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## Questioning the Truth. Ideals of Justice and Trial Techniques in India

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/p. 10/

‘Justice resides in truth alone, and there is no happiness apart from justice’  
(E. Zola, *Truth*, 1903 [transl. E.A. Vizetelly])

This paper is about the discourses on the notion of truth that are held in the context of criminal cases in India. While the relationship between ‘justice’ and ‘truth’ is a core issue in the philosophy of law,<sup>1</sup> the present contribution is much more limited in its purpose and merely aims at illustrating how, in India, discourses and practices concerning truth are involved in the judicial process or projected onto it. It is therefore about understanding a social reality, not about developing a legal theory. We do this by successively adopting three main perspectives. The first of these corresponds to discourses that set Truth, in an absolute sense, as the goal to be reached by the judicial process; this ideal is expressed in the higher courts (High Courts of the states and Supreme Court of India) when they wish to underline the ethics of justice (compare Ho, 2008 : 46ff.).

A second discourse, more pragmatic, concerns the actual techniques for eliciting a judicial truth.<sup>2</sup> Trial judges, in particular, have to take a decision and to deliver a judgement on the basis of the interactions that take place during the trial. As Antoine Garapon put it, ‘[I]f the philosophy of law is a quest for what is justice *in abstracto*, through ideals and rules, the quest for “judging well” requires total immersion *in concreto* in the very experience of the act of judging, an experience, indeed, which is just as much social and personal as it is legal’ (Garapon, 2001: 19 — our translation). Part of this experience is the production of a legal, judicial truth, solely concerned with facts established according to law, which may not exactly cover the reality of the facts (Landowski, 1988; Summers, 1999; Ho, 2008). This gap between judicial truth and what actually happened is particularly marked in India as witnesses at the bar frequently retract their initial testimony recorded by the police, precluding any thorough examination of the litigation and excluding the possibility of legally establishing incriminating facts.<sup>3</sup> This will be illustrated here through a case study to help describe some of the techniques by which a judge may construct a two-layered narrative or /p. 11/ a dual ‘truth’(techniques which, in Common law systems, may also be used by the prosecutor or the lawyers): one is clearly disputed by the judge but is legally binding and leads to the acquittal of the accused; the other is a counter-narrative, tangentially evoked in the transcript of the verbal exchanges at the bar, and pointing to facts that the judge deems plausible but devoid of any legal value — a rhetorical device (Wolff, 1995) that allows judges to suggest that they have not been deceived. The truth thus established is then restricted to a procedural truth. However, our ethnography also suggests that judges implicitly recognize that the interest of both parties is sometimes better served by justice that takes into account social and local factors — which has been described as a ‘sociological truth’ (Just, 1986) — than by justice striving to establish the truth of the facts.

The third discourse considers trials as processes prone to manipulations of all sorts. Critics are commonly addressed to the courts by people, including lawyers, who underline the social, economic and political context in which trials take place. According to such discourses, and in stark contrast to the idealist stance, the judicial process is a tactical ploy to which parties in conflict at local level may have recourse, among other means, and which may be subverted by corruption. The quest for truth, from this perspective, tends to be reduced to the unfolding of a script that follows a judicial dramaturgy (Samaddar, 2013).

We conclude by suggesting that this range of discourses not only illustrates once more the gap that may exist between ideals and practice, but also points to a specific contradiction between an institution boasting its independence and the reality of social relationships.

## **Truth as Value**

Judges at High-Court or Supreme-Court levels tend to develop a speculative and idealistic approach to the question of truth. This may be expressed in the text of their judgments where truth is sometimes discussed in a style not devoid of literary ambitions and from different perspectives, whether philosophical, moral, religious, cultural, or legal. The judges-cum-authors, on these occasions, introduce into their judgments comments or considerations which are not strictly related to the case in question or with the law, taking inspiration from an eclectic corpus of literature ranging from Sanskrit religious texts (Vedas, Upanishads) or epics to modern British or American writers. These judgments, in turn, become an authoritative source for further legal decisions.

For instance Justice Krishna Iyer, in a Supreme Court judgment of 1977 bearing on a claim for recovering a debt, wrote:

Truth, like song, is whole, and half-truth can be noise! Justice is truth, is beauty and the strategy of healing injustice is discovery of the whole truth and harmonising human relations. Law's finest hour is not in meditating on abstractions but in being the delivery agent of full fairness.<sup>4</sup>

### **/p.12/**

This was quoted in turn by a judge from the High Court of Delhi, J.R. Midha, in a case about the acquisition of a property,<sup>5</sup> and in another case (a claim for maintenance)<sup>6</sup> where a literary reference from the Supreme Court (in the Union Carbide case following the Bhopal tragedy) citing Anatole France was also quoted:

Truth passes [*sic*, orig.: possesses] within herself a penetrating force unknown alike to error and falsehood. I say truth and you must understand my meaning. For the beautiful words Truth and Justice used not be defined in order to be understood in their true sense. They bear within them a shining beauty and a heavenly light.<sup>7</sup>

These ideals were developed in the early twentieth century (Zola's aphorism has to be placed in the context of the Dreyfus Affair) by various thinkers and were also advocated by Mahatma Gandhi or Swami Vivekananda. They permeate current reflections on the judicial process in India. Another passage from a Supreme Court decision which is frequently found in other judgments states:

(§31)... The truth should be the guiding star in the entire judicial process.

(§32) Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage

themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.

(§33) Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.<sup>8</sup>

Sometimes, this quest for truth appears to some to be a specifically Indian virtue:

The Indian ethos accords the highest importance to truth. The motto *Satyameva Jayate* (Truth alone succeeds) is inscribed in our National Emblem “Ashoka Stambha”. Our epics extol the virtue of truth. Gandhiji gave us truth [...]. For the common man truth and justice are synonymous. So when truth fails, justice fails. [...] Truth being the cherished ideal and ethos of India, pursuit of truth should be the guiding star of the Justice System. For justice to be done truth must prevail. It is truth that must protect the innocent and it is truth that must be the basis to punish the guilty. Truth is the very soul of justice. Therefore truth should become the ideal to inspire the courts to pursue.<sup>9</sup>

The pursuit of this goal follows an oft-repeated formula: ‘the Court has to remove chaff from the grain. It has to disperse the suspicious, cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, **p.13/** cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt.’<sup>10</sup> This responsibility falls first and foremost on the trial judge, described as ‘the keyman of our judicial system’, as he is in charge of the collection and of the evaluation of the evidence in direct interaction with the protagonists of the case, whereas appellate courts have only the written report before them, usually years later. This role attributed to the trial judge is frequently evoked in appellate courts for criticizing him or her on the poor quality of the evidence recorded at the time of the trial or for defective legal reasoning. These alleged flaws are said to irrevocably compromise discovery of the truth, leading to an irreparable miscarriage of justice which appellate courts would have difficulty repairing.

The appellate Courts having only the written record before them are normally reluctant to interfere with the appraisal of evidence of witnesses by the Trial Judges who have had the advantage of looking at the demeanour of the witnesses. The appellate Court, it has been said, operates in the partial vacuum of the printed record. A stenographic transcript fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most accurate record of oral testimony is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried.<sup>11</sup>

That Upper Courts are ‘normally reluctant’ to review evidence compares with the ‘Upper Court Myth’ aired in various works, particularly in the United States, according to which these courts, working only with files and without direct interaction with the parties concerned, hesitate to reevaluate the legal facts established by trial judges. However, in India, this does not in practice deter appellate courts from judging a case anew, not only in law but also in fact, so that the judicial truth can be overturned at each level of appeal.

The idealist discourse on truth and justice is essentially normative in character, and when a denial of justice is acknowledged by the courts themselves, it is also an occasion to reiterate the same lofty ideals. This was, for instance, the case in 2004 when the Supreme Court reviewed the successive decisions taken by lower courts concerning one of the criminal incidents that took place during the Gujarat pogroms of March 2002 (an estimated 2,000 Muslims were killed by Hindu mobs with the alleged connivance of State authorities); in this incident, known as the ‘Best Bakery’ case, all the accused were acquitted:

If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to /p.14/ book those who were responsible for the crime. The public prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appears to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. [...] Judicial Criminal Administration System must be kept clean and beyond the reason of whimsical political wills or agendas.<sup>12</sup>

However, apart from gross miscarriages of justice which are officially denounced but regarded as exceptional, the ordinary, day-to-day quest for truth in courts is actually quite far-removed from the ideal established by judges from the Upper Courts, and trial judges tend to phrase the question of truth in a quite different way. The discourse regarding the practice at this level of the judiciary points to two main factors that hinder the process of fact finding: the characteristics of the adversarial procedure in Common Law systems, and the chronic recurrence of witnesses retracting their testimony.

### **Adversarial system and hostile witnesses**

Legal scholars have opposed so-called adversarial and inquisitorial procedures in relation to notions of truth, contrasting a ‘fight/combat theory’ with a ‘truth theory’. Langbein refers to ‘truth-impairing incentives’ of the adversarial system:

In an Anglo-American trial, the job of each adversary is to win the courtroom struggle. Winning often entails tactics that distort or suppress the truth, for example, concealing relevant witnesses, withholding information that would help the other side, preparing witnesses to affect their testimony at trial (coaching), and engaging in abusive cross-examination. (Langbein, 2003: 1)<sup>13</sup>

A committee was specially set up in India in 2003 to reflect on possible reforms of the criminal justice system and echoed similar preoccupations:

The Adversarial System lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover truth as in the Inquisitorial System. When the investigation is perfunctory or ineffective, Judges seldom take any initiative to remedy the situation. During the trial, the Judges do not bother if relevant evidence is not produced and plays a passive role as he has no duty to search for truth.<sup>14</sup>

The committee concluded, however, that maintaining the adversarial system would ensure greater fairness in the treatment meted out to the parties. According to a former Director of the National Judicial Academy, in keeping with the theory of judicial truth (in his words, ‘law’s truth’), the tension /p.15/ between the quest for an ideal truth and the combat-effect of the adversarial procedure ultimately resolves itself: ‘judicial inquiry is to establish the existence of facts through reasoning and rationality and in accordance with law, not to establish the truth in the absolute, divine or subjective sense.’ As E. Landowski (1988: 49) observed quoting P. Foriers who explained that it is not ‘any fact, even obvious, even constant, that is deemed to be a fact according to law’, the consequence is that ‘such a principle opens the door to paradoxes as it leads to admit as “legally true” what may happen to simultaneously appear as uncertain, doubtful, or even bogus from another perspective.’

While judges in the Upper Courts may dwell on normative conceptions of justice-as-truth, trial judges have to deal with the issue in a concrete way. Their judgments preclude any speculation on truth in the abstract sense, and abide by the exposition of evidence established during the trial and by the successive phases of their own legal reasoning. Expressing personal philosophical ideas would be seen as preposterous by Upper Courts. However, this does not prevent them from having their own ideas, widely shared among law professionals at the district court level. Conversations with trial judges in Himachal Pradesh (North India) showed that most of them complained that in India ‘people have no respect for truth’.<sup>15</sup>

This discourse might seem to reproduce a colonial bias. In her work on colonial justice in India, Elisabeth Kolsky has shown that the pursuit of truth was a persistent source of anxiety for the British, as they saw Indians as a people who could not ‘distinguish fact from fiction’ or who had a ‘notorious disregard for truth’ (Kolsky, 2010: 108-9; see also Lal, 1999) — indeed, the author argues that ‘the theory of evidence in India was founded on the colonial assumption that native witnesses and their statements were not to be believed.’ Today’s discourse held by Indian judges is free of such racist and colonial overtones, and unlike former British assumptions about an ‘Indian psychology’, the alleged general disregard for truth is ascribed to the weight of local solidarities, of power relationships, and of economic interests. Judges, prosecutors or lawyers may refer to this discourse during the trial, for instance when witnesses (it may be the victims as well) start to contradict what they stated during the investigation and therefore to support the opposing party. In such a situation, according to Common Law rules, the witnesses are declared ‘hostile’; it is insinuated that they are not telling the truth — a frequent turn of events in India, very rarely leading to prosecution for perjury (Berti, 2010). Police officers may also be blamed. The judges’ discourse about untruthful villagers goes hand in hand with a deep mistrust of the police who, out of incompetence, ignorance, or corruption, are often alleged to falsely implicate innocent people or, on the contrary, to enter into negotiations with the accused and thus purposely weaken the case. The fact that most trial judges are former lawyers might contribute to generating this distrust.

In this context, trial judges and prosecutors try to deal with this problem at a practical level and to show a resigned attitude when witnesses retract from previous statements. Even though judges try their best to apply Upper Court directives and to actively look for ‘the truth’, their quest is determined /p.16/ by the technical possibilities offered by the adversarial procedure. Judicial truth relies on rules and techniques – what Dupret (2011: 3) calls the ‘practical grammar of truth in a legal context’.<sup>16</sup> Many of these techniques enable the elaboration of a narrative which, in India, often exposes this judicial truth in a deliberately ambivalent light.

### **The elaboration of a legal narrative**

Although Indian criminal procedures apply the so-called principle of orality according to which evidence against the defendant must be presented by witnesses in court who may be cross-examined, judiciary practice attributes a crucial role to written accounts because what witnesses say before the judge is recorded in writing during the trial. Oral evidence is produced in court mostly so that it can be put on record — a form of ‘entextualization’ (Bauman and Briggs, 1990). The transformation into a written document of the set of questions-answers that have been put to a witness enables legal professionals to create a narrative as if told by the witness, and to put on record the crucial points they wish to convey. Such ‘stories’ are strategically built in accordance with the procedural constraints to legally prove one version and to challenge the opponent’s. As observed in another context (Conley and O’Barr, 2005: 26), the examination and cross-examination of witnesses and the

transformation of question-answers into written documents is often done to suggest something rather than to obtain an answer. A case study will illustrate some of the techniques used to construct the judicial truth.

The case was opened by the State of Himachal Pradesh against Guddu Ram, a forty-year-old villager.<sup>17</sup> In December 2004 his wife, Kaushlya Devi, in her twenties and with whom he had two children, was found hanging from a tree in the forest surrounding the village. A First Information Report (FIR) was registered by the police against Guddu on the request of the girl's mother and the girl's paternal uncle, a retired policeman, under two sections of the Indian Criminal Code: section 498A, 'punishment for subjecting a married woman to cruelty', and under section 306, 'abetting the commission of suicide'.<sup>18</sup> The mother's declaration to the police stated:

'My son-in-law Guddu used to beat her when he drank wine and his brothers also beat her. I met my daughter yesterday and she was alright and today, 10-12-04, at almost 1 o'clock Darshan Ram told me that my daughter Kaushlya Devi had committed suicide by putting a rope around her neck and by hanging herself from a tree. I have doubts about my son-in-law, Guddu, concerning the death of my daughter Kaushlya Devi. She got tired of his beatings and put the rope around her neck and finished her life.' (our own translation from Hindi).

The hearings started in October 2006 and the judgment was passed in June 2007. The prosecution called eleven witnesses, the defence none. The **/p.17/** accused was eventually acquitted. What happened during the trial throws some light on this outcome.

According to procedure, on the first day of the trial, witnesses come to the bar to notify their presence, and then leave the room before being called to testify. The first witness on the list was the mother of the girl, but before calling for her, the judge asked the *pradhan* (president of the village assembly) of the village, a lady in this case, to come to the bar to answer some preliminary questions, which were considered to be 'confidential' and therefore were not recorded by the typist. The latter is always needed during the hearings of criminal cases to put all the verbal testimonies into writing: the typed version is then signed, page after page, by the judge and by the witness. The fact that the initial interaction with the *pradhan* was not recorded introduced a first discrepancy between what would be consigned in the court's archives and the actual unfolding of testimonies. This informal interaction was, however, useful for the judge as an indication of the probable unfolding of the case, because a *pradhan* is at the very heart of village affairs, and for the judge to see up to what extent the prosecutor would be able to prove the accusation.

During this preliminary exchange, the judge reminded the *pradhan* of her statement at the time of the investigation, that Kaushlya's suicide was the consequence of her husband harassing her over a long period of time. The *pradhan* retracted everything she had said to the police and had signed at the time. Here are some passages from these interactions (our own translation from Hindi; the judge or the prosecutor sometimes also spoke in English, without the *pradhan* understanding them).

Judge, to the *pradhan*: It is written here [in the police report] that she [Kaushlya Devi] was extremely troubled. [...]

*Pradhan*, in a firm tone of voice: Nobody troubled her.

The judge, the prosecutor and the lawyers, also present, immediately understood the situation: the *pradhan* had turned 'hostile', suggesting that the other witnesses would not maintain the initial testimony they made to the police. This was explicitly stated by the prosecutor who commented: 'if the village president does that [telling a lie], the others will do

the same!’ Indeed, that the *pradhan*’s attitude is a standard indicator of the attitude adopted by other witnesses during a trial has been underlined in studies on the relationships between village assemblies and state courts (Moore, 1998: 85).

Judge, addressing the prosecutor: Why has the case been made then?

(Addressing the *pradhan*): Prior to this, had anyone also [in the village] hanged themselves?

*Pradhan*, calmly: She did not hang herself.

**/p.18/**

Judge: What? How did she die then?

*Pradhan*: When we arrived there [at the place where the dead body was found] she had fallen down and her shawl and sickle were on the ground.

Though the judge may have thought that the fact of the suicide had been established, he realized that this was not the case and that a new version of what had happened was emerging, that of an accident. This was to be the version sustained by the defense.

After this informal and preliminary interview the judge asked the *pradhan* to wait outside the courtroom for the official hearing and called for the first witness, Kaushlya Devi’s mother. The recording in a written form of the oral testimonies could begin. According to procedure, witnesses are asked to repeat before the judge what they first stated, here in Hindi, to the police at the time of the investigation. The judge then dictates in English (which is not understood by most of the witnesses) the sentences to be recorded by the typist.<sup>19</sup> What is said by a witness is thus translated into a different language and adapted to suit a legal wording; the exchange of questions and answers is also reformulated as if it were a continuous narrative told by the witness. Thus, while the written report presents testimonies in the form of a discourse held by the witnesses, this discourse actually results from a process of interrogation, translation and reformulation. While it is mostly the judge who does these operations, the prosecutor and the lawyers may also dictate to the typist, especially at the time of the cross-examination, when there may be some competition as to who will be the first to use a turn of phrase that suits the party concerned. Kaushlya’s mother’s testimony illustrates these techniques.

After a few preliminary questions, the judge arrived at a possible cause for the girl’s suicide: the dowry. He asked the mother if she had given what was customary at the time of the wedding, to which she nodded and the judge dictated, in her name: ‘We gave the dowry to our daughter according to our position.’ The prosecutor asked, ‘[A]fter the wedding did she use to come to your house?’, and the mother acquiesced. This was an important point in favour of the accused because the absence of visits of a married woman to her parents (she always lives in a different village with her husband) can be a sign that her in-laws are harassing her for additional dowry. Extra questioning did not prompt the mother to reveal any particular problems her daughter might have had with Guddu Ram and his family. The judge and the prosecutor insisted on the woman repeating the accusation she had made when the case was first recorded by the police and which made her the main witness for the prosecution. Two years had passed since her initial statement, and the woman now seemed to hesitate in repeating her accusations. The prosecutor said to the judge that he was embarrassed; what could he do now? He continued to question the mother and try to make her say something against the accused, for example that he had maltreated his wife or harassed her often over the years. Eventually, the judge interrupted him, **/p.19/** saying in English, ‘There is nothing in particular! She said that her daughter did not complain about anything!’ The woman then said that, when the body was found, someone from the village called her and told her that her daughter had fallen from a tree. When she got there, she saw her daughter on the ground with no sign of strangulation on her neck. The prosecutor, looking astonished, said, ‘But how did



she die then?’ To which the mother replied, ‘Sometimes she was sick. I do not know....Only God knows!’

The judge decided not to dictate this reply. Instead he dictated to the typist in English a sentence referring to the police record of the woman’s declaration: ‘I have reasons to believe that my daughter was killed by the accused due to maltreatment. My statement Ext. PA was recorded by the police and bears my signature.’ He then addressed the woman, smiling in a rather astonished sort of way, ‘Your statement was written down at the time! It is a strange case!’ The woman murmured, ‘There are two children. The children are young. They have to be looked after.’ Although this last comment might have explained why the woman did not confirm her initial written statement, the judge did not take it into account. Instead of declaring the mother ‘hostile’, as she was contradicting her first testimony, he chose to consider the written report established by the police two years before, and bearing her signature. This decision shows a certain attenuation of the principle of orality that is followed in other adversarial systems where the judge and the jury, ‘do not bear any procedural memory exceeding the trial hearing’ (Scheffer, 2007:14). By contrast, in Indian criminal trials, depositions signed by witnesses in the presence of the police — though of no value as *evidence*, as in other adversarial systems — are frequently used during the trial by the judge and the witness is sometimes confronted with them.

The *pradhan* was again called to the bar, this time to officially record her oral testimony.

Judge: When you got there, what did you see near the dead body?

*Pradhan*: Nothing! Only a shawl and a sickle [to cut the grass].

Judge: And the rope?

*Pradhan*: There was no rope there.

By denying the existence of the rope near the dead body the *pradhan* was again denying what she was supposed to have stated to the police during investigation. The prosecutor murmured some words to the judge and the latter dictated that ‘at this stage learned Public Prosecutor states that the witness is partly suppressing the truth and that he should be allowed to cross-examine the witness. Request considered and allowed.’ This is a codified procedure and thereafter questions are put to the witness according to the rules that apply to cross-examinations. He or she will be systematically confronted with previous statements which are referred to after every question. To each question the witness has to reply yes or no. The content of the question is then transcribed by adding the formula ‘It is incorrect that...’ or ‘I have not stated that...’ when the reply is negative, and ‘It is correct /p.20/ that...’ when it is affirmative. In the negative, the English transcription is followed by the sentence ‘Confronted with portion [reference to the paragraphs] of the statement ...in which it is so recorded.’ Long paragraphs from the police report may then be referred to in court records, suggesting that witnesses have changed their initial testimony and are thus lying before the court.

The *pradhan*, who was initially called to the bar as a prosecution witness, was thus declared ‘hostile’, since her testimony was now on the side of the defence. The judge dictated in her name: ‘I have not stated to the police that rope, shawl and sickle were sealed by the police in separate parcels in my presence (confronted with portion A to A of mark A where it is so recorded).’ This enabled him to suggest, behind the ‘official’ evidence provided by the witness, an alternate truth as a subtext. The judge then showed the *pradhan* the deposition which she had signed: ‘Look here, and then read that over there, at the beginning of the paper. When you signed here, it was all already written there. It is written in Hindi. Read! You are able to read Hindi, aren’t you?’ But the *pradhan* calmly replied, ‘It was not written there when

I signed.’ With this she was accusing the police of having added information (the presence of the rope) which was not there in the original document. The judge told her:

Judge: Look, *Pradhan ji*, they [Guddu Ram and his family] voted for you [in the village elections] and in order to save him [Guddu] you are telling a lie.

*Pradhan*: No Sir, they did not back me and I am not telling a lie.

This exchange was transcribed as follows: ‘It is incorrect that I am suppressing the truth because the accused backed me at the election of *pradhan*’. While the standardized formula ‘it is incorrect that...’ allowed the very contrary of what was being denied to be affirmed, the sentence also pointed to the most logical reason for a *pradhan* to obstruct the prosecution (though neither the judge nor the prosecutor had any evidence to prove this). Reference to electoral issues is a typical way of concluding a hearing with a village president. In fact, the judge and the prosecutor often think that, besides winning the votes of the accused, the village president may have received money from them. Yet, the ‘electoral reason’ is a conventional form of recording the fact that a village president has turned hostile.

The final decision (an acquittal) was the logical outcome of the legal version based on the oral testimony of the witnesses: all of them, except the uncle of the victim who partially maintained a watered version of his testimony, retracted at the bar. This version was known to the judge and to all the protagonists to be factually inaccurate. Indeed, generally speaking, the truth that such judicial techniques establish may contradict the personal opinion of a judge, who may think an accused guilty and nevertheless, being strictly bound by the rules of evidence required by the law, acquit him. It is therefore necessary to nuance statements such as ‘veridiction cannot be dissociated /p.21/ from credibility’ (Leclerc, 2001: 213). Nobody, in the Guddu Ram case, believed that it was an accident. The judgement, enunciated by an authority (Cotterrell, 1998) and respecting the prescribed rules of procedure, was simply a performative pronouncement establishing, by the very act of being pronounced, a new truth — a legal, procedural one — which in turn could be challenged before a court (Garapon, 2001: 148; Ho, 2008: 14).

In the present case, the fact that it was impossible to legally establish that Kaushlya Devi’s death was a consequence of harassment along with the systematic denial by witnesses of their initial testimony led to building a kind of ‘legal fiction’ (Demos, 1923; Beidelman, 1961; Campbell, 1983). At the same time, through a series of negations, the judge managed to provide a subtext contradicting this version which pointed to a case of suicide, not an accident, and to an out-of-court arrangement between the parties. The defence lawyer, during an out-of-court conversation, admitted that it was indeed a case of suicide, and that Kaushlya Devi’s husband had been beating her, but gave as the cause an estrangement between husband and wife due to her alleged misconduct (it was not a dowry issue). The lawyer confirmed that a meeting of the families involved had taken place in the village. The risk of the accused spending ten years in jail, leaving his children on their own, had eventually convinced everybody that a conviction had to be avoided — from this perspective, the judicial truth that the court had arrived at was also a ‘social truth’ (Just, 1986): it resulted from the application of villagers’ standards while, at the same time, it was formally in keeping with the rules of state justice (Bilmes, 1976; on distinguishing norms and rules, see Greenhouse, 1982). However, it should be noted that if the judicial truth eventually corresponded to a ‘social truth’, it was in this case mainly by shunning any reference to the social context: there was no attempt to understand why Kaushlya had decided to end her life, the issue being whether her death could be attributed to her husband’s alleged ‘cruelty’ according to a legal definition; the details of a large number of important interactions during the trial, which may have helped to understand the out-of-court situation, were not transcribed in the court documents either. We have seen, for example, how the words of the girl’s mother, ‘The children are young. They

have to be looked after' were not taken as evidence and were never evoked during the arguments or in the final order.

The process of entextualization in this case was particularly relevant with regards adjusting legal rules to a 'social truth', an observation that has been made by scholars in other contexts — for instance by Stiles (2009) in her ethnography on Islamic courts in Zanzibar; the author refers to the work of the historian Leslie Peirce who noted that the different ways in which the litigant's testimony was recorded in documents in sixteenth-century Ottoman Islamic courts was to be interpreted both as a consequence of restrictions on procedures and as a way of preserving the community's interests.

The judiciary procedure is thus part of social dynamics at local level, and is seen as such by the protagonists. While, in some cases, law may be strategically used (or said to be used) by people to exercise their power, in other /p.22/ cases territorial or kinship allegiances and/or economic negotiations lead to private forms of conciliation or compromise which impact the judicial process. The analysis of how judicial truth is built in criminal cases has to include these social, economic and political components.

### **Crime, truth, intentionality and evidence**

An out-of-court compromise may be tacitly accepted by the court, as in the previous case. It may even be explicitly requested by the judge, somewhat questioning the criminal nature of the case. For instance, in a false rape case that Pratiksha Baxi (2015) studied and which had been filed by the parents of a girl who opposed her marriage with the accused (whom they considered to be of lower caste status), a compromise between the accused and the plaintiffs was encouraged by the judge as he was aware of the non-criminal nature of the case. The couple eventually married and had a child, but the trial for rape nevertheless had to take place as rape is a non-compoundable offence. The prosecutor and the judge had to act out a form of fiction, discussing the truth or untruth of the alleged 'rape' but using provisions of the law to acquit the accused.

As a matter of fact, in everyday practice, legal proceedings diverge markedly from their ideal representations:

They reflect local culture in the form, for example, of customary dispute settlement procedures being conducted in parallel to the formal legal proceedings, through caste councils or by quasi-religious means. Perhaps even more importantly, they are shaped by local and supra-local structures and inequalities of power that help explain, among other things, the ubiquitous influence of processes of extra-legal mediation and negotiation out with the court itself, and the startling propensity of key witnesses to change their earlier stories when actually called to testify in court. (Good, 2015: xvii)

A common discourse held in court milieus is that the statement given to the police is not usually signed by the witness and therefore has no legal value: from a legal standpoint, it could just as well be fabricated by the police. Indeed, invoking a false case is a regular defence strategy used by lawyers. It is also an allegation frequently made by castes at all levels about cases involving the (Prevention of) Atrocity Act, which criminalizes discrimination against ex-untouchables (also called Scheduled Castes, Harijans, or Dalits). For instance, upper-caste court milieus tend to see this Act as being misused by Dalits for exerting pressure on a member of an upper caste by filing a false case against him. As a Brahmin lawyer working in Bihar explained to N. Jaoul:

'Police officers don't have [the] courage to just negate lodging an FIR, even when they know that the information given to them is false. But /p.23/ since they apprehend that they may put

into trouble, they don't carry out the independent investigation. It is a very mechanical investigation; they never bother to discover the truth. Police fear that if they make a final report [i.e. refuse to write the FIR], the SC [Dalit] people will approach some leaders. Therefore, the charge sheet is produced by the police under pressure to avoid trouble.' (Jaoul, 2015: 195)

The overall picture may be more complex. Some lawyers have underlined that this misuse of the law by Dalits would not be possible without support from dominant castes: Dalits would not be in a position to face the consequences of enmity with dominant castes in their villages. So, when there was a case of Dalits misusing the laws, this might have been instigated by members of upper castes who enlisted the help of their Dalit labourers in order to harass their own upper-caste enemies. In this general climate of mistrust, the lawyers with whom Jaoul worked were keen to stress the alleged corruption of judges themselves.

One upper-caste lawyer pretended that, in the past, lawyers would mediate bribery between the accused and the judge. However, according to him, judges nowadays took the money directly, 'and bargaining takes place also.' [...] A Dalit lawyer estimated that 90 per cent of judges were corrupt, just like the rest of government officials—which facilitated the fact that witnesses turned hostile. According to a prosecutor and several Dalit lawyers, if judges wished, they had the legal means to take action against such hostile witnesses for making false depositions in the first place. But my informants argued that instead of discouraging this practice, the judges preferred to accept bribes and close their eyes. (Jaoul, 2015: 192)

Legal truth in criminal cases in India thus largely depends on out-of-court compromises — some reached on a voluntary basis, others imposed through intimidation — as well as on the degree of competence and integrity within the police and in the judiciary. From this perspective, the legal truth may well follow the blackletter law: out-of-court deals, however, make it look like just one element in the complex relationships between villagers, police staff, and the court milieus.

## **Final remarks**

According to the Bar Council of India, lawyers in the country numbered 1.2 million in 2010, about the same as in the U.S.A. By contrast, however, it has sometimes been suggested that in India comparatively few cases find an out-of-court compromise (Foster, 2007). One may wonder on the contrary if, despite the quantitative success of Indian state justice (the number of cases pending is so high that the system is totally blocked, imposing years of waiting before cases can be tried), having recourse to the courts **/p.24/** may not actually be the initial move by parties before entering into non official forms of arrangement.

In this perspective, the three kinds of discourses evoked in this contribution concerning the relationships between truth and justice offer striking contrasts. They may be found elsewhere. However, the discrepancy between the normative discourse, the pragmatic one, or the accusations levelled against the judicial system, take an acute form here. Since the court appears to be only one instance among others for solving conflicts, the truth that a trial may actually produce often depends on the part played by out-of-court negotiations, whatever the initial motivation of the plaintiffs may have been in approaching the police and state justice. The records of the trial often bear traces of such compromises in the form of a subtext to the legal version, compromises that lead to the expression of an ambiguous judicial truth and which testify to the existence of obstacles, at all levels, that prevent lofty ideals, which are regularly highlighted as giving justice its meaning, from being achieved.

## Notes

1 See for instance the discussions in Dupret (2006), or Ho (2008).

2 On this pragmatic approach to the process of judging, which also compares ritual and legal contexts, see Berti, Good and Tarabout (2015).

3 According to the National Crime Records Bureau, the percentage of conviction in India decreased from 36,4 percent in 2004 to 26 percent in 2007, as a consequence of retractions by witnesses. <http://www.lawyersclubindia.com/articles/A-Critical-Analysis-on-Hostile-Witnesses-6257.asp#.VYPLjuE2V2A> (accessed June 2015).

4 §7, *Jasraj Inder Singh v. Hemraj Multanchand*, 14 February 1977; AIR 1977 SC 1011, (1977) 2 SCC 155, 1977 2 SCR 973.

5 *Ved Parkash Kharbanda vs Vimal Bindal* on 8 March, 2013, Delhi High Court, RFA No.83/2007.

6 *Kusum Sharma vs Mahinder Kumar Sharma* on 14 January, 2015, Delhi High Court, FAO 369/1996.

7 §30, *Union Carbide Corporation vs Union Of India (Uoi) And Ors.*, on 4 May, 1989; I (1990) ACC 214, JT 1989 (2) SC 454, (1989) 3 SCC 38, 1989 3 SCR 128, 1989 (2) UJ 285 SC. The quote is from *A Chronicle of our Own Times, III: the Amethyst Ring* (transl. B. Drillien, 1922).

8 *Maria Margadia Sequeria ... vs Erasmo Jack De Sequeria (D)*, Supreme Court of India on 21 March, 2012. C.A. No. 2968 of 2012.

9 *Committee on Reforms of Criminal Justice System* ('Malimath Committee'), Delhi, Government of India, Ministry of Home Affairs 2003, pp.28-29. 'Satyameya Jayate' comes from an Upanishad's verse and is inscribed on the pediment of some High Courts.

10 *Mohan Singh & Anr vs State Of M.P.*, Supreme Court of India on 28 January, 1999 (p.4).

11 §17, *Ved Parkash*....

12 §68, *Zahira Habibulla H. Sheikh and Anr. Vs. State of Gujarat and Ors.*, Supreme Court of India on 12 April 2004 (AIR2004SC346; 2004(3)BLJR1971; 2004CriLJ2050; (2004)2GLR1078; 2004(4)SCALE375; (2004)4SCC158). The plaintiff was a key witness to a massacre in a bakery where many of her relatives were killed. She retracted her initial testimony at the bar, then later admitted she **/p.25/** had been threatened and coerced. She then changed her version many times and was accused of having received monetary inducements. She was finally tried and sentenced to a one-year term of imprisonment and a fine for contempt of court (<http://infochangeindia.org/human-rights/news/perjury-earns-best-bakerys-key-witness-zaheera-sheikh-jail-term.html>). The judges justified this conviction, which was exceptional in India, by the need to act against hindering the judicial process (*Zahira Habibullah Sheikh & Anr vs State of Gujarat & Ors*, Supreme Court of India on 8 March, 2006 (Appeal (crl.) 446-449 of 2004).

13 For a detailed account of such practices in a recent criminal case, see Sen (2015).

14 *Committee on Reforms of Criminal Justice System*, 2003: 27.

15 There is also a stereotype about gender. Once, a woman *pradhan* (village president) started denying in court what she had said to the police some months before. The judge looked at me and said to me 'Now you can write in your report how women in India tell lies to the court'.

16 One of them is the oath, still a requisite and an important criterion for accepting the testimony of a young child (who should understand ‘the sanctity of the oath’). Conversely, statements made to the police, without taking the oath, are not legally binding. In a narcotics case, for example, the accused initially admitted (in their lawyer’s absence) that there was indeed some cannabis in their house which was seized by the police, but that it was for religious use. During the hearing, at their lawyer’s suggestion, they affirmed that there had never been any cannabis there. Neither the prosecutor nor the judge referred to the initial version of events recorded by the police.

17 The case has been described and analyzed in detail in Berti (2010). The names of the participants in the trial have been modified to protect their anonymity.

18 These two sections are part of the measures taken to prevent so-called ‘dowry deaths’, i.e. deaths of married women who have been harassed by their husbands or in-laws with incessant dowry demands (on dowry provisions, see Menski, 1998 and Palkar, 2003). As a consequence of these measures, whenever a young married woman commits suicide, her husband and in-laws are immediately suspected and, upon the slightest accusation, arrested — this threat of arrest has led to what, on the other hand, has been denounced as the misuse of dowry provisions; see for instance *Indian Dowry Law (209a): Myth vs. Reality. An Investigative Report* (<http://www.498a.org/contents/Publicity/498aBooklet.pdf>). When Kaushlya died in September 2004, Guddu, who was accused by the girl's mother of being responsible for what had happened, was immediately arrested. After three weeks' imprisonment he was bailed out until the start of the trial.

19 Although this procedure of recording slows the pace of the trial, it provides a written transcription of witnesses’ testimonies which will be referred to in the successive phases of the trial. Passages from these transcriptions will be read aloud by the lawyer or prosecutor during the arguments and will be quoted by the judge in his written order. They will also be used much later, when the case is examined at the appeal court many years after the verdict. Here the appeal judge will rely entirely on these transcriptions to evaluate the case.

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