

## Ritual Faults, Sins, and Legal Offences A Discussion about Two Patterns of Justice in Contemporary India

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Legal scholars have shown how the history of contemporary criminal procedures in the West is bound to religious history and in particular to medieval Christianity. They argue, for example, that the jury trial is a consequence of the decline in practices based on God's judgment as revealed through the procedure of the ordeal. Once the judge, and not the deity, had to make the final decision regarding the guilt or innocence of the accused, the jury trial was introduced as a way of sparing the judge the full responsibility of passing judgment and of allowing him to share this responsibility with the jurors.<sup>1</sup> In his work on the theological roots of the criminal trial James Q. Whitman goes even further, arguing that one of the crucial legal rules of contemporary criminal procedure, "reasonable doubt", is to be seen as a vestige of a very widespread pre-modern anxiety about judging and punishing<sup>2</sup>. The author shows how the original function of reasonable doubt was not, as it is today, to protect the accused, but to protect jurors against the potential mortal sin of convicting an innocent defendant. The rule of "reasonable doubt" was, he argues, a "technique of moral comfort", aimed at protecting the judge from damnation.<sup>3</sup>

In India the religious dangers attendant upon judging had been mentioned in Sanskrit texts since the early centuries of the common era. Phyllis Granoff has shown, for example, that while certain texts warned the king that he must punish the guilty lest he take on himself the offender's sin, other texts warned him that in punishing the innocent, he would go to hell<sup>4</sup>.

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Although, as her paper shows, a certain anxiety about judging may be seen in Sanskrit literature, when Western criminal procedures were introduced during the colonial period, they were in no way associated with these medieval religious concerns and were perceived as completely secularized techniques. Some of the practices adopted during colonial times, such

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<sup>1</sup> J. Fitzjames Stephen, *A History of the Criminal Law of England* (London: Routledge, 1996). On this topic see also Robert Jacob, "Le serment des juges," in *Le Serment*, ed. Raymond Verdier (Paris: CNRS, 1991).

<sup>2</sup> James Q. Whitman. *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial*. (Yale: Yale University Press, 2008).

<sup>3</sup> Whitman, *The Origins of Reasonable Doubt*.

<sup>4</sup> Phyllis Granoff, "Justice and Anxiety: False Accusations in Indian Literature", *Rivista di Studi Sudasiatici* (forthcoming).

as the jury trial, were even abolished soon after Independence, and the absence of the jury trial seems not to have generated any particular religious anxiety about the judge's salvation in the next life. The procedure followed in India during a trial thus no longer has any obvious link with Christian or Brahmanical religious concerns, and violations of rules or offences are not sanctioned according to religious precepts but according to sections of the Civil or Penal code.

The secular character of the official courts is often evoked in India in discussions on modernization, globalization and the rule of law.<sup>5</sup> This is particularly true when courts of law are compared to another context of litigation, arbitration, and judgment, which is quite widespread throughout India, especially but not exclusively at rural level, and which is based on the authority of local gods. I refer here to temple consultations where a medium (or oracle), institutionally linked to a village temple and speaking on behalf of the deity, interprets people's problem, arbitrates conflicts and identifies culprits. The outcome of people's wrongdoings is not evaluated here according to legal codes but according to a social, ritual and "moral" order in which the deity intervenes. In the context of these consultations people appear to be responsible for the misfortunes they suffer, which are just as much divine punishment as human errors.

In this chapter I show how, though temple mediums and judges may appear to have nothing in common, they share some similarities: they both arbitrate cases, interpret or establish "facts" and "truth", and they pronounce judgments and verdicts. In one case the arbiter is a god's medium, who speaks on behalf of a village deity; in the other it is a professional judge who speaks on behalf of a State court. Most importantly, from our perspective here, both the mediums and the judges, especially those from Higher courts, make reference to the notion of sin in order to interpret the evidence that has to be judged. In fact, as I demonstrate in the following pages, although Indian courts appear to be secularized contexts /p.155/ of judgment and of decision-making as far as the trial proceedings are concerned, a religious or moral understanding of sin emerges, particularly in judicial rulings.

It is in these rulings that High court and Supreme Court judges have to argue the reasons for their decision to dismiss or allow an appeal. However, contrary to the mediums of the deity, Indian judges are not directly concerned with the idea of divine displeasure (at least this is not considered to be an argument for the court); nor do they expose the alleged wrongdoer to public reproach for his errors in the same way as the mediums do during a temple consultation. And yet there emerges in these well-argued written decisions a clear notion of sin, used by the judge to bestow a moral tone on his argumentation. The notion of sin in these judgments relies on the ancient Sanskrit texts, which are used here alongside codes of law or legal precedents as legitimate sources of the judicial reasoning.

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<sup>5</sup> Marc Galanter, "Hinduism, Secularism, and the Indian Judiciary," *Philosophy East and West* 21, 4 (1971). Symposium on Law and Morality: East and West.

I begin with an examination of the judgment of the village medium, which not unexpectedly is all about “sin” or wrongdoing. This is followed by a discussion of judicial pronouncements, which, surprisingly may also be very much about sin.

### **At the devta's court**

The institution of divine mediumship is quite widespread throughout India and represents an alternative way of dealing with people's problems to what is provided by the *purohit* (the Brahman priest), who can nonetheless be consulted simultaneously.<sup>6</sup> Unlike the *purohit*, who treats his client's problem by relying on astrological calculations and sophisticated ritual procedures, the temple's medium allows people to question the deities directly, and personally to dialogue with them.

In the region of Himachal Pradesh, in Northern India, divine mediumship is highly institutionalized. Each main village deity has his official medium, who is ritually selected from among members of various castes. Village deities are considered to rule over specified territories, the largest of which includes the territories of subordinate gods. Those who live within a deity's jurisdiction feel themselves bound to the deity not only as a devotee to a god, but also as a tenant to a landlord. In fact, village deities hold properties and land rights, which may be used by villagers /p.156/ in exchange for rent payable to the temple, or for a service to the temple (officiating as a priest, serving as a medium or temple musician).

Post-Independence land reforms have caused a considerable drop in wealth for these landowning deities. Nonetheless, village deities still exercise their influence over their former territories, within which they are supposed to grant happiness or misfortune, depending on the behaviour of their subjects. In the event of misfortune or natural disaster, people consult their village deity to find out the reason for what has gone wrong and to seek a remedy. A temple consultation then takes place, in the form of a *darbār* or royal audience, where the king listens to his subject's complaints.<sup>7</sup> The medium often talks during the consultation, speaking out as if he were the deity: “You have come to my court”, or “I am the Delhi Emperor”, or else “The court is mine, justice is mine.” What the deity says during the consultation is considered to be a final ruling. The deity may be strongly critical of his subjects' behaviour. The villagers are judged responsible for the misfortunes that befall them, including “natural “ disasters such as drought, floods or poor crop yields, all of which are regarded as divine punishment for human errors. Human errors may be ritual mistakes, a lack of devotion, any form of misconduct, and violation of established rules. Unlike *purohit* consultations, which are usually held privately and which do not subject the client to public scrutiny of his behavior, the deity's medium is consulted at the village temple and may publically denounce the wrongdoing not only of a single person but of the entire community as well.

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<sup>6</sup> Jackie Assayag and Gilles Tarabout, *La Possession en Asie du Sud : parole, corps, territoire*. (Paris: EHESS, 1999).

<sup>7</sup> Daniela Berti, “Gestes, paroles et combats. Pluralité rituelle et modalité d'action en Himalaya indien, « Annales de la Fondation Fyssen 16 (2001) :29.

I will now go into further details of consultations with deities in order to show how sin or errors are defined within this ritual context. The data analyzed here were collected during my fieldwork in 1995 in Kullu district in Himachal Pradesh. They are mostly taken from the medium at the temple of the goddess Śravanī, who is a member of a low caste quite well known in the region as the medium of a powerful goddess. What follows is a passage from the *bhartha* (goddess's story) recited by the medium in the first person as if the deity, immediately after having ritually received the goddess within himself.<sup>8</sup> The deity's presence or influence (*prabhāv*) over the medium is visible through a slight trembling of his legs and arms which may vary in intensity throughout the seance. What the medium /p.157/ says when in this state is considered by villagers to be the deity's actual words.<sup>9</sup>

At the beginning of the consultation, the goddess talks of today's degenerate times by using the concepts of *kaliyuga*, the degenerate age and *satyuga*, the bygone golden age.<sup>10</sup> Reference is made here to the social order and to some collective, general form of misbehavior. At this initial stage of the consultation both the goddess's sentences and the people's replies are very formal and strictly regulated.<sup>11</sup>

Goddess: Oh my subjects! These are the words of the *sat yuga*. I destroyed a basket of incense, just as I destroyed a basket of *jaṛībūṭi* (medicinal plants). For eight days I made rain, for eight days I made the sky blue. I made the dry ground green. You had the truth, I had the power.

Public: Oh Mahārājā! You have the same power even today.

Goddess: In *satyuga* times, one person spoke, and ten listened. I spoke forth and people gathered like bees. Today these are *kal yuga* times. You have lost the truth, we have lost power! Things that shouldn't have happened have happened. Brides have become co-brides. Sons and father quarrel with each other. Two women work together but they think bad of one another.

Public: Yes, this is happening today.

Goddess: The mud of the mountains has moved to the plains, the mud of the plains has moved to the mountains. The shepherd himself tells lies. Crows and roosters fight each other and the cow eats dirt. There are no longer any gods, nor any dharma. At the place where Aṭhāra Karḍū (name of a group of local gods) live, those who sat outside have come inside and those who sat inside have gone outside. The son has given up

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<sup>8</sup> Daniela Berti, *La Parole des dieux. Rituels de possession en Himalaya Indien* (Paris :CNRS Editions,2001)

<sup>9</sup> I have thus chosen here to speak of "goddess" instead of "medium" in order to reproduce the local perception, though in some cases the medium may be accused by villagers of speaking on his own.

<sup>10</sup> These concepts are commonly used in other rural areas of India by members of different castes. Ann Grodzins Gold, "Spirit Possession Perceived and Performed in Rural Rajasthan," *Contributions to Indian Sociology* 22 (1988) 41.

<sup>11</sup> For the same village deity the *bhartha* does not change from one consultation to another. By contrast each village deity has his or her own *bhartha* and a specific way to tell it during the ritual.

his father's work and has many problems to face. There has been a lot of misfortune and problems. Will I be able to put an end to it or not?

Attendants: Why should you not be able to put an end to it, Mahārājā?

Goddess: Go then! I will put your mind at rest. You will hear [about misfortune] but you will not see [it]. I will wash the black and spread the salutary red. If I give you good news, acknowledge me! Otherwise no! Why did you call me?

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This is a rather general, codified, anonymous way of speaking about the lack of good behavior; although there is the idea that people today are doing wrong, the deity is not addressing anyone in particular and the wrongdoings referred to are rather vague. The focus here is on the fact that the goddess's special power to regulate the weather and to protect villagers from misfortunes has been weakened due to people's misbehaviour. People's misconduct is also presented by the deity as a violation of *sat yuga* rules: the practice of polygamy; the reciprocal negative influence people from the plains have on people from the mountains; the loss of innocence attributed to the shepherd; quarrelling between those who used to ignore each other ("crows and roosters") in the past; people's negligence in failing to keep cows pure; disrespect for caste rules ("those who sat outside have come inside...") and a lack of respect regarding the handing down of inherited jobs through the generations. These changes are presented as being the cause of people's misfortunes and diseases.

After portraying this degradation, the *bhartha* ends on a reassuring note: people will hear about misfortune and disease but they will not be affected by it directly. Then, when the consultation proper starts, the definition of wrongdoing is adapted to the particular case of the person consulting. At the beginning this may be done by using formulas which evoke the problem in an indirect way. For example, if the medium, on behalf of the deity, wants to say that the cause of the problem is due to a dispute over money, he says: "Greed [will come] from greed and the end of the world [will come] from sin". Or if he wants to say that the person does not respect the traditions he says: "No rules, no fathers, no gods!"

Some of these formulas are alliterations such as "*pāp pāp dharma dharma sāc sāc jhūṭha jhūṭha*" - "sin [comes] from sin, dharma from dharma, truth from truth, impurity from impurity". These formulas are sometimes used as a hypothetical interpretation proposed by the deity in order to test the reaction of the person. They are part of the consultation technique. For example, the deity may say "you did something wrong" (*galat kām*), without saying what the person had done actually wrong and then wait for the person to react. After some interactions and using certain divination techniques, the deity may start to discuss the problem further.

A temple consultation may last between five and thirty minutes, but it may even be longer if many people are involved in the case. On occasion, a consultation that starts with the deity merely being asked to send down or to stop the rain, ends with the goddess/medium going over the various misdoings committed by people in her area. This happened, for example, in Shuru village where, during a period of drought, villagers /p.159/ consulted the goddess to ask for rain. The goddess promised to send down rain over the next few days, but only on

condition that the men of eight neighboring villages, who had been arguing for a year, agreed to meet at her temple and reach a compromise. During the various consultations on the same issue subsequent to this demand, the goddess also accused some village women of having made the temple impure by entering it during their menses, and therefore she ordered a purification ritual to be performed. She also demanded that work be stopped on a building that some villagers had started, as it was on a site that was considered to be used by her brother's neighboring god, Takṣak Nāg, for meditation. All these facts, which were perceived by people as unrelated to each other, were presented by the goddess as multiple causes of the same problem: the lack of rain.

During the consultation the words *pāp* or *galat kām* are alternatively used by the medium to define the wrongdoings committed by a person, by a group of people or even to talk more generally about mankind's degeneracy. A concept close to that of *pāp* is *doṣ*, which indicates both the fault committed by the person and the punishment by a deity for this action.<sup>12</sup> *Doṣ* in the sense of punishment may also be considered to come from a *bhūt* (ghost or mischievous power) sent by a sorcerer or a witch to attack an enemy. In these usages the notion of *doṣ* does not include a moral dimension. It is also in the sense of punishment that the term is also used to indicate the effect of a ritual performed by a *ṭāṇagī* (tantrik specialist, here a sorcerer) to affect someone. This is defined as a *ṭāṇagī kā doṣ* instead of a *devtā kā doṣ*. The expression *ṭāṇagī kā doṣ* is used to underline its opposition with the deity's punishment, particularly in the context of a temple consultation. For example, the deity may say: 'Let's see if it is my *doṣ* or if it is the *doṣ* of a *ṭāṇagī*. In this sense, the term can be assimilated to that of *vighna*, an obstacle, a sign that there is something wrong.

The action that provoked the *doṣ* may have been done by the person without their realizing it, or even by one of his ancestors. This was the case, for example, of a family whose members were the traditional goldsmiths of the goddess Gāyitrī in Jagatsūkh village. /p.160/ A member of this family had health problems and went to consult the goddess Śravaṇī, whose temple is close to Gāyitrī's. The goddess Śravaṇī told them that there was an object in their house that they had taken from the goddess Gāyitrī and had not given back. They had to find this object, give it back to the goddess and make ritual reparation in order to eliminate her *doṣ*. What follows are some passages from the consultation by the goddess Śravaṇī at the family's house.

Goddess, to the family members: Come on then quickly. Take this object out of the house! [addressing a woman in the family] Oh woman! This object comes neither from a *ceṭu* nor from a *bhūt*.<sup>13</sup> It's an object and it belongs to the goddess Gāyitrī.

A family member: Oh! Then we have to give it back immediately!

Goddess: Who did work for goddess Gāyitrī in the past? It is like this! It is a pot for cooking rice. You exchanged it!

<sup>12</sup> See also Tarabout in this volume.

<sup>13</sup> *Ceṭu* and *bhūt* are sometimes synonymous, but the term *ceṭu* refers more particularly to a *bhūt* sent by a witch. Berti, 2001.

Woman: Eh!...what is that? How could we know that?

Goddess: It's like this! When you repaired some of Gāyitrī's utensils you exchanged this pot for one of your own and you inherited it.

Woman: How could we know this Mahārājā?

Man: Only our ancestors can know this.

Goddess: Three generations have passed!

Woman: So then! Don't punish us!

Goddess: This object has come from sharing [the heritage]

Woman: I don't remember! But I'm ready to give it back this very day!

Goddess: You have to give it back. I'm telling you.

In other cases, the cause of the deity's *doṣ* may be the violation of the rules of purity, or negligence vis-à-vis the goddess. The *doṣ* may be seen as the cause of physical disease or obstacles ,conflicts, failures , but also of weather conditions such as drought or excessive rain. If the error has been made by several community members, the punishment may take the form of a drought or a flood. In order to eliminate a *doṣ*, the ritual requested by the deity may be either a *yāg* or sacrifice performed by a *purohit* or a *chidra* (ritual of "cutting") performed by the medium. A *chidra* includes the sacrifice of an animal (usually a lamb) whose leg is tied to a thin ritual cord the ends of which are held by the parties involved in the *doṣ*.

The deity's medium performs the operations for the *chidra* without entering a state of possession. Once the preparation is over, he has to pronounce various sentences which announce the end of the problem in question. After each sentence all the participants in the ritual have to repeat together "*chidra*" and throw some grains of barleycorn and oats onto the animal's leg. After the final sentence the cord is cut by the medium which indicates the end of the *doṣ* brought about by the goddess. /p.161/ The *chidra* is also performed in cases where the deity's *doṣ* is caused by a family or village dispute. In this case, the two parties must be reconciled by performing a *chidra* together with the deity. Reaching a compromise through a *chidra* is much more compulsory than finding a compromise through the village assembly (*pañcāyat*). What needs to be solved through the *chidra* is in fact not only the dispute but also the consequence of the deity's *doṣ*, which otherwise would continue to affect the parties. Though the parties may be forced by the deity to reconcile, the ritual cutting of the cord does not entail any moral obligation for them, the aim of the *chidra* being more to remove the obstacle (*vighna*) provoked by the deity's *doṣ* (punishment).

This system of divine justice and its underlying values are sometimes at odds with the judiciary system located in town. Courts are in fact another context where villagers (the same villagers as those who consult the deities) are called upon from time to time and where facts and acts are again judged and punished.

Mediums themselves, speaking on behalf of the deity, sometimes refer to courts of law at the time of consultations, especially when those consulting the deity are involved in an ongoing court case<sup>14</sup>. They may sometimes even enter a form of competition with the court. For example, in 1995 in the village of Shuru, the temple administrator was accused of having misused the temple money. During a period of drought villagers asked the goddess Śravaṇī to send them rain. The goddess started by saying that she could see a lot of sin, and in the end she announced angrily that she would indeed have sent them rain if they had reached a compromise with the temple administrator. /p. 162/ This is what she said:

Goddess: You have courts [courts of law] but my decision will be taken here [at the temple]. Reach a compromise with the administrator and your prestige will be my prestige. I have the rain and I will give it to you!

Villagers: Oh Mahārājā! The reply isn't here, it's in court! The case is still ongoing.

Goddess, in a provocative way: All right! The rain is also in court then! Go and look for the rain in court!

While the villagers were trying to separate a conflict issue (in this case a civil suit) from what they perceived as a deity issue (control over the rain), the goddess presented the problems as being related to each other. By tracing the cause of people's problems to their social or family conflicts, which is the preferred technique used by mediums to arbitrate these conflicts, they prompt the parties to reach a compromise. In fact, as we have seen, a compromise between the parties is presented by the deity as a way for the wrongdoer to avoid god's punishment. Village gods present themselves as "the gods of all compromises" and during a consultation they repeatedly say to people "You did wrong! Make a compromise!"

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<sup>14</sup> The existence of different institutions of judging is attested also in ancient times. Indeed, in Indian legal history practices related to a god's judgment such as ordeals, are often found integrated in or articulated to more secular judicial proceedings. Sanskrit texts describe how the king, though being at the head of the judiciary, was assisted or replaced by a judicial assembly composed of Brahmans and some assessors. They had to decide about the guilt or innocence of the accused by making recourse either to witnesses and written documents or, in case where human evidence failed to lead to a clear decision, to different kinds of ordeals. (Sukla Das, *Crime and Punishment in Ancient India* (New Delhi: Abhinav Publications, 1977), 93-127. In these texts crimes and ritual transgressions were overlapping and a penal sentence did not exclude a ritual expiation. (Louis Renou, *L'Inde fondamentale* (Paris: Hermann, 1978). Ethnographic researches have shown how ordeals and other institutions of god's mediation continued to coexist at a local level parallel to and sometimes in collaboration with more secular institutions such as an elected village council (*pañcāyat*) or informal assemblies formed by members of the dominant lineage, who are also linked with the main village temple. See Jean-Claude Galey, "Souveraineté et justice dans le Haut-Gange. La fonction royale au-delà des écoles juridiques et du droit coutumier," in *Différences, valeurs et hiérarchies. Textes offerts à Louis Dumont*, ed. Jean-Claude Galey (Paris: EHESS, 1994) and Berti Daniela, *La parole des dieux*.



This valorization of compromise encouraged by mediums at temple consultations may sometimes clash with the way a case is judged in a court of law when the same case is also registered at the district court. Nonetheless, a compromise solution may not be a problem for the court in civil matters. In fact, even at the court level, seeking a compromise between the parties may be welcomed by the judge. But in the case of criminal offences a compromise is less likely to be accepted by the court. In fact, many criminal offences are "non-compoundable", which means that they cannot be compromised by the parties in an out-of-court negotiation. Criminal offences in such cases are considered offences against the law and require State action. The defendant has to be tried in court and will be acquitted or convicted on the basis of the rules of evidence alone.

### Courts of law, Sin, and Sanskrit Texts

Contrary to temple consultations where wrongdoings are defined by the deity by referring to a disruption both of the religious and social order, in courts of law the definition of offences merely relies on sections of legal codes without explicitly involving any religious dimension. /163/ Moreover, though witnesses may be asked by the judge to speak the truth in the name of dharma or in the name of god, the trial proceedings do not especially aim to lay moral blame on the accused. As in other common law countries, Indian courts focus on facts and contradictions without being very concerned, at least in principle, with morally judging the person. This is different, for example, from what happens in French criminal procedure where the defendant's *rapport de personnalité* - i.e. the defendant's personal story, his family life, his general character - becomes an important part of the file prepared by the investigative judge and on which both the defendant and the psychologist are asked to express their opinion during the trial. More particularly, the prosecutor's "*plaidoirie*" may be very stinging for the defendant since, as the French say regarding legal matters, what is judged in France is "the man, not the facts".<sup>15</sup> Indian trials are also different from what Yanrong Chang<sup>16</sup> writes about Chinese criminal courts where, as the author notes, the main aim of the prosecutor's questioning is to invoke Chinese cultural notions of shame and morality, which are used to extract a confession and remorse from defendants. Nothing of this kind happens in an Indian court, where both the prosecutor and the defense lawyer base their "arguments" (the equivalent of the "*plaidoirie*" in civil law countries) only on legal reasoning and on rules of non-contradiction.

Another reason that the court in India does not appear as place for passing moral judgment is that in most criminal cases before the trial is even held (often a long time before), the parties have already reached a compromise at the village or family level. A consequence of this

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<sup>15</sup>Bron McKillop, "Anatomy of a French Murder Case," *The American Journal of Comparative Law* (45, 3, 1997): 579.

<sup>16</sup>Yanrong Chang, "Courtroom questioning as a culturally situated persuasive genre of talk," *Discourse & Society* 15, 6 (2004): 710.

"culture of compromise" as Pratiksha Baxi<sup>17</sup> calls it, criminal cases in India are most often hindered from the very beginning by the fact that all the witnesses who, having told the police during the investigation that the man or woman had done something wrong, subsequently deny all their previous statements before the court. They are all declared "hostile witnesses" by the prosecutor, and the accused then insists that he or she is completely /p.164/ innocent and that the case is a false case, which has been totally fabricated either by the police or by their enemies.<sup>18</sup>

With the defense insisting on the false nature of the case and the prosecutor having no more witnesses to support the accusations, there is no room for blaming the defendants during trial interactions. In fact, throughout the trial the defendant is never addressed and has no right to speak. He is asked to stand at the back of the courtroom with nobody looking at him. Even at the end of recording the evidence, when, under section 313 he is given the right to personally explain to the judge "any circumstances appearing in the evidence against him" (the so-called "statement of the accused"), the interactions are very formalized and there is no real space for a moral reprimand. The questions that the judge asks the accused are prepared in advance and to each of questions the accused systematically replies, "it is incorrect" or "it is not true". When a case proves to be a very weak case for the prosecutor, the statement of the accused may even be directly recorded in English by the typist under supervision of the prosecutor and the defense lawyer, without the defendant even being asked any of these questions in Hindi.

No reference to sin, repentance or moral conduct is therefore made in the courtroom. At the end of the trial the crime with which the accused is charged will be judged through a 15-20 page report written in English, hence on most occasions, completely incomprehensible to the accused. The text of the judgment is passed to the defense lawyer in the courtroom, sometimes with no additional comment or with the judge merely pronouncing the word "convicted" or "acquitted". Even the text of judgments at trial court level do not take into account any moral or religious considerations. The judge is mainly concerned with providing the different versions of facts that have emerged during the hearings and with finding out errors in investigations or witnesses' contradictions.

At this level court proceedings appear indeed to be secularized. It is therefore surprising that references to religious or moral notions are quite often used in the rulings that the High Court and Supreme Court judges write (all in English) at the end of an appeal, when they have to argue their final decision. Here High Court and Supreme Court judges are very much concerned with the notion of sin, both in a moral sense and in a more /p. 165/ specifically religious sense, since they refer for this discussion to the *śāstras* and other Sanskrit texts.

The judicial use of Sanskrit texts has already been discussed by Christopher Fuller<sup>19</sup> in relation to some Indian Supreme court judgments regarding religious issues such as temple endowments, the appointment of temple priests, or temple entry rights, especially in Tamil

<sup>17</sup>Pratiksha Baxi, "Justice is a secret: *Compromise* in rape trials," *Contributions to Indian Sociology* October 44 (2010): 208.

<sup>18</sup>Daniela Berti, "Hostile witnesses, judicial interactions and out-of-court narratives in a north Indian district court," *Contributions to Indian Sociology* 44, 3 (2010).

<sup>19</sup>Christopher Fuller, "Hinduism and Scriptural Authority in Modern Indian Law," *Comparative Studies in Society and History* 30, 2 (1988). See also Ronojoy Sen, *Articles of Faith. Religion, Secularism, and the Indian Supreme Court* (New Delhi: OUP, 2010).

Nadu. The author shows how Sanskrit texts such as the *Āgama* are not only treated as sources of law by the courts but also, in many cases, are reinterpreted by the judges in order to make them congruent with modern values and constitutional principles, a practice regularly adopted in India, both by commentaries and by reformists with the aim of "recovering" the original truths lost by subsequent misinterpretations.<sup>20</sup>

Reference to Sanskrit religious texts is made by judges not only in cases related to religious institutions or temple practices. Religious text may also be cited in cases concerning criminal offences or family law. Examples will be given below. Although it is difficult to compare criminal and civil cases, my intent here is only to examine how judges make use of religious or moral notions of sin in their judicial reasoning.

In a judgment at a Bombay High court in 1986, the judge had to decide a case related to an attempted suicide under section 309 of the Indian Penal Code, where the act is punishable by up to one year imprisonment. After presenting the various points of view regarding suicide in different religions such as Buddhism or Jainism, the judge moved on to the *Dharmaśāstras*, noting that they condemn suicide or attempted suicide as a great sin, "whoever kills himself becomes *abhisasta* and his '*sapindas*' (consanguine) must not perform any death rites for him".<sup>21</sup>

We may note however, that the way judges refer to these Sanskrit texts in order to define what is sinful and what is not has changed over time. This is the result of the amendment of old laws and the passage of new laws, making more complicated the recourse to Sanskrit texts. For example, after the enactment of various sections regarding the dowry issue, such as section 306, abetment to suicide, or 498a "subject women to cruelty" (the so-called "dowry death"),<sup>22</sup> judges are now confronted with cases where the woman who commits suicide is considered as a victim of the husband's maltreatment or of harassment by her in-laws. /p.166/ Now judges do not actually judge the act of suicide, especially in cases of women committing suicide. Instead, they try to find out whether the reason that pushed the woman to commit suicide was harassment by her husband or her in-laws. Therefore, a case will be registered against the husband or the in-laws, not against the woman. There may be judges who still refer in such cases to the notion of sin, though in a different way. We find, for example, in the High Court of Punjab and Haryana, in 2000, a judge who writes that "it is not a sin on the part of the wife to file a complaint under Sections 406/498-A IPC... when she has been neglected and maltreated by her husband and his other family members".<sup>23</sup>

A comparison can be made between the judgment mentioned above, which was passed after these post-dowry prohibition acts, and a judgment passed by the High Court of Madras in 1940, therefore prior to the amendment to the first Dowry Prohibition Act of 1961. The

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<sup>20</sup> Christopher Fuller, *Hinduism and Scriptural Authority*, 240.

<sup>21</sup> *Maruti Shripati Dubal vs State Of Maharashtra*, Bombay High Court, 25 September 1986.

<sup>22</sup> These two sections are part of the measures taken in India to prevent so-called 'dowry deaths', i.e. deaths of married women who have been harassed by their husbands or in-laws by incessant demands for dowry. 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, taken into custody.<sup>22</sup>

<sup>23</sup> *Harpal Kaur Vs. Balbir Singh*, High Court of Punjab and Haryana, 23 April 2001

judge had to decide whether the jewels of a woman who had died without leaving any children were to be inherited by her father or by her husband (in this case, a civil suit). The judge wrote that this depended on whether the marriage had been contracted according to the "asura form" (where the bride's parents receive something from the groom's parents, which is considered "sinful") or to the "Brahma" form (where the bride's parents give a dowry to the groom's parents and which is prescribed). Then he moved on by quoting the Dharmaśāstra and concluding that Manu, verse 54, "indicates that the acceptance of a dowry from the bridegroom does not turn the marriage into a sale. ... It is only honoring (*arhanam*) the bride and is totally free from sin".<sup>24</sup>

Another issue where judges may refer to a scriptural definition of sin concerns caste discrimination and the rules of purity/impurity as regulating caste and ritual relationships. This discrimination is now criminalized under the Scheduled Caste Prevention of Atrocity Act of 1989, but prior to this act it was taken as legitimate by judges on the grounds of Sanskrit texts. /p.167/ Here is an example of a judgment written in 1912 at the Bombay High Court where the judge had to decide whether a man from the Śūdra caste who had married a Brahmin widow and with whom he had many children, had the obligation to maintain his wife financially after having thrown her out of his house. The judge referred to different Sanskrit texts (especially the Manusmṛti, the Mitākṣarā, the Yājñyavalkya Smṛti) to argue that since the marriage was between a Brahmin widow and a śūdra man, the marriage had to be considered illegal and void according to Hindu Law. The judge referred to a text cited by Madhvācārya in his commentary on the Parāśara Smṛti which, as he notes in his judgment, is regarded by Hindus as an authority of special force in these degenerate times called *kaliyuga*. He wrote the following passage, where he also evokes the notion of *kaliyuga*:

"Further, Yajnyavalkya says that a son begotten by a Shudra with a Brahmin woman becomes a Chandala, the most degraded of human beings, and therefore "outcaste to all religions." That is to say, he regards the progeny as something worse than illegitimate; and that can only be because they are the offspring of a relation which is sinful".<sup>25</sup>

The idea of a degradation of the present times, which has also been noted in the context of temple consultations, is expressed by the Supreme Court of India in the following judgment decided on 2008, with regards to the case of a man who was accused of having raped his daughter:

The father is supposed to protect the dignity and honour of his daughter. ...If the protector becomes the violator, ...the sanctity of the father and daughter relationship becomes polluted. It becomes an unpardonable act. It is not only a loathsome sin, but also abhorrent. The case at hand is a sad reflection on present-day society

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<sup>24</sup> V.S. Velayutha Pandaram vs S. Suryamurthi Pillai, High Court of Madras, 6 December 1940.

<sup>25</sup> Bai Kashi vs Jamnadas Mansukh Raichand, Bombay High Court, 5 March 1912.

where a most platonic relationship has been soiled by the perverted and degrading act of the father.<sup>26</sup>

The importance that a religious notion of a sinful relationship assumes for judiciary decisions may be noted not only in cases related to Hindu personal law but also in cases related to Muslim Personal Law, as the following passage from a High Court of Allahabad shows:

Under this mode of Talaq, the husband utters divorce thrice and the moment the Talaq is pronounced a third time during one Tuhr or one sitting the /p. 168/ divorce becomes irrevocable and thereafter husband and wife cease to be husband and wife. Any marital relationship or marital cohabitation between the two, after the Talaq had become irrevocable, is illegal and sinful.<sup>27</sup>

The references made by judges to Sanskrit or Islamic texts in cases concerning marriage, inheritance or charitable endowments are the consequence of the existence in India of different codes concerning personal law according to religion. Even before the modern legislation, the attitude followed both by the Mughals and the British in India was to consider local practices as legally valid in civil cases. However, as we have seen, religious notions are also used by judges in criminal cases, and sometimes sin is used as a synonym for crime or offence. Thus in an appeal for a case of rape filed at the Kerala High Court the judge wrote that "rape and murder are undoubtedly brutal and diabolic sins constituting the worst forms of criminal incursions on the human body".<sup>28</sup>

Similarly, in a murder case for which an appeal was filed at the Orissa High Court, the judge wrote that "on a careful consideration of the facts and circumstances of the case and also considering the evidence from all angles, we find that the prosecution has signally failed to prove motive or mens rea against the appellant for committing the sinful act of murdering his own daughter". In another case of murder, in Uttar Pradesh, where the accused demanded a reduction of the punishment with the argument of being of unsound mind the judge wrote that Kulwinder Singh (the accused) "had put us in a piquant dilemma on the quantum of punishment especially when the sin protruding out of the crime for which he has been found guilty, protests against any mercy".<sup>29</sup>

Sometimes, the quotation of a Sanskrit text is not taken by judges directly from the original source but, like precedents, from a previous judgment which may concern a completely different case. In an appeal filed in the High Court of Gujarat on a case of food adulteration by a Company of sweet production under the Prevention of Food Adulteration Act, the judge referred to a Supreme Court judgment concerning a well-famous case related to Hindu-Muslim riots, where the judge quoted a Sanskrit passage in order to underline the errors committed by the prosecutor, for example, for not cross-examining an important witness who

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<sup>26</sup> *Siriya @ Shri Lal Vs. State of Madhya Pradesh*, 13 March 2008.

<sup>27</sup> *Rahmat Ullah And Khatoon Nisa vs State Of Uttar Pradesh And Ors.* High Court of Allahabad (Lucknow Bench), 15 April, 1994.

<sup>28</sup> *State Of Kerala vs Poothala Aboobacker @ Babu*, High Court of Kerala at Ernakulam, 24 August, 2006.

<sup>29</sup> *The State Of Punjab vs Kulwinder Singh* on 5 July, 2005.

had turned hostile<sup>30</sup>. /p.169/ The High court judge, after entering into the detail of the Prevention of Food Adulteration Act and of the witness statements recorded by the trial court, used the quotation of a passage from the Manu Samhitā already reported in the Supreme Court judgment:

Where in the presence of Judges "dharma" is overcome by "adharma" and "truth" by "unfounded falsehood", at that place they (the Judges) are destroyed by sin".<sup>31</sup>

By contrast with the previous examples, reference to the notion of sin is made here by the judge in a different way. The idea that the (trial) judge would commit a sin if he could not prevent the violation of justice, though it may evoke the religious anxiety about judging mentioned at the beginning of this chapter,<sup>32</sup> is taken by the Supreme Court judge as a way to ask the trial judge to be more involved in the interactions during the hearings and not to limit himself to the role of a mere "supervisor" that Common Law traditionally assigns to him.<sup>33</sup>

The attitude of being a passive protagonist of the trial is often criticized by judges from the Higher courts, though not necessarily by referring to the notion of sin as in the case mentioned above. An example of this attitude may be given here by quoting what a Shimla judge once told me with a tone of resignation after the hearings of a case where all the witnesses had turned hostile: "We can do nothing, we are silent spectators. We can't go beyond the law". /p.170/

This discourse of being bound to evidence and procedure is commonly put forward by trial judges, and may be one of the reasons why District court judges do not make any reference in their written judgments to moral or religious considerations. As a matter of fact, trial judges are very much focused on discussing facts by exposing different narratives and on quoting precedents, trying not to deviate from a purely legal reasoning. This contrasts with the attitude of some High Court and Supreme Court judges, who support their arguments by means of

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<sup>30</sup> Zahira Habibullah Sheikh & Anr vs State Of Gujarat & Ors, Supreme Court of India, 8 March, 2006.

<sup>31</sup> State of Gujarat Vs. Sailendrabhai Damodarabhai Shah and 2 Ors., High Court of Gujarat at Ahmedabad, 28 October 2009.

<sup>32</sup> The expression "by sin" does not appear in the Sanskrit text and it has been added in the English translation either by the judge (if he quotes directly from the Sanskrit) or by the author of the English translation of the text. The original sentence, which has been taken from chapter 8 (stanza 14) of the Manu Samhitā, does not contain the expression "by sin". The sentence has been translated by George Bühler as follows: "Where justice is destroyed by injustice, or truth by falsehood, while the judges look on, there they shall also be destroyed". Bühler in another part of the chapter uses the word 'sinful' to translate the term kilbiṣa. "The Laws of Manu translated by George Bühler," last modified August 9, 2011, <http://oaks.nvg.org/pv6bk4.html>. I thank Gérard Colas for his comment on this point.

<sup>33</sup> This is a point often put forward in High court judgments. As one High Court judge of Patna wrote: The Judge Magistrate should not be a silent spectator and should not allow the things to go on as they are going, but he has to apply his mind and take an initiative and steps for dispensation of justice by resorting to provisions of law in exercise of power by enforcing the attendance of a witness, who is failing and defaulting for no valid and cogent reason. Shyam Narayan Singh and Ors. Vs.State of Bihar, High Court of Judicature at Patna 1 August, 2011

much more eclectic sources and whose pronouncements, as in the cases considered here, speak the religious language of sin and quote from religious texts.

### **Concluding remarks**

At the village level we have seen how the medium uses the notion of sin either in a general way, to speak of an increasing disregard for dharmic rules, or as an etiological category to identify the cause of a particular problem that may involve an individual, whole families, a village or even an entire territory. In fact, what is distinctive about a consultation is that in many cases the consequence of the deity's punishment affects not only the person(s) who is (or are) directly responsible for the wrongdoing, but the whole village or area. Here people's wrongdoings are defined by the deity in reference to a specific territory and in relation to a specific community. We have seen, for example, how the impurity affecting the temple due to a private construction work, or to a dispute related to the temple's money, was presented as the cause of a drought or of too much rain, thus affecting the whole village or an entire area. Though this "joint responsibility" or joint punishment may be felt as unfair by villagers, it is also a way for the medium to involve the whole village in putting pressure on the individual or those responsible, who are asked to put a stop to their wrongdoings (the construction work or the dispute with the administrator). In all these cases, we may say that the idea of committing sin is not so much taken to be a problem of an individual, as it is to a notion used to negotiate social relationships or even to manage village politics.

Paradoxically, something closer to a religious discussion about sin is more apparent in the judgments written by the High judiciary, where the definition of a sinful action is sought by some judges in religious and Sanskrit prescriptions, which are then put forward by them as pan-Indian sources of authority. Here the consequence of a wrong action ,at least in criminal cases, exclusively concerns the person who is responsible for it. /p.171/

Whether a judge refers to Sanskrit texts is something of a personal choice; some judges are very concerned with Sanskrit or Islamic literature, while others consider it irrelevant to their reasoning. The use of religious texts is particularly evident in cases regarding personal law (thus for civil matters), where the judges' decision relies on what the texts say, for example, whether a marriage is sinful, which they conclude also makes it illegal. The definition of sin differs in the case of Muslim, Hindu or Christian personal law. References to Sanskrit texts are also important in criminal cases, though in such cases they are not considered as determining the decision, since the crime is defined according to codes and acts of law. Nonetheless, in criminal cases judges may still use Sanskrit scriptures as a way to reinforce or to attenuate the punishment, although they do not rely on these texts for their actual decisions.

What it is important to underline here is that, both in civil and criminal cases, High Court and Supreme Court judges often try to combine a legal definition of offence and crime with a

religious definition of sin. They cite Sanskrit sources to give more authority to the judicial decision, thus somehow combining the role of a court judge with the role of a traditional *paṇḍit*. In this way religious notions of sin may color judicial pronouncements, even in this secular court system.

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