second part of the above mentioned definition of rape (i.e. whether the act has been completed or not...
physiologically) is often overlooked. This wording creates possibilities for subjective interpretation on the part of the judges, as often occurs in legal practice (cf. Ekström, 2003).

Interpreted this way, “penetration (often by a penis) is more central to both the legal definition of rape and the male definition of sexual intercourse than it is to women’s sexual violation or sexual pleasure,” as the feminist scholar Catharine MacKinnon puts it (1982:532). Until this requirement is confronted as such, the only possible way to prove penetration is through examination of the vagina and detection of sperm. What if the rapist does not have an orgasm, or if there is an absence of sperm but there has been vaginal penetration? Trần Văn Luyến (2007) acknowledges this fact when he points out that in actual police investigations there were cases in which the perpetrator admitted to having committed one of the sexual crimes (i.e. rape, forced sex or having sex with a child) and completed the act of penetration as well, however the forensic results appeared to be inconsistent with the convicted rapist’s testimony at times. The main reason is the time lapse in reporting the case to the authority.

Indeed, it is worth noting that the present-day Vietnam rape law only punishes non-consensual penile-vaginal intercourse, and thus leaving out a great deal of behavior involving other forms of penetration inter alia. This is an aspect of the proscriptive, normative nature of the French Roman law tradition, vestiges of colonial French influence on Vietnamese law. For example, if one cannot with any reliability determine penetration by examination for the presence of sperm, then one may proceed to examine the vagina, noting the condition of the hymen in case the victim is a young girl who has had no previous sexual experience. But, there is no way to prove penetration in a sexually mature woman unless this is done shortly after intercourse.

A probably much more widespread idea is that the severity of the crime is always made dependent on evidence of bodily injuries on the part of the female victim, in particular the loss of her virginity, then her marriageability. The explicit basis of such logic appears to have led so many reports of rape to be dismissed without prosecution, or resulted in an unjust judgment. The point is that such emphasis reveals traditional legal thinking about the nature of rape, considering penile penetration of the vagina have the potential to cause greater physical and psychological suffering (such as fear of
pregnancy) than other forms of bodily penetration (cf. Rumney, 2008). So long as the court holds on to the requirement of penile invasion of the vagina, rapists may receive acquittals by claiming that penetration has not taken place or it has been ‘done’ by other means.

At the same time, we can find the element “against one’s will” in the current rape law. Put differently, in a rape case, a matter of utmost importance lies in the proof of the application of force or a threat of violence through which the victim is compelled to submit to a sexual act. Yet, how is it possible to objectively prove the element of “no consent”? Reviewing research on rape, Keith Bletzer and Mary Koss have noted that: “consent is an area of conceptual ambiguity, and this is due, in part, to an absence of social understanding regarding what constitutes appropriate communication before, during, and after sex” (2004: 118).

The failure to prove retroactively that the act is “against one’s will,” which has so often exonerated many an offender and allowed a defendant to escape from rape conviction, results from the impossibility of this burden of proof. This leaves the victim to prove her “non-consent” by showing signs of resistance, such as injuries, or calling on witnesses who have heard her cries for help at the moment of the rape. Moreover, this requirement often reinforces the tendency of rape trials to focus on the behavior of the female victim rather than the male offender. Following this definition, it does not matter if the woman wants to engage in the sexual intercourse or not; as Nicolle Zeegers (2002) makes it quite clear: she is not asked, she is not in the position to choose. From a feminist perspective, MacKinnon further argues that the defining theme of consent “rather than no mutuality as the line between rape and intercourse further exposes the inequality in normal social expectations” (1982:532). This view fits with the cultural construction of femininity in Vietnam heavily influenced by the Taoist ideology of yin and yang, suggesting that women naturally have low sex drives and thereby become sexually inferior to men whose strong sexual desires might read in the past as legal polygamy, while in the modernity as a menu of possible extramarital relationship (Nguyễn Khánh Linh and Harris, 2009). Stereotypically, this dominant construction of masculinity as inherently sexual is also one of the reasons public discourse - as reflected
in the media - used to explain or rationalize rape as a phenomenon of sexual nature rather than an act of violence. I will return to this point in Chapter 7.

It is worth mentioning that the wide range of possible sentences is not unique to rape. Most other offenses have a similar range of punishments, to be determined in light of the circumstances of individual cases and overall government policy at any given time. This does not mean that the judges themselves are granted so much personal discretion in sentencing. The bureaucratic nature of governance is such that the judicial system does not operate independent of the political system. Rather, the wide range of possible sentences depending on the nature and severity of the cases tends to create more space for public corruption in the courts (cf. Posner, 1998). In practice, when faced with unfamiliar cases and new situations, judges in Vietnam tend to defer to the provincial or national governments, often seeking an informal opinion on the state of the law (Quinn, 2003). Generally it seems that local governments often have the opportunity to affect more directly the outcome of cases in which they have an interest.

1.2. Forced sex: Coercion and abuse

Sexual relations grounded in coercion and abuse are regulated in Article 113 of the Penal Code. This article defines the crime as follows: anyone using any available means to force any vulnerable person, whether a subordinate fellow worker or a dependent family member, to engage in sexual intercourse shall be sentenced to imprisonment for a term of six months to five years. The elements of the crime require that the perpetrator is indeed aware of the state of unconsciousness, meaning the dependency, or the desperate situation of the victim and that the victim’s socially fragile condition precludes self-defense. Thus the scope of this statute is more specific, indicating less general behavior than Article 111. Like rape, this crime requires the mens rea73 of intent. According to the Vietnamese Penal Code, “criminal intent exists in the following instances: 1) the criminal is aware that his behaviour is dangerous to society, foresees the consequences of that behaviour and wants these consequences to actualize; 2) the criminal is aware that his

72 For further discussion about the administration and management of the Vietnamese legal system see Gillespie (2007), Quinn (2003).
73 The legal concept is used to denote a person's awareness of the fact that his or her conduct is criminal.
behaviour is dangerous to society, foresees the possible consequences of that behaviour, and while he does not want these consequences to actualize, he still consciously lets them actualize” (Từ điển Pháp luật Hình sự [Vn.: Dictionary of Criminal Code] 2006: 146. See also Dinh Văn Quê, 2005:41-43). When a “guilty mind” is accompanied by, or expressed in, an act of culpability, it is this act that is liable to prosecution.

As Dương Tuyết Miên (2007) recently observes, the victim’s behaviour is an important element in drawing the distinction between rape and forced sex. In a rape incident, trái ý muốn [Vn.: an absence of consent] is a primary element (except in situations as regulated in section 4 of Art.112, 1999 P.C), whereas references to miên cứng [Vn.: reluctance] - are often cited in cases of forced sex. In addition, she argues that it is vitally important for the jury to differentiate between the two crimes by looking at the nature of the perpetrator’s behaviour. In the rape situation, the perpetrator through means of violence or through threat of violence takes advantage of the victim’s helplessness and forces the victim to have sexual intercourse against her will. Meanwhile, in the case of forced sex, a defendant is to be found guilty if he uses any available means to force a dependent or a person in a desperate situation to engage in sexual intercourse.

In rape-related crimes, the crime of unlawful carnal knowledge is defined as sexual intercourse with a child under thirteen years old (Article 112/4, 1999 P.C). The penalties range from twelve to twenty year prison terms, life imprisonment or even death. “Child molestation” is a crime involving a range of indecent sexual acts [Vn.: known as hành vi dâm ô] committed by an adult against a child. The penalties range from seven to twelve years of imprisonment (Article 116, 1999 P.C). It is important to keep in mind that children are defined as persons under the age of sixteen, Article 1 of the 1991

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74 Whoever has sexual intercourse with a child under the age of thirteen will be found guilty of child rape and is liable to be sentenced to not less than twelve years up to twenty years of imprisonment, life imprisonment or even death, depending on the severity of the cases. This “age of consent” (13) brings us to the “rape” saga about Polanski, the film director who was recently arrested in Switzerland for the alleged statutory rape of a thirteen years old girl in California more than 30 years ago (see Chapter One).
75 The term “statutory rape” is understood in Vietnamese as phạm tội hiếp dâm theo quy định của pháp luật (personal communication from Dr. Dương Tuyết Miên).
76 The Vietnam National Assembly lately endorsed a number of amendments to the criminal code, which take effect January 1, 2010. Accordingly, rape and several other offences have been removed from the list of crimes punishable by death.
77 Those of eighteen years of age and older are considered as người thành niên [Vn.: adults]; those not yet reaching the age of eighteen are considered to be người chưa thành niên [Vn.: adolescents] (Article 18,
Luật Bảo vệ, Chăm sóc và Giáo dục Trẻ em [Vn.: Law on Protection, Care and Education of Children]. In reality, the issue of the victim’s age has assumed particular significance as a result of the prevalence of miscarriages of justice directly attributable to the prosecution’s concealment of exculpatory evidence, particularly with regard to the true age of the victim and the relationship between the accused and the victim in case of sexual offence involving children (Article 68 of the 2003 Criminal Procedure Code, hereafter cited as 2003 Cr.P.C). To this end, the Tòa án Nhân dân Tố cao [Vn.: People’s Supreme Court] also highlights section B-3, Article 196 (2003 Cr.P.C) in order to govern the sentencing and imprisonment in sexual offences cases (Resolution No2/2003/NQ-HDTP dated 17 January 2003 of the Hội đồng Thẩm phán Tòa án Nhân dân Tố cao, The Council of Judges of the People’s Supreme Court, hereafter cited as PSCJC). 78

As Trần Văn Luyện points out (2000), there has been a rising concern about the problem of the sexual abuse of children in recent years, taking into account the grave consequences the child has to suffer in the process of growing up and, more generally, the erosion of traditional norms in society. Thus, this type of offence should be deterred by legally sanctioned and enforced threats of criminal punishment. This can be explained by the introduction of two relatively new statutes on “child molestation” and “forced sex with a minor” to the amended 1999 Penal Code (see Table 5 for statistical data on these crimes since 2000). At the same time sexual harassment, a taboo subject so long ignored in Vietnam’s male-dominated society, has also begun to draw more public attention, but a law is yet to be drafted to deal with this subject.

Moreover, the legal recognition of forced sex within marriage as a crime, as provided for in the Luật Phòng chống bạo lực gia đình [Vn.: Law on Domestic Violence Prevention and Control], promulgated in 2007 (hereafter cited as 2007 L.D.V.P.C) has been part of an attempt to address with greater sensitivity the prevalence of such behavior. In the Vietnamese context, the introduction of the idea that cưỡng ép quan hệ tình dục [Vn.: forced sex] between spouses as a form of domestic violence, and thus a coercive and illegitimate act, is in itself an intriguing social phenomenon.

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78 In this Resolution, mức hình phạt từ có thời hạn thấp nhất [Vn.: the minimum prison penalty] for “rape” is two years and for “child rape” is seven years, while the maximum penalty for both crimes is twenty years. This indicates that “child rape” is considered to be more serious than “normal” rape in the eyes of legal authorities.
It is interesting to note that the term *hiếp dâm* is not used in this new law, thus excluding the form of coercive (and violent) sexual acts from the general rape provisions, as shown in Art. 2-d (2007 L.D.V.P.C). It has been bolstered by Order 16/2008 CT-TTg, issued by the Prime Minister, concerning enforcement of the afore-mentioned law, which places these acts under the jurisdiction of civil law rather than criminal law. This is an important point, because if one is prepared to acknowledge that a wife can be raped by her husband or vice versa, then one has to consider how the (criminal) law should label and adjudicate such experiences. In other words, the legal system has been reluctant to consider this form of sexual assault within the scope of criminal law, and this reluctance can be partially explained in terms of popular perceptions about the “natural” entitlement of sexual intercourse within marriage. In this connection there are on-going debates on whether and how to develop successful interventions that include a criminal legal system helping women escape abuse and combat domestic violence in different parts of the world (Römkens, 2001, 2006; Bui, 2003; Sokoloff and Dupont, 2005; Morash *et al.* 2007). These issues, however, are beyond the scope of this present study.
Table 5: Statistical data on crimes of sexual offence from 1995 to 2006

<table>
<thead>
<tr>
<th>Year</th>
<th>Rape C/O</th>
<th>Child Rape C/O</th>
<th>Forced Sex C/O</th>
<th>Forced Sex with a minor C/O</th>
<th>Having sex with a minor C/O</th>
<th>Child Molestation C/O</th>
<th>Incest C/O</th>
<th>Sex offence crime C/O</th>
<th>Total crimes C/O</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>916 / 1252</td>
<td>N.A</td>
<td>17/19</td>
<td>N.A</td>
<td>70/75</td>
<td>N.A</td>
<td>3/4</td>
<td>1006 / 1350</td>
<td>32364 / 61962</td>
</tr>
<tr>
<td>1998</td>
<td>533 / 886</td>
<td>564 / 625</td>
<td>14/19</td>
<td>N.A</td>
<td>126/144</td>
<td>N.A</td>
<td>5/5</td>
<td>1242 / 1679</td>
<td>38614 / 62316</td>
</tr>
<tr>
<td>1999</td>
<td>401 / 622</td>
<td>624 / 763</td>
<td>8/8</td>
<td>N.A</td>
<td>143/147</td>
<td>N.A</td>
<td>7/11</td>
<td>1183 / 1551</td>
<td>49729 / 76302</td>
</tr>
<tr>
<td>2000</td>
<td>408 / 679</td>
<td>713 / 792</td>
<td>1/2</td>
<td>3/3</td>
<td>172/198</td>
<td>80/96</td>
<td>4/6</td>
<td>1518 / 2003</td>
<td>41409 / 61491</td>
</tr>
<tr>
<td>2001</td>
<td>399 / 618</td>
<td>700 / 761</td>
<td>5/7</td>
<td>2/2</td>
<td>203/218</td>
<td>106/111</td>
<td>1/2</td>
<td>1493 / 1848</td>
<td>41265 / 58221</td>
</tr>
<tr>
<td>2002</td>
<td>384 / 617</td>
<td>673 / 767</td>
<td>4/5</td>
<td>3/3</td>
<td>200/209</td>
<td>89/94</td>
<td>0</td>
<td>1442 / 1831</td>
<td>43012 / 61256</td>
</tr>
<tr>
<td>2003</td>
<td>360 / 550</td>
<td>638 / 724</td>
<td>5/9</td>
<td>1/1</td>
<td>221/234</td>
<td>88/95</td>
<td>2/2</td>
<td>1389 / 1737</td>
<td>45949 / 68365</td>
</tr>
<tr>
<td>2004</td>
<td>374 / 591</td>
<td>614 / 705</td>
<td>4/4</td>
<td>6/6</td>
<td>290/309</td>
<td>114/114</td>
<td>2/2</td>
<td>1484 / 1854</td>
<td>48247 / 75453</td>
</tr>
<tr>
<td>2005</td>
<td>426 / 652</td>
<td>684 / 776</td>
<td>17/36</td>
<td>2/2</td>
<td>343/365</td>
<td>141/144</td>
<td>0</td>
<td>1688 / 2112</td>
<td>61147 / 97133</td>
</tr>
<tr>
<td>2006</td>
<td>360 / 558</td>
<td>653 / 702</td>
<td>12/21</td>
<td>3/4</td>
<td>311/334</td>
<td>158/159</td>
<td>1/1</td>
<td>1637 / 2044</td>
<td>56137 / 91379</td>
</tr>
</tbody>
</table>

Source: The People’s Supreme Court (Hanoi: Fieldwork 2007)
Note: C: Case; O: Offender(s)

2. Rape reporting: Early contacts with the police

In this section, I focus on what is generally considered to be a crucial stage in the prosecution process: the disclosure of rape to the local authority (Jordan, 2002). How these interactions with police officers as agents of institutional power unfold can have profound implications about procedural “fairness.” Furthermore, it is through the security of binary parameters at the site of officer-citizen interaction that the legal process is launched, establishing the troublesome paradigm whereby the citizen/rape victim is the subject/object of examination and assessment, and the police officer is the powerful observer.
2.1. Report locale

The following story of Nga is a case in point. It describes how problematic it is for women to go public with their stories of rape. This story was told by her mother.

“I reported to the local *phường*79 [Vn.: ward] police station where we live. The ones I met there were real scoundrels. I came at 5PM but they made me wait until 7 PM then took me to the ward police of Tower Block because the incident took place there. Later I heard from others, that the guy (defendant) knew personally a police officer at the district who called his colleagues at the ward where I initially reported. That explains why I had to wait until 7PM when they finally took me to the other ward where they transferred the case there. Only there they began to take up Nga’s statement and mine as well. Afterwards it was almost 10 PM when they gave me a note of introduction to bring Nga to the hospital for a medical examination. When I got to the hospital, the staff there did not allow me to go with Nga into the examination room. Instead they told me to go back for the result at 9AM the next day. I was there at 9AM the next day but the result was not yet available. I was asked to come back at 2PM the following day. I went back, still no result. Again they told me to come back again next day. Totally frustrated I decided to go to the Tower Block ward to inquire about the results of the medical exam. There I was told to leave the business to the ward’s police officer. I gave him VND 100,000 for his ‘travel cost’ to go the hospital to get the result. But they (policemen) did not inform me about the result. A few days later I came back to the ward to ask about it, it was only then that they told me that my daughter had not been harmed. Meanwhile they kept my daughter’s underpants - obviously the most important piece of evidence - in a closet at the station instead of sending it for forensic exam… Since I made a complaint the ward police made a show of arresting him (the offender) at the entrance of the local market. He was arrested at 8PM and was released an hour later, after claiming his innocence. A few days later the police of the Tower Block ward transferred the case to the district police of Free Wheel. At the district police bureau they all said the same thing that my daughter had not been harmed. Meanwhile the police at my own ward put on the green light for him (the defendant) to escape, saying that he was sent away for a drug rehabilitation program. Because the ward police was aware of the possibility that the district police

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79 *Phường* [Vn.: ward] is the lowest state administrative unit in urban areas; in rural areas it is the *xa* [Vn.: commune].
might change their mind and order the guy’s arrest, they offered him an escape route.’” (HN-PI200770)

Nga’s story demonstrates that the initial reporting of an incident to the police is generally followed by the officer’s decision whether to handle the case or not. Local officials do not base their dealings with people only simply on laws and rules; in fact there is a considerable amount of mediation that occurs at the everyday basic urban level as pointed out by David Koh (2006), and in this case between the police and ordinary citizens.

It should be borne in mind that a plaintiff can contact either the police of the location where the crime occurs or the local police where the plaintiff’s is officially registered (Article 101, 2003 Cr.P.C). While the authorities encourage the public to report crimes particularly the more serious ones, in practice the system does not work that way. Underlying the police’s reluctance to investigate the case of Nga are two major assumptions. The first emanates from a general belief that a rape case is more likely to proceed if the victim has visible, physical injuries to corroborate her account and if the rapist is someone who is a total stranger to the victim. The second suggests possible police malpractice. As the gatekeeper to the justice system, the police play a key role in their ability to influence which offences are registered, investigated and turned over to a prosecutor.

This is clearly a problem for some of the rapees even at the point of initial contact with the police. In Nghi’s case, it was her female friends who urged her to report to the local authority that she had been sexually assaulted by a chat friend. Nghi decided to contact the police station of the ward where the assault occurred. After three days of being kept at the police station for statement taking, Nghi and her two other friends were allowed to go home. As she recalled:

“It was possible that the case might be sent back to River Side ward as I am a registered resident there... Anyway they did not catch the guy (the rapist). The policemen of Blue Bridge ward told my mother that they would still handle the case if my family insisted... But I heard people say that his family bribed the police of the River Side ward and thus they did not proceed further.” (HN-PI200771)
Nghi’s decision regarding whom to report to and where to report, was motivated in part by an attempt to insulate herself from further shame. Rather than going to the police of the ward where both she and the perpetrator were registered residents, she went to the police station of the location where the assault had taken place. It was her effort to keep the incident away from her mother. This form of reaction is consistent with the idea that sexual victimization is something embarrassing or shameful that might bring the entire family in disrepute and therefore should be kept from her family (cf. Fisher et al. 2003). More importantly, Nghi’s main concern was to prevent the incident from becoming social gossip if she reported it to the local authority.

Concerning the cases of Nghi and Nga, the regulation on reporting was used only as an excuse to cover up the reluctance to solve the crime on the part of the police in charge of the case. A common point in these two cases was that the defendants both lived in the same ward as their victims, even though the incidents took place somewhere else. According to section 4, Article 110 of the 2003 Cr.P.C, the local police has the responsibility to investigate the crimes that occur in their territory. In Nghi’s case after she had reported the incident to the police where the incident occurred, she was referred back to the local police at the ward where she was a registered resident. The reason given was that the local police would be best qualified to continue the investigation, and to search for the culprit. But no one knew what the police were up to, or why no search warrant was issued. As Nghi’s mother recalled:

“After he (the defendant) did it he ran away, and only came back a year later. The other day Nghi was visiting friends. The scoundrel, obviously drunk, happened to be in the vicinity. He yelled: ‘Where’s the little Nghi? I’ll stab her to death because she dared to take me to court.’” Nghi was so scared that she ran back home and told me not to go on with the case. “If you do it, I won’t be able to stay here. He’ll take revenge and kill me.” I said: “You don’t have to worry. You just stay put. I already told all the cops.” Then I went to the scoundrel’s house, told his family: “From now on, if anything happens to my daughter, if she is stabbed, you will be held responsible.” Maybe the scoundrel was afraid when he heard that we were still getting on with the case, he ran away again.” (HN-PI200772)

80 2003 Cr.P.C 141 states that the search requires a warrant issued by the chief prosecutor or his deputy, or the president or vice president of the court, or the head or the deputy head of the investigating bodies at all levels (See also Ta, 2006).
In Thu’s case, for instance, her mother’s previous brushes with the police had been prompted by interpersonal conflicts, mainly quarrels with neighbors and in-laws. The police officer who had dealt with her before, arrived thinking he was responding to a civil case rather than rape. This explained his initial reluctance to take on the incident. As the mother explained:

“So I brought Thu to the ward police... It was 9 P.M... The police officer on duty that day was Duy. He said to me: ‘It’s too late now... I worked enough. Let me take a rest.’ I replied: ‘This is not an ordinary matter... This is a matter of violation of human dignity, even a violation of justice. If you let me wait until tomorrow the matter will cool down I won’t be able to tell it again. So if you do not want to take my statement right now, just write it down on a piece of paper.’ Then I added: ‘Tomorrow I’ll go to the central office of the Women’s Union to report the case, I’ll bring that piece of paper as evidence (that you don’t want to do it).’ At that time I was raving mad so I didn’t really care. Then he told me: ‘If I write down things like that surely I’ll get myself into deep trouble because it shows that I have failed to do my duty as a law enforcement officer. All right, just sit down and tell me what happened.” (HN-PI200773)

This episode about the police’s initial interaction with the plaintiff seems to express the so-called “particularized respect” (Barrow, 1976, quoted in Mahabir, 1996: 106). This particularized respect is based on the police’s first impression of the person with regard to his/her wealth, place of residence, family background, education, employment status, and the type of emotion displayed. All this is bound to influence the police’s response (Kaufmann et al. 2003). In the Vietnamese context there is a proverb saying: trơng mặt mà bắt hình dong [Vn.: looking at the face to capture the true figure]. In the case of Thu, her mother made a strong impression on the police officer with her apparent familiarity with the law, and the forceful manner in which she presented her case eventually persuaded him to proceed further. Even in a patriarchal society, this woman’s fortitude proved crucial in breaking through cultural and social preconceptions about gender and class.

Regarding procedures of complaint, 2003 Cr.P.C 103 (1) stipulates that “the investigating authority, the public prosecutor have the duty to receive fully all complaints, reports of crimes brought to their attention by individuals, agencies, organizations and proposals to prosecute sent to them by public authorities.” However,
police malpractice clearly undermined the strength of the case of Nga where she had been lured to sign a misleading statement. Nga’s mother recalled how angry and dejected she felt when the officer in charge had played a trick on her and her daughter during the early stage of reporting:

“The fact was that the ward policemen of Tower Block tricked me into signing the initial complaint, accusing him (the defendant) of child molestation rather than rape. That evening was just a mess... I wasn’t really myself as my mind kept drifting aimlessly... After taking my statement, the police official told me that ‘it was late now you should bring her (Nga) to the hospital for the medical exam. I will do the rest (of the paperwork). Just sign here.’ Without hesitation I just followed his instructions, signing any piece of paper he gave me. Based on these documents they (the police officers) later made a counter claim, saying that I did agree to sue him (the offender) for child molestation but not child rape. But fortunately there was still my daughter’s hand written account of the incident with her own signature on it.” (HN-PI200774)

In Nga’s case, the rape charge was reduced to indecent assault as the ward police tried to protect the defendant. Furthermore the issue of a prompt complaint was considered relevant in the police’s records of the incident but no attention was paid to this vital point. Even so, the police’s “arrangement” in sending the accused away to a drug rehabilitation program raised a number of questions. First, suppose the investigating agency concluded that the offensive act was not rape as stated in the complaint, but another type of sexual offense then was it justifiable to send the accused to a rehab-center to keep him away from his place of residence for a certain period of time? Article 87 (1) of 2003 Cr.P.C stipulates that the time limit for detention in custody may not exceed three days. Section 3 of the same article stipulates that during this temporary three-day detention period, if there is no basis for prosecution, the accused must be freed immediately. For example, in the case of Thu, the accused was released after nine days in temporary custody. The decision was based on the premises that in cases when the accused admits his crime, shows sincerity in volunteering information, has no previous criminal record, or is of advanced age (in this case the accused was sixty-six years old at the time), he/she may be

81 In the case of Nga, the perpetrator was a drug addict.
82 For those interested to know more about this topic, see Ta (2006), Đinh Văn Quê (2005).
83 The persons exempt from this detention include women who are pregnant or have to feed a child under the age of 36 months, and people of ill health who have fixed addresses (2003 Cr.P.C 88).
released temporarily but is not allowed to leave the area of residence until the investigating body has completed the dossier and submitted it to the prosecutor’s office for further decision.

Moreover, in the case of Nga, one can see police malpractice in view of the fact that while the accused kept denying his crime and the victim persisted in her demands to bring the matter to justice, the local police decided instead to send the accused to a drug rehabilitation center. This was a clear violation of the law. Admittedly, the investigating body cannot bring khởi tố [Vn.: institution of the prosecution] when 1) there is no criminal act; and 2) the (alleged) act does not have the components of a crime according to section 1 and 2 of Article 107 (2003 Cr.P.C). With respect to Nga’s case, even when the investigating authority determined that there was no evidence of the crime of rape, it was difficult to deny the evidence of the crime dâm ô trẻ em [Vn.: child molestation]. In this light, there were no grounds for the investigating body at the locality where the incident occurred to release the alleged offender immediately, and for the investigating body at the locality where the alleged offender was a registered resident to send him to a rehab center. The fact that Nga’s family maintained their request to bring khởi tố with regard to the crime of child rape made it even harder to comprehend the behaviour of the investigating authority concerned.

2.2. Rape: a matter for private prosecution?

By way of contrast, comments made by Nghi’s mother were full of praise for the way in which police officers handled the case at the station where had Nghi initially reported the incident. As she recalled:

“If you make a misstep you still have a chance to correct it but if you make a slip of the tongue then it’s finished. There were about a hundred pieces of paper that I was asked to sign. I told the police officer that I did not have much schooling and the only thing I

84 In this case the competent officer must not bring khởi tố or if this has been done he must issue an order to annul the earlier decision to bring khởi tố, and duly inform (the concerned parties) the reasons thereof - section 1, article 108 (2003 Cr.P.C) on decision not to bring khởi tố of a criminal case.

85 Regarding the decision to bring khởi tố when evidences of a crime have been determined, the investigating agency must issue a decision to bring khởi tố of criminal charge, as stipulated in Article 104 (2003 Cr.P.C).

86 As stated in Section 1, Article 105 (2003 Cr.P.C), all the crimes as stipulated in section 1 of Articles 104, 105, 106, 108, 109, 111, 113, 121, 122, 131 and 171 will only be considered for khởi tố upon request of the victims or the legal representative of the victims who are adolescent, physically or mentally disabled.
know is to write down the initial letters of my name. They said it was all right... They read them out one by one... just to make sure that I understood what I was about to sign. They also asked me whether I would withdraw the accusation if the family of the offender insists on that... I said that ‘it is my right to decide whether or not to continue with the complaint. My wish is to have you as a law enforcement officer to support us during the process of reporting’... From the beginning until now I did not have to bribe them, apart from offering them some cigarettes each time I came to see them. Actually I once offered them some cash in an envelope but they turned down... because ‘your family is so poor,’ they said.” (HN-PI200775)

There were also clear instances where prompt response from the local police was instrumental in speeding up the confession to a crime, as illustrated in the case of Phi, a thirteen-year-old Dao girl raped by a Kinh road builder:

“The next day we went to see the guy in charge of the construction team where he (the perpetrator) worked, but the guy told us to wait until evening. Evening came but he still didn’t want to talk to us. My family decided to contact the commune people’s committee. When the commune police came, he (the perpetrator) confessed everything. The commune police chief asked us: “How do you want to resolve this case? If the case is referred to higher levels, it will be serious, this guy has to go to prison.” We thought if we proceeded with the law, other people would know, and it would be difficult for my daughter to get a husband. We said: it’s best to solve it amicably. He has to pay (compensation). Then we will sign a statement saying we will not sue him further. Not much, 10 million VND (= US $ 65087). If he doesn’t agree, we will go higher levels.” (LC-PI200776)

This feature of ethnic relations in many rape complaints from members of minority groups may explain the arrogant attitude shown by the offender and his boss in their reluctance to admit the wrongdoings given the fact that they appeared to be both economically powerful (being involved in a road-building project through a Dao village) and culturally “superior” (being majority Kinh). Additionally social status also had an impact on the outcome of cases of sexual violence against girls and young women. In the case of this Dao girl, the police involvement shifted the balance of power between the rape plaintiff and the assailant in an overt way. This is an example showing that when it

87 Vietnamese đồng - US dollar exchange rate at the time.
comes to solve the “internal” problems, the police may stand up for the local residents, due to their sense of being part of the local community (cf. Koh, 2006).

At this juncture, it may be worthwhile to reflect briefly on issues of ethnicity as they relate to power differentials, local affinities, insider-outsider status, majority-minority subjectivities, etc. Here the interesting point is that while the police officer in charge of the case belongs to the minority Dao, who together with other minorities, are often regarded as less advanced, less developed, and less civilized (cf. Druong Bích Hạnh, 2006; Salemink, 2009), the alleged rapist is from the majority Kinh group. The police officer found himself in a position where he had to defend the interests of one of his fellow villagers, while exerting his authority in dealing with a Kinh outsider. Opting for a “negotiated settlement” instead of pressing a criminal charge seemed to satisfy all parties concerned. By keeping the rape case off the official records, the local police would lend credence to the official view that instances of rape were “under control” in those sensitive địa bàn trọng điểm [Vn.: areas of special focus] a term referring to mountainous and remote areas inhabited by minority groups. A sort of “all quiet on the border front” that would keep everyone happy. It would also make the local police officer look good in the eyes of his superiors at the district and provincial levels, thus enhancing his promotion prospects. During my fieldwork in Lào Cai, one local cadre said that authorities at the grass roots often denied or played down the existence of “social evils” such as drug addiction, prostitution in their communities. The authorities often tried to divert my attention when I attempted to make inquiries about the rape problematic locally.

As noted in Chapter 5, the motives behind the decision of Phi’s father not to pursue the case further might stem from the Dao’s conception of womanhood, which emphasizes the marriageability of girls (with financial consequences) and the honor of their families. This is apparent in the cases of Hải and Thịnh cited earlier, two Hmông girls who were raped while sleeping in a hut in a remote field by two fellow villagers. Having failed to get a “negotiated settlement” (as compensation) with the rapists, the two girls’ families

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88 Focusing on the prevalence of rape in the so-called địa bàn trọng điểm has the effect of masking the true incidence of rape nationwide by leaving out the major cities and urban areas. This is the view expressed by several participants at the workshop on Child Sexual Abuse Prevention co-organized by World Bank and Research Center on Family Health and Community Development (CEFACOM) in Hanoi, November 2007. Among the participants were a (male) senior official of the Bureau of Criminal Investigation and a (female) senior official from the Ministry of Labor, Invalids’ Welfare and Social Affairs. I was there as a member of the organizing committee.
decided to go to the local authority to seek justice. These stories are powerful examples how plaintiffs among the ethnic minority groups could make use of the formal legal system effectively to seek compensatory payments.

In dealing with cases of sexual violence, factors related to the particularities of the officers in charge including personal relations and ethnic background also need to be considered. In the cases of Phi, Thịnh and Hải both local officers involved were from the same ethnic groups as the plaintiffs. This appears to be in stark contrast with the attitudes and behaviors displayed by the local police in cases involving a perpetrator from another ethnic group (e.g., in the case of Phi). Similarly in the case of Hải, whose uncle was an influential figure (i.e. the secretary of the local branch of the Party) it can be seen that informal ties played an important role in securing the arrest of the offender soon after the victim’s father went to the police. Likewise, the male officer who initially handled Thu’s complaint had family connections on her father’s side.89 Despite his reluctance in the beginning to get involved due to previous unpleasant dealings with Thu’s mother in matters related to family disputes, the officer facing a serious crime on his hand was spurred on by compassion and decided to go after the rapist. This is an example of a member of the local authority who responds to the call of moral duty in helping fellow community members (Koh, 2006).

The question is whether the compassionate attitude shown by some police officers who initially deal with rape plaintiffs represents a genuine concern for the plight of the victim? A closer look reveals that behind this police-plaintiff “compassion,” there is a host of questions involving family honor and social taboos, spinning a web of entanglements among relatives, friends and neighbors. For someone like Nghi who has no local family connections, one wonders whether the sollicitous attitude of the police officer handling her case is truly motivated by compassion. It should be mentioned that the police suggested to the plaintiff (in this case: Nghi’s mother) to drop the case altogether. Given the fact that the mother had reported to the police that her family and especially her daughter were running a real risk of becoming target of an act of revenge

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89 He was married to the woman whose mother was the younger sister of Thu’s grandfather.
from the perpetrator, a suggestion of suspending the investigation midway by local officials left a lot of unanswered questions.90 Examples like these have led some authors to develop the notion that crimes of rape are a matter for private prosecution (Ekström, 2003), which means that if the woman withdraws her charge, the legal authority may not pursue the case. Rape is thus primarily perceived as something private - something that concerns the woman personally - rather than as a serious crime. In the Vietnamese context, the stories above show that often it is up to family members of the victim to decide whether to press charge against the perpetrator or not, as I have pointed out with illustrating examples in Chapter 5. Real life situations suggest that there seems to be a mix between an individualized legal battle on the one hand, and a family-and-honor-based dispute that may fit this kind of “private prosecution” on the other. These peculiar situations often make room for reaching a compromise between the contending parties. One may wonder whether this has something in common with the notion of law as a visible manifestation of “community sentiment” (Durkheim 1960, quoted in Gillespie, 2005:31), which is understood in the Vietnamese context as tình làng nghĩa xóm. From a perspective of mediating and preserving the public peace, as David Koh (2006) points out, emphasis is placed on moral considerations rather than laws. The course followed by individuals involved is to seek a “negotiated settlement,” as expressed by the old saying dît hòa vi quý [Vn.: keeping the peace is the best solution].

2.3. Gendered behaviour in interviewing: The macho-culture of the police officer

The above analyses attempt to show the factors influencing preliminary reactions of the local police officers when they first received report of the incident, to be followed up by interviewing the rapee. From the women and girls that I talked to, their most common remarks were about the acute lack of sensitivity and understanding on the part of the police. Nga, for example, recalled:

90 Section 2, Article 105 (2003 Cr.P.C) provides that if the plaintiff chooses to withdraw the accusation, he/she will not have the right to make a second request, unless the plaintiff is under pressure or is forced to drop the allegation. In this respect, if there is sufficient evidence of the use of force or violence on the plaintiff, the police, the prosecutor, and the judge may authorize further proceedings without a formal complaint. At the same time, the investigative agencies have a responsibility to protect the safety of the plaintiff (Section 3, Article 103, 2003 Cr.P.C).
“The officials threw a barrage of questions at me… I did not understand anything at all… They were screaming at me so how could I remember… They were all men, that made me scared stiff.” (HN-PI200777)

Nghi recalled her despair in facing a group of male interrogators, finding it extremely difficult in revealing intimate details:

“It’s terrible all these questions. They (police) just shouted at me, especially a middle aged man asking such nasty things… as he appeared to be drunk. I just don’t want to recall the questions that he asked me… Very insulting indeed… He asked me intimate things like how the guy took off my clothes, and why there were no bruises on my arm to show that he used force… I said he (the offender) held my hands so tight… That day I wore an open neck shirt that made it easy for him (the defendant)… The (police) man kept asking me to give every single detail… There were about ten of them… They interrogated me continuously for three days… I was retained in the ward police station for statement-taking for three days… They almost forced me to report… They shouted at me… How scary.” (HN-PI200778)

On the basis of this experience, Nghi decided not to disclose the rest of the incident to the officer. Excerpts of her narrative:

“I just said: yes, after he did it, he did it again… I didn’t want to tell it it again… I slept there for several days… I ate nothing but instant noodles almost every day. Totally fed up.” (HN-PI200779)

Given the sensitive nature of the incident, and the intimate questions that had to be asked, Nghi found it very difficult to be questioned by male officers. From her experience she would have preferred a woman to do the job.

"Once there was a young woman… She just asked once, summarized it in the report, then let me go… Women are better than men. Men make me scared.” (HN-PI200780)

Several of the women interviewed said that it would be easier to disclose details of the incident to another woman. These are clear cases of “it has to be a woman” or “women get it right.” Regarding Linh’s case, her mother thought a woman officer might be more sensitive about this aspect:

“I think it best to let these things concerning women be handled by women police officers… They do it better than male police officers or male prosecutors… Females
Thus it seems that policewomen might show more understanding and sensitivity in response to the needs and feelings of rape plaintiffs. However, not all of the women interviewed by male police officers rated their experience negatively. As Mỹ remarked:

“Generally speaking, they asked many questions, how I was beaten. I told them what happened. It wasn’t easy to tell every detail. They (the male officers) also showed respect (to me), didn’t use rough words. Anyway they needed my declarations to arrest the culprit. They encouraged me, tried to create a sympathetic atmosphere so I could calmly tell what happened.” (HT-PI200782)

Mỹ felt heartened by the detective’s warmth and sensitivity. In her case public confidence in the police was redeemed. Mỹ’s story indicates that maleness per se does not necessarily determine the way an officer respond to sexual assault victims or his attitude during the interviewing process. Not every male is an aggressive, hostile interrogator. Still, Mỹ felt that women police would be better in responding to rape plaintiffs.

“To be interrogated by a female might be easier. But what can you do, the great majority of police officers are males. There are so few women (in the police force).” (HT-PI200783)

Linh’s mother initially felt that it would be easier for her daughter to disclose intimate details of the incident to a woman officer when they first reported to the local police. But the gender factor became irrelevant when they met a female district prosecutor who wanted a bribe:

“Take the example of that woman, the district prosecutor. At first she said, with a crime like this, the scoundrel would get at least 12 to 13 years. Later she came to us, saying: ‘that guy has an important cousin, the head of the investigating office of the district police who wants to protect him.’ She wanted to intimidate us, hinting that some money might be necessary to get the case going.” (HN-PI200784)

Generally, the women’s experiences indicate that the gender variable affects their treatment by the police. Female interviewers are thought to show more warmth, compassion and sensivity. However, in terms of rating their satisfaction with the police, the gender factor of the interviewing officer is not singled out as the key element as Nga’s mother pointed out:
“Professional duty is the main point. If they can do their job in a transparent way it doesn’t matter whether they are men or women. But if they want to take bribe they are all the same.” (HN-PI200785)

The onus is on the police as professionals, and as the gatekeepers of the justice system their professional comportment should be a paramount consideration. By establishing a transparent and participatory environment that fosters empowerment among rapees, a professional police force, whether consisting of male or female officers, might enhance a sense of fairness in the adjudication of rape complaints and prosecutions.

3. From report to verdict

The divergent responses that women encounter in their initial efforts to pursue prosecution for acts of sexual violence either on behalf of their daughters or themselves reveal a recurrent fact that it is the police who exert the ultimate influence. The actions of the police must be viewed in relation to what we may call the “key scenario” (Ortner, 1973; cf. Ekström, 2003) of individual women reporting rape. The fact that a report of rape is assessed and evaluated according to a number of particular standards or benchmarks, which are assumed to be valid indicators of truth and blameworthiness. The primary “marker of truth” is the putative “purity” of the woman, primarily assessed in terms of virginity; and evidence of penile penetration of a vagina. The following discussion focuses on the way in which the police relies predominantly on this so-called standard of truth and blameworthiness before it decides whether a case is worth pursuing or not.

3.1. “Pure and innocent”: Does it work?

The extent to which rape charges end up being prosecuted as child molestation or unlawful carnal knowledge is best illustrated in the 2003 case of Nga, a thirteen year-old epileptic daughter of a common-law couple of working class background. Nga seems to be just the kind of victim the law of rape is intended to protect, being configured as a vulnerable, virginal girl who was sexually violated by an acquaintance. At this point it should be pointed out that usually incidents involving a young, teen-age virgin are
considered more serious than those involving a mature woman. However, the preliminary inquiry showed that Nga’s hymen was still intact. Nga’s mother recalled:

“They said that her hymen is of the hoa khế [Vn.: starfruit flower] type, that means it is stretchable, that’s why it didn’t break. Normally in other girls it would break easily. The incident occurred in June 2003- in the meantime we were trying to bring the case to justice- but it took the police 5 months before they sent for us. The officer in charge of the investigation said: ‘Look, from the way things are your daughter is OK. The medical exam shows the hymen is intact, no harm was done. How fortunate it was for your daughter! Don’t you think this is a case of đâm ô [Vn.: child molestation]?’ I said: ‘I don’t accept this. His crime is of the other kind (meaning rape), not the kind you say.’”

(HN-PI200786)

The condition of Nga’s hymen had an impact on the police’s perception of the degree of the harm done. For them the violence was not sufficient enough to deflower or injure her. The police were inclined to see the incident as “indecent assault,” allowing the accused to plead guilty to the lesser charge of child molestation.

There is evidence elsewhere that the police are more reluctant to investigate cases where there is little evidence of violence or no injury beyond the rape itself (Mack, 1993). In addition, the issue of non-disclosure of material evidence against the accused assumed particular significance in this case - a miscarriage of justice directly attributable to police concealment of exculpatory evidence. Nga’s mother questioned, for example, how the police could fail to disclose relevant material that would substantially strengthen the prosecution’s case.

“Almost half a year later the police summoned us and sent my daughter for an examination. At the institute of criminal forensics, they said she had no problems. Then they asked why in her statement there was mention of a pair of underpants with a pink blood stain. It was only then that the police produced this piece of evidence, that was five months after the incident took place. They (the forensics expert) said: “For similar cases we have sent written instructions (to the police) at all levels that it is essential to send evidences like these to us as soon as possible. After 5 months a thing like this could have degenerated easily...” Then he scolded the police: “Why did you wait till now...instead of bringing it straight to us the day after you received it.” Then there was another misshap. The envelope containing the piece of evidence was sealed with scotch tape, this was not
in order they (the forensic analysts) wanted a date on it. So it was sent back to be stamped with a date on it.” (HN-PI200787)

The case reveals the careless and fallacious construction of the prosecution case by the police in the first place. According to Article 75 of the 2003 Cr.P.C, pieces of evidence have to be collected in a timely manner, in their entirety, and recorded truthfully in the report. In addition, Article 310 (2003 Cr.P.C) stipulates that evidentiary material have to be sealed and preserved carefully and if the person responsible for this task fails to do so, depending on the level of failure and violation, he/she will face a fine or being charged with a criminal offence.

Nga’s experience also highlights how a rape complaint can be subjected to a range of questioning tactics: repetition, attacks on credibility, doubts about memory, questions about behavior before-during-and-after the alleged assault, etc. The starting point is questioning the plaintiff’s credibility. As Nga’s mother recalled:

“Earlier on, my daughter described in graphic details how it happened. He (the defendant) was wearing a pair of black shorts, naked above the waist save for a T-shirt hung over the shoulder. Then he took off the shorts. There was a black (birth) mark on his groins. She could not remember whether it was his left or right groin, but she saw it. It’s obvious that he took off his shorts otherwise how could she have noticed it...Sure the thing happened because the underpants (of my daughter) bore traces of the guy’s semen. I washed it (her vagina) when she came home, at the guest house he (the defendant) also made her wash it, but it (the semen) was still oozing. In such a panic I took her straight to the ward police. I also saw traces of blood on her panties...But the police still didn’t believe our story and kept repeating their questions. They believed we wanted to slander him (the defendant). My daughter stuck to her story. Only after the result of the DNA test\(^{91}\) was known, did they go to the rehab center to arrest the scoundrel and took him to test whether he matched the DNA result.” (HN-PI200788)

The police’s disbelief of Nga’s testimony is consistent with Mary Paine and David Hansen (2002)’s findings that children with disabilities are likely to encounter special problems disclosing their abuse. Nga’s medical history, in particular her assumed mental retardation, was raised by the police to undermine her credibility. There have been some suggestions to the effect that the more unspoiled and “asexual” the woman is assumed to be in her

\(^{91}\) Until now a DNA test is not always available and/or affordable for the rape plaintiffs, in particular for those living in the rural and remote areas of Vietnam.
character and behavior - the so-called “innocent and pure” - the more likely she would fit the role of the victim (Ekström, 2003). Given that the police are likely to dismiss cases not conforming to conventional understandings of rape scenarios, including those in which the rapees’ sexual history can be used to discredit their testimony, it is surprising that when a rapee is morally innocent, it nonetheless hinders the perceived integrity of her claim. In other words, even though the police knew that Nga did not have an unsavory sexual past, they nonetheless proceeded to downgrade the crime of her rapist from child rape to child molestation. The case of Nga shows that being an “ideal” victim per se does not translate automatically into a conviction of a de-facto rapist.

In another twist the following story of Linh illustrates the marked discrepancies in the police findings and the prosecutor’s presentation of the case. Her mother recalled:

“That day he volunteered all the necessary information, he spoke the truth, but at the court he denied everything. They did not let me see the notes taken at the police station, the only evidence given was that I took the girl to have an examination of her wounds. In the beginning the police said that with this crime this guy should get 12 or 13 years at least. Even the lady who investigated the case said so. But later they passed a completely different judgement. That's why I think they wanted to get money from us. But we had nothing to offer. That’s why everything took a 180-degree turn... They gave him a much lighter sentence.” (HN-PI200789)

The prosecutor in Linh’s case also used the argument that the absence of evidence of a broken hymen could potentially undermine the allegation of rape. This is interesting because the police initially concluded that it was a rape case. As it happened, I did meet and interviewed the officer involved in the incident when it was first reported to the local police. He noted that he found her allegation of rape convincing enough to pursue the investigation. This was also supported by the fact that the offender had admitted the crime of child rape at the local police station. However Linh’s mother explained to me that the offender has a cousin who was the chief of the district police at the time. The offender’s family used this connection to intervene in the case, trying to save him from being prosecuted from the crime of child rape. In fact, the female prosecutor in charge of the case told Linh’s mother the offender has a “big umbrella” - implying powerful protection by

92 Working with the same set of facts, the appeals court found the perpetrator guilty of child rape and sentenced him to nine years imprisonment.
people in high places - and asked her whether her family had the financial resource and the determination to pursue the case to the end. According to the constitution, the prosecutor’s office (an agency affiliated with the National Assembly) has the power to proceed with the investigation independently and to “control and inspect” the work of the police, which is a government branch. The above shows that even when police investigation recognizes the case as rape, as the proceedings go on its character can change greatly, taking account of outside influences that ultimately affect the outcome of the trial. Thus it is difficult for women - even those who believe they conform to dominant images of the blameless, sexually innocent victim - to convince the authority.

3.2. Gendered interactions in the courtroom

One of the consistent tactics adopted by defense lawyers during cross-examination was an attempt to shift the nature of the criminal act from rape to the lesser offense of indecent assault. Thus, the emphasis of the trial was on who did what to the plaintiff, when and how. One method of shifting the nature of the criminal behavior, for example in Linh’s case, was to emphasize her alleged failure to provide a consistent detailed account of the incident. The fact that the assault took place in a dark attic and she was under age was ignored by the jurors. This can be explained that, in most of cases, juries are inherently biased in favor of mature male defendants. Yet in this context these details are crucial. As her mother recalled:

“For example when the court asked: “Then what did he do to you, what did you see?” She only knew that he pushed her to the floor, covered her mouth with his hand. Then they asked: “what did he put into you?” How could she know whether it was a finger or the other thing (the perpetrator’s genitals)? When asked did it hurt, she said of course it did. Why didn’t you shout? How could she shout when he put his hand on her mouth like that. They kept asking questions like that. She’s just a kid of twelve, how could she know about that male thing (penis) to answer them. Also it was very dark in the attic, no electricity up there. At the investigating office, they repeated those questions. My daughter is very timid. She just said yes or no. If they persisted she said she didn’t know.” (HN-PI200790)

By using this line of questioning, the prosecutor reduces the victim to the role of witness and in so doing, reinforces both gender and cultural essentialism (Mertus, 2004). This was what the defence tried to re-characterise Linh’s reaction during the alleged assault. Her
explanation of being scared and unable to resist the defendant was discounted and her lack of resistance recast as indicating consent.93 This attempt to undermine the coherence of Linh’s testimony was followed up by the defense pointing out that the defendant had given her a “good luck” envelope containing cash gift during Tế the traditional New Year festival. This might raise doubt in the minds of the jurors about the credibility of the rape allegation, suggesting none too subtly that Linh had exchanged sex for money, thus ruling out “no consent.” In general, the use of leading questions that generally require a “yes” or “no” answer is also a deliberate tactic used by the judge to give the appearance that the plaintiff agrees with the defense’s questioning. Leading questions provide little opportunity for the plaintiff to explain herself or place her answers in a specific context, thus undermining the credibility of her narrative.

Regarding courtroom performance Kathy Mack (1993) observes that women are more likely to speak hesitantly even if they are certain, while men are more likely to speak with assurance even if unsure or wrong. Moreover, the judge apparently does not take into account the possibility that the defendant might lie to protect himself, because it is reasonable to assume that defendants have a lot to gain by avoiding or minimising their punishment and are therefore potentially unreliable sources of information (Burns, 2005).

As Nga recalled:

“He shifted all the blame on me. He said that day I lured him to the guesthouse to sell drugs, and it was only by accident that he dropped semen on my hand.” (HN-PI200791)

Obviously this defendant’s argument was far from convincing. One can assume that he made up such a story to cast blame on the victim and discredit her, stressing her earlier provocative behavior (consenting to take the cash gift and go along with the defendant). Similarly, the blaming tactic was used by the defendant in Linh’s case, as her mother recalled:

“He was so well drilled in these matters that he puts up all kinds of arguments... He said for example that the girl tempted him to go upstairs, holding his hand... Only under the pressure of the police did he confesses to the crime of rape.” (HN-PI200792)

Apparently, the defendant tried to dwell on the likelihood that the court might believe that he had made a “voluntary false confession” due to police coercion during interrogation.

93 The fact that Linh was twelve years and six months old at that time of the incident was not considered. Her case belonged to the category of statutory rape.
This could be linked to a point made by Burns that “such allegations are likely to be believed because the interrogation processes inevitably involves an element of coercion” (2005: 121). Perhaps more importantly the “imagined proceedings” (Ekström, 2003), the stage when the defendant weighs up his chances at the trial in his own mind, has led him to adopt a masculine, powerful speech style in his own defense. Consequently, the verdict in Linh’s case came as no surprise: a thirty-six month prison sentence for child molestation, clearly a victory for the defendant.

While space is created for expanding the defendant’s power to define events, the space in which women can express their opinion is simultaneously contracted. For instance, in Ái’s case, when she wanted to refute the inaccuracy in the defendants’ testimony, the judge did not allow her to do so:

“I stood up trying to tell the court that what the accused said was untrue, but the court did not allow me to speak.” (LC-PI200793)

This aspect of gender bias works directly against women in the particular context of rape trials, since the victims find themselves at odds with the cultural norms that emphasize female modesty and decent character. As Simon Ekström (2003) points out, persons involved in rape cases relate to a set of special connections and associations that have something to do with imagined gender differences. As a result, these norms inhibit females from talking publicly about sex-related matters and it is this inhibition that often hinders the prosecution of rape and other sex crimes in Vietnam.

Now one may pose the question: where were the lawyers all these times? The fact is that in most cases lawyers representing the plaintiffs are present at the trial, but they are mere figureheads, hardly measuring up to their expected roles as defenders of their clients’ interests. Take the case of Linh, for example. According to her mother, their lawyer failed “to speak one good sentence on their behalf.” Instead he put his own client - in this case a twelve year old girl - in an unbearable situation in front of the court. Her mother recalled:

“He asked my daughter silly questions like: “What did he do?”; “Did he put his penis into you?” How could a child of twelve answer questions like that.” (HN-PI200794)
3.3. A matter of mediation

Sentencing in rape cases depends largely on the burden of proof, primarily on the evidence of sexual intercourse based on penile penetration of the vagina, and it is a heavy burden indeed. Due to the strict evidentiary stipulations in the rape law, probably nothing short of death, or, at the very least, serious physical injury could convince court officials of the veracity of the rape charge. Regarding Linh’s case, the judge ruled that it was not rape:

“The evidences are unable to prove that Sang committed the act of intercourse with Linh, but only show the presence of Sang’s semen on Linh’s underpants in agreement with the accused’s confession that he did lie on top of Linh, still wearing his underpants. The hospital also confirmed there was no perforation of the hymen and there was no presence of sperm in Linh’s vagina, therefore there was no foundation to conclude Sang has committed the act of rape or forced sex.” (CP200795)

Although there was no disagreement regarding the fact that the defendant did force himself on Linh, nevertheless, because Linh did not repel his act and there was no evidence of a penile penetration, it could only be concluded that the sex act fell under the category of dâm ô trẻ em [Vn.: child molestation]. As a result the appeals court gave the defendant a rather light sentence term. Regarding Thu’s incident, the judge reasoned:

“When Quy put Thu on the bed, and pulled down her trousers, Thu did not display any acts of resistance or cried for help. Only when Quy put his penis in Thu’s vagina, and shook repeatedly did she feel pain and pushed him away. Medical examination showed that Thu’s hymen bore old marks of perforation.” (CP200796)

Even though there was evidence of a broken hymen the judge did not regard this incident as child rape because Thu did not try to resist. The key reason, as the judge insisted, was that there were no verbal pleas to stop until the act of penetration was over. Moreover, when the defendant fondled her breasts and unzipped her pants, Thu offered no resistance. Thus this was interpreted as a sign that she actually enjoyed the sexual encounter, given the fact that Thu had let the defendant perform cunnilingus prior to the incident. As a result, the defendant was convicted of having sexual intercourse with an under-age girl and sentenced to thirty-six month imprisonment. We can see that in these two cases, the victims’ behaviour was put on trial, and the outcome of the cases depended heavily on the interpretation of their behaviour by the presiding judge. In the cases of Thu
and Linh, the court concluded that they had not put up resistance against their assailants vigorously enough.

Here again the findings reveal that even if the man fits the profile of perpetrator (i.e. incorrigible criminality, capacious sexuality) there is no certainty that the complaint would lead to a just conviction at the end of the day. A considerable amount of mediation occurs throughout the court proceedings, a situation which Koh (2006) refers to as the penumbra of the state-society relations in Vietnam. In highly complex situations, this penumbra is present at the everyday basic urban level. Local officials do not base their dealings with people on laws and rules alone, leaving ample space for manipulation, corruption and abuse of power within the bureaucratic system. This situation is bound to affect the outcome of the prosecution of rape cases.

Now let me examine those cases where the trial led to a successful conviction, for instance, the cases of Ái, Hài and Thịnh. While the two perpetrators in the gang rape of twenty-two year old Hài and nineteen-year-old Thịnh were condemned to heavy prison sentences of ten years each, the four offenders in Ái’s case received prison terms of up to ten years. In Ái’s case a guilty plea was secured thanks to a witness who immediately called the police to the scene of the crime; such evidence was not readily available in the other cases. It should be mentioned that gang rape is considered to be a more serious crime than other forms of rape and as such is not limited by the provisions of prosecution based on complaint.

But power cuts both ways and sometimes can favour the plaintiffs. Ái’s case was reinforced by the informal ties her mother had with some law enforcement officials at the provincial level. In Hài’s case, her uncle’s position in the local administration was likely to strengthen the plaintiff’s position. This element of power play was absent in the cases of Thu and Linh whose families were socially marginalized.

It is worth noticing that regarding rape incidents in remote mountainous areas where defendants belong to ethnic minority groups, the courts often passed heavy sentences on offenders of ethnic minority backgrounds (the Hmông in Hài’s case), those considered as “less advanced” or “less civilized” in the eyes of the majority Kinh people (see, for example, the 2009 World Bank Country Social Analysis Report on Ethnicity and Development in Viet Nam). By singling out abusers and victims from certain ethnic backgrounds, the courts
might want to deliver a message that rape occurs as a more or less deviant behavior in địa bàn trọng điểm [Vn.: areas of special focus], namely mountainous and remote villages.

4. At the peripheries of law: Making ways for agency

As the above cases indicate, reporting sexual victimization to law enforcement officials was not an easy task. The police stations and the courts appeared to be a hostile place for women claiming rape, and their experiences amounted to a secondary victimization. Yet, there existed the possibility of agency, which enabled the rapees and their families to find useful channels to publicize their cases and adopt proper tactics in order to overcome the adversarial process, especially when they had to act as eyewitnesses. In the present study, the meaning of what seemed like “agentic” acts as part of their struggles in seeking justice, lay in a conscious attempt to challenge the status quo of situational power relations. Above all, the stories provided insights into how the justice system operated in real life and how the women, as rapees and mothers, developed strategies to cope with the complexities of the judicial process.

4.1. Leapfrogging: Exploitation of bureaucratic hierarchy

On the basis of their experiences with the criminal justice process, some women described the difficulty, frustration and costs of dealing with the legal authorities. This is in line with the view that law, like most forms of public power, is organized bureaucratically (Ewick and Silbey, 2003). In this respect victims from poor families and members of minority groups often started out at a disadvantage, and often subjected to some forms of discrimination. At the same time, through contact with legal personnel and involvement in investigation and court events, some people managed to discover and exploit openings in the institutional structure of the legal system for their own benefit. Nga’s story is a case in point. As Nga’s mother told me:

“The guy (the defendant) lobbied very hard. At that time my family sent petitions to all kinds of organizations: the Public Security Ministry, the City’s Police Department, the city’s Women’s Union, the Central Committee of the Women’s Union, the National Committee for Population, Family and Children. Ten days later we received an official letter from the deputy inspector-general of this National Committee, acknowledging receipt of our letter and mentioning that he has written to the investigating authority to
request proceeding with the case. Meanwhile by pure chance my husband read in the newspaper about an organization that supports children’s rights. I called its hot line and got in touch with Mrs Mai. After hearing my case she told me to write a complaint and give it to her. She then brought my complaint to the same National Committee for Population, Family and Children. She helped us a lot with the paperwork. Without her engagement, the procedure couldn’t be sped up that way.” (HN-PI200797)

It is clear from the above example that by bringing their problem to the attention of those higher up in the bureaucracy, Nga’s mother was able to heighten the significance of the case, turning it from an individual matter into a bureaucratic issue, a sort of cause célèbre. In discussing the route to get the case to the top, she admitted that this was a difficult climb and a time-consuming effort. Patricia Ewick and Susan Silbey (2003) aptly calls this tactic “leapfrogging” over layers of bureaucratic hierarchy. Feeling betrayed by a lack of police integrity and deeply frustrated by a fallacious construction of the prosecutor’s case by the local officials, the family decided not to follow the routine channel for handling complaints but go to upper echelons in the bureaucratic hierarchy. Nga’s parents reasoned that the more doors they knocked and the higher authorities they approached, their case would become widely known and might reach people in leadership positions.94

Furthermore, by going to agencies at the national level, and especially by alluding to the international discourse of women’s rights and child protection (e.g., the involvement of the local NGO), Nga’s story had the primary effect of letting the higher authorities in the hierarchy know about what was going on among their subordinates (e.g., district prosecutors and local police officers). It is an example of this “frog-leaping” tactic that ultimately helped her achieve justice. According to bureaucratic procedures, disputes of various kinds were to be resolved from the grassroots upward. The action undertaken by Nga’s family sent a strong distress signal about their predicament in order to attract the attention of those higher up in the hierarchy of power. In seeking (and receiving) the

94 The 2003 Cr.P.C devotes the whole Chapter 24 to the rights of individuals as well as agencies and organizations in proceedings, to file complaint against acts in criminal proceedings that are in violation of the laws or infringements of their interests, and the complained person, be it the investigating person, the procurator, the judge, or another person conducting investigation, must give explanation with evidence justifying the legality of these acts. For a further discussion on this issue, see Ta (2006).
support of an influential agency - in this case the Ủy Ban Dân Số, Gia Đình và Trẻ Em\textsuperscript{95} [Vn.: National Commission for Population, Family and Children], one that was not related to the judicial system - Nga’s family had overstepped the bounds of “regular” criminal jurisdiction. This Committee was affiliated with the National Assembly, whose role was to supervise the activities of government ministries and related bodies. While one cannot rule out the factor of sheer luck in such a case, Nga’s family has adroitly made use of the opportunity offered by a non-governmental agency in bringing their case to the court.

All this would not happen if the family did not receive the assistance of an NGO whose activities Nga’s mother had read about in a newspaper. It was this NGO that made initial contact with the National Committee for Population, Family and Children on their behalf. In a society like Vietnam private citizens used to mobilize their networks of relatives and acquaintances with influence in order to get things done (Gammeltoft and Herno, 2000). For ordinary people with humble social backgrounds like Nga and her family, the assistance of an NGO was something of a novelty. These NGOs only emerged in the 1900s (Heng, 2001) bringing in their wake rudimentary ideas of a civil society (cf. Salemink, 2006) in the wake of the Đổi Mới reforms. To be able to get information about such organizations and their activities via the media was an interesting development, something unheard of in the years preceding Đổi Mới (Marr 1998). This topic will be investigated in depth in Chapter 7.

4.2. Open court or open for support: Shifting the balance of power

With respect to the conduct of judicial proceedings, Article 178 (4) of the 2003 Cr. P.C stipulates that the prosecution has to decide whether the trial is held in public or behind closed doors. The rationale of this requirement is to take into consideration the need to “protect state secrets, to maintain the people’s fine customs and to preserve the privacy of the persons involved based on their own justifiable requests” (Art. 18, 2003 Cr.P.C). In rape cases, a preference for a closed trial often stems from a concern to

\textsuperscript{95} The Commission was dissolved following a decision of the National Assembly; its tasks were re-assigned to various ministries (Decree 1001/ QĐ-TTg issued on 8/8/2007 by the Prime Minister).
protect the victims’ reputation, especially in the cases of very young girls, thus saving them from the shame associated with having to speak in public about their victimization.

On the other hand, some plaintiffs request the court to hold open trial, in the belief that such a setting would enhance the credibility of their cases and increase the likelihood of achieving a fair outcome. This is the case of Ái, a Kinh eighteen-year-old schoolgirl, drugged and raped by a group of six teenagers who eventually were all convicted. For Ái, an open court was important since it allowed everyone who wished to be there free access to hear her speak of her victimization. Her decision to “go up front” also aimed at mobilizing public opinion in her favour in the gang rape case. Part of this strategy was to counter the allegations that she had drunk together with men she hardly knew before the incident, and to focus on the crucial fact of her being drugged before being raped.

Seen from another perspective, the open court was chosen since it offered both emotional and physical support to the plaintiffs through the presence of others. Considering the fact that the defendants and their family members were bound to form a majority in the audience at the trial, Ái’s mother was anxious to restore the “power balance” between the defendants and her own side. This is the reason why she asked for a public trial, despite the judge’s early suggestion to hold the proceedings behind closed doors. In Ái’s own words:

“The court preferred a closed sitting but my family wanted it to be open… Look, (in a closed trial) if we were there on our own, there were six of them with their parents making it twelve altogether. A closed trial had many disadvantages for me at least numerically. In a closed sitting of the court they could change their lines of testimony which might work against us. We had nothing to hide that’s why we asked for an open court.” (LC-PI200798)

For example, Ái’s mother asked an attorney friend who has had previously worked at the district prosecutor’s office to accompany her to the tribunal together with her other colleagues. Mobilizing a specific group of people to attend the court proceedings is part of the mother’s strategy to show their refusal to be intimidated, while boosting the morale of her daughter during her testimony.

The case of Ái also shows that both mother and daughter were knowledgeable about their allocution right. In opting for an “open” court they believed that this would enhance the likelihood of a fair trial. Yet not everyone was aware of his/her legal options. My
observations indicate that many of the plaintiffs were unfamiliar with the nature of the courtroom interaction and their own place in the prosecution process. The case of Linh was illustrative:

“Over there they decided to hold an open trial. They asked us to come. I did not request for a closed trial. Frankly I did not know much about what went on out there, let alone the things related to the law... I only knew he was guilty and he had to be condemned and sentenced for the crime he committed... How would I know what they were up to?” (HN-PI200799)

Linh’s mother expressed negative feelings because of her lack of general information about courtroom procedures. Both Linh and her mother appeared to be ignorant of what to expect in court and were unable to manage the discomforting aspects of testifying. From the standpoint of securing a conviction, this may be counterproductive (Konradi, 2001). It works against the plaintiff’s desire to actively contribute to the success of prosecution and thereby reduces the chances of financial compensation. Linh’s mother explained:

“When we appealed the case we just requested compensation for the damage to honor and human dignity and the harm done to health. Now they said that since the lower court didn’t resolve this problem they couldn’t do anything. Where could we go to ask for this? How could we know what price to ask? If the state sets this price for this (sort of crime), that price for that (sort of crime) then we knew what to ask. I just wanted compensation for the loss of honor of my daughter, that was all. How much honor is worth, the court must know... They have judged many cases, they must now how much... Now they asked us how much we demand... The lawyer had told us to send along the medication bills and so forth. But we didn’t buy anything that day. We just wanted compensation for the dishonour my daughter had to suffer, a moral debt to the girl.” (HN-PI2007100)

This example makes one wonder to what extent the plaintiff’s understandings of the criminal justice process may impact the outcome of the proceedings. Logically, the information acquired not only eases their worries and boosts their confidence, but also helps them formulate their testimony in such a way to back up the prosecutorial effort. Thus they may enter the court with a complete sense of what they want to say, not just a vague, general expectation that they would talk about the assault event (Konradi, 1996). In this sense one would expect that those who are knowledgeable about the legal process would have a better chance of securing a conviction. Unfortunately, not all jurisdictions
offer crime victims the opportunity to be prepared for such an eventuality. In reality, often confused by formal procedures and bewildered by bureaucratic obstacles, ordinary plaintiffs, especially those belonging to minority groups, often find themselves at a loss in facing the jury, unable to perform their witness roles in a credible manner.

4.3. Dealing with emotion: Contrasted image of rape victims

The emotion factor plays an important role in the courtroom performance of the plaintiff on the witness stand. Most rapees would rely on the presence of relatives and friends to give them moral support, and help them in keeping their emotions in check with a view to giving a coherent testimony (Konradi, 2001). Re-constructing a particular courtroom demeanour in a rational, dispassionate way is a strategy that can help a plaintiff. As Ái recalled:

“Generally speaking, at that moment I felt rather normal. I didn’t cry at the court sitting.” (LC-PI2007101)

Likewise, one of the tactics adopted by Nga and others was trying to avoid eye contact with the defendant:

“I did not want to look at his face. I felt normal when I looked at the judges. When the lawyer asked me questions, I answered them all right.” (HN-PI2007102)

This is not surprising as many women make genuine efforts to mitigate conditions that might exacerbate their anger, embarrassment and fear. For some, the court scene offers a setting for them to regain personal control vis-à-vis their attacker. In Nga’s case she did this by mentally putting him out of her sight and out of her mind at a stroke in order to concentrate on her testimony. Both Ái and Nga seemed to have achieved an inner calm that did not allow any show of emotion in the courtroom, a far-cry from the stereotyped witnesses testifying in tears. Furthermore, Nga described her testimony in the witness stand as a way of shutting out the memory of her rape experience:

“To tell the truth, once I told my account of what happened, that’s it. I let it go, don’t want to remember it, ever.” (HN-PI2007103)

As Konradi (2001) suggests, this emotional neutrality reflects both a respect for the authority of the court and a commitment to the pursuit of a successful prosecution. Yet in the case of the twelve-year-old Linh, she found it extremely difficult to cope with the court scene and failed to provide a consistent, detailed account of the incident. It was
particulatly painful for her to revive and retell the harrowing experience of being raped by a family member. Her mother thought the extended involvement in the court proceedings only prolonged Linh’s pain and made it all the more difficult for her to recover emotionally.

Apart from the task of telling their rape experiences to the court in a convincing manner, most rapees felt the need to give detailed accounts of their assaults. This was problematic for two reasons. First, the prospect of providing an adequately detailed account required the accuracy of memory and recall. The plaintiffs were unsure whether they would be able to remember specific details of the incident which occurred months or even years before. This made cross-examinations particularly worrisome for plaintiffs since they were expected not only to present their own cases coherently but also to recall details of the acts of their assailants correctly.

It should be pointed out that in the case studies, not all rape plaintiffs were passive bystanders in the legal proceedings. Faced with their new roles as witness and the responsibility to testify in the public forum of the courtroom, some women went out of their way to prepare themselves for the trial. In doing so, they tried to present themselves as credible witnesses in their own cases, hoping for the best possible outcomes at the end of the judicial ordeal.

Summary

In the foregoing I have pointed out that certain aspects of the legal definition of rape make it difficult for women in Vietnam - even those conforming to the dominant images of the blameless, sexually innocent victim - to bring their cases to justice. The case studies in this research reveal that the process of rape prosecution is fraught with hazards and pitfalls spanning across social backgrounds and ethnic lines. As gendered interactions come into play, rape plaintiffs often have to face a dismissive attitude and rude treatment by the police during the early phase of the judicial process. Furthermore the long judicial procedures often cause a heavy emotional burden on the victims, making them susceptible to a further risk of secondary victimization. Seen from a broader perspective, the practice of law enforcement in rape cases is not cut-and-dry but often boils down to a
power play the outcome of which is usually mediated between three major players: the victim (and her family), the perpetrator (and his family) and the local authorities. This interaction takes many forms, notably coercion, resistance, negotiation and even imposition.

From the cases analyzed in this chapter there seems to be a mismatch between a concern for the harm done to the individual rapee and the need for legal redress on one hand, and notions of honor and virginity that have more to do with family interests (e.g., in terms of the rapee’s marriageability) on the other. In real life situations an individualized legal battle often goes hand in hand with a family-and-honor affair that seems to fit the notion of “private prosecution” in rape cases mentioned earlier. This peculiar situation often creates room for a possible compromise between the contending parties. It should be added that for the victims and their families there is the possibility of agency which enables them to publicize their cases and adopt proper tactics in order to overcome the adversarial judicial process, especially when they take the witnesses stand.

Last but not least, from these legal narratives one is able to catch more than a glimpse of the representations of rape often seen in the Vietnamese mass media, which often mirror popular understandings of the problem. These also color the perceptions of the plaintiffs and actualize in the ways they muddle through the judicial process. To illuminate this point further the next chapter will deal with the representations of rape in the printed media.

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