

International Workshop

with the support of the Centre for South Asian Studies (CNRS/EHESS)

Through the Lens of Law: Power and Society in India

January 7 & 8 room 638, 6th Floor,
192-198 Avenue de France, Paris 13th Arrondissement

For anthropologists as well as for historians, law practices and their discursive productions provide a way of studying tensions between lofty ideals such as neutrality, objectivity, equality, secularism, and everyday life interactions and decisions where cultural, social, and political factors play a major role. It is also an area where cultural transformations and social reforms result not so much from a party or a political leader's ideological programme as from specific decisions taken within a framework of concepts, categories and proceedings, the technicality of which is barely understood outside the professional sphere.

Although this is common to all legal contexts, and especially to a common law context, it comes across even more clearly in a post-colonial society like India, where both legal acts and rules of proceedings were initially introduced and formulated by people from a different social and historical context. Since Independence, this complex judiciary machine has been taken over by the Indian elite and made into one of the most powerful tools of governance in the country. It aims at regulating a society which nevertheless remains largely based on local servitudes of religion, gender, age, and caste status, and on territorial, kinship and feudal allegiances – which are all highly coercive mechanisms through which authority is still exercised at rural level.

Since its inception, the *Just-India* project has aimed at studying these interactions between the state and local society through the lens of law, while taking into account the commitments that India has made both at national and international level – as regards, for example, the legal protection of "underprivileged" groups, its environmental policy, narcotics control, and human rights. These interactions may trigger conflicts or misunderstandings, whenever the state's commitment goes against local forms of relationships or against local economic or political interests; or they may cause reciprocal adjustments and adaptations whenever the state or society strives to seek alternative solutions or negotiations.

From this perspective, over the last four years, the members of our project have developed ethnographies of court cases and of deliberations at local level, and have studied case reports and narratives in order to understand judicial processes within their broader social context, as tools of governance. It has been our assumption that the details of people's interactions, verbal exchanges and power relationships point to the ways in which state power is specifically implemented. This workshop is the opportunity to take stock of some of the results of these studies, and to reflect on possible research in the future.

I. Culture Issue

Monday, January 7, (10.00 am – 1.00 pm)

Discussant: Anthony Good (University of Edinburgh)

Jean-Louis Halpérin (ENS, Paris)

Some Specificity About Law and Justice in India, from a Comparative Point of View

Daniela Berti (CNRS, CEH)

Emotions Under Scrutiny. Suicide Notes as Legal Evidence in Indian Courtrooms

Nicolas Jaoul (CNRS, IRIS)

Brahminical Justice? The Dalit Critique of the Judiciary.

II. Courtroom Rhetoric

Monday, January 7, (2.00 pm – 5.00 pm)

Discussant: Véronique Bouillier (CNRS, CEIAS)

Catherine Clémentin-Ojha (EHESS, CEIAS)

As the Learned Judge Said...

Pratiksha Baxi (JNU, Delhi)

Judicial Interpretation of Rape as Atrocity

Gilles Tarabout (CNRS, LESC)

(Un)spoken Values in Judgments. Cases from South India

III. The Implementation of Acts

Tuesday, January 8, (10.00 am – 1.00 pm)

Discussant: Gérard Toffin (CNRS, CEH)

Parveez Mody (University of Cambridge)

Love Jurisdiction and Love-Marriage Rights in India

Chandan Gowda (Azim Premji University, Bangalore)

The Devil is in the Implementation: The Prevention of Atrocities Act vs. the Police and the Courts

Joëlle Smadja (CNRS, CEH)

"Don't Terrorise our Territory". Environmental Cases related to Kaziranga National Park (Assam)

IV. Interacting Instances

Tuesday, January 8, (2.00 pm – 5.30 pm)

Discussant: Antoine Garapon (IHEJ)

Jean-Philippe Dequen (SOAS, University of London)

A Journey to the Brink of India's Legal Landscape: Jammu and Kashmir's Judicial Scenery

Jayanth K. Krishnan (Indiana University-Bloomington), with Centre for Social Justice (Ahmedabad), Jagori (Dharmashala), & National Centre for Advocacy Studies (Pune)

Grassroots Litigation and Rights-Awareness in India

Raphaël Voix (ANR Just-India / CEIAS)

Great Wise Men and the Judges. Fighting for Proper Governance in the City of Bliss

Zoé Headley (CNRS, CEIAS)

A Century of Penalties and Punishments Under the Banyan

ABSTRACTS

Session I: CULTURE ISSUE

Monday, Jan. 7th, 2013, 10.00 am – 1.00 pm

Discussant: Anthony Good (University of Edinburgh)

- Jean-Louis Halpérin (ENS, Paris): *Some Specificity About Law and Justice in India, from a Comparative Point of View*
From a comparative point a view, the Indian legal system can appear in the same time as a model of indeterminacy and as a well hierarchised structure based on a developed constitution. Accordingly the Indian Judiciary can be characterized as a small and centralized Union apparatus or as a complex, and impossible to reform, conglomerate of courts. In a globalized world where the importance of the Judiciary has increased, is the Indian case a paradigm of judicial activism or a special type of constitutional democracy?
- Nicolas Jaoul (CNRS, IRIS): *Brahminical Justice? The Dalit Critique of the Judiciary*
This contribution will reflect on Dalit intellectuals' critique of the judiciary as a being caste biased, and analyse the different uses of brahminical culture in this critique.
- Daniela Berti (CNRS, CEH): *Emotions Under Scrutiny. Suicide Notes as Legal Evidence in Indian Courtrooms*
Cases of suicide committed by women are frequently scheduled in the daily cause lists of Indian courts. Commonly referred to among professionals as section "498a" (subjecting a married woman to cruelty") or "306" ("abetment to suicide"), these cases are often referred to in newspapers or in academic writings as "dowry deaths". Despite the possibility that some of these suicides could in fact be murders or, on the contrary, that they could have nothing to do with dowry issues, as soon as a young married woman dies (hanged, burned or poisoned) the case is registered by the police under both of these sections, with the immediate arrest of the victim's husband and sometimes of her in-laws. In many of these cases, notes or letters are found after the victim's death in which the woman expresses in a rather dramatic yet sometimes conventional way the reasons that pushed her to end her life. She may declare having written the note (and having committed suicide) in order to punish her relatives; or, on the contrary, she may try to exculpate them by presenting her act as being due to her own personal choice. In the note she may also explicitly request that there be no doubt about her being the actual author of the note. Depending on what it is written in the note, the defense lawyer or the prosecutor regularly try to show that the diary/note is a fake and that it has been fabricated after the woman's death to support one version or another. In this paper, I examine some of these cases to show how these suicide notes (independently of their authenticity) constitute a genre of writing which not only gives voice to emotions and feelings but also reflects or is partly generated by the legal and judicial consequences of a woman's death.

Session II: COURTROOM RHETORIC

Monday, January 7th, 2.00 pm – 5.00 pm

Discussant: Véronique Bouillier (CNRS, CEIAS)

- Catherine Clémentin-Ojha (EHESS, CEIAS): *As the Learned Judge Said...*
When it was promulgated in 1950, the Constitution of India guaranteed "religious freedom", but it did not define what it meant by « religion ». It declared "Hindu religious institutions" opened to "Hindus" (art. 25), but it did not define the words "Hindu" and "Hinduism". It left these questions to the appreciation of the courts. As in all common law countries, the judges had to interpret the articles of the Constitution applicable in the cases brought before them. Within the fifteen years following independence, a period of time corresponding roughly to the Nehru era, the Supreme Court was to pass a number of rulings that created religious case law. The implication is that in later litigations their decisions were binding. But not only their

decisions. Their interpretations, opinions and arguments have also been referred to as legal precedents. I propose to make a preliminary survey of this system of quotations by looking at recent judgments requiring a definition of “religion”, of “Hindu” or of “Hinduism”. My aim will be to point to the discursive tactics implied in terms of long term governance. My approach will be that of a student of religion interested in the evolution of the state regulation of Hinduism since independence, not that of a jurist or of a juridical anthropologist.

- Pratiksha Baxi (JNU, Delhi): *Judicial Interpretation of Rape as Atrocity*
In this paper, I analyse the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Act 33 of 1989 (henceforth, PoA Act), which names rape of dalit and tribal women as atrocity. I indicate the complexity of the jurisprudence that has emerged in naming rape as atrocity or reading rape with atrocity. Atrocities are legally defined as those crimes listed under the PoA Act against a scheduled caste (hereafter, SC) or scheduled tribe (hereafter, ST), committed by a person(s) who is not SC or ST. This special law justifies the need for protective legislation to redress and prevent specific forms of degrading violence against these ‘enumerative communities’ (Das 2003:10). I contend that the judicial interpretation of the PoA Act is concerned with how dominance is enacted, communicated and displayed between men of unequal status rather than addressing the trauma of dalit and tribal women, on its own terms. I highlight the judicial narratives of dalit women whose testimony we encounter in judicial records to pose specific questions to the sanitised sociological pictures of caste. In other words, I argue that rape trials furnish scripts of the social via the juridicalized bodies of violated women. Further, these rape trials are not about the memorialization of what Lucie White calls epic styles of memory, ‘a legacy of wrong doing’ that courts are ‘constitutionally committed ... to transcend’ (White 1996 cited in Sarat and Kearns 2002:18). In contrast to such epic styles of narrating stories about race, ‘claims about sex discrimination ... focus on how men and women differ and whether that difference makes a difference. When a historical story is told, it is a history of social attitudes rather than a history of national or constitutional dimensions’ (Sarat and Kearns 2002:18). By inscribing rape as an act of lust, outcomes of natural sexual differences, rape is neither inscribed as an act of political violence nor set as the scene of historical discrimination. These trials are split from histories of violent sexual humiliation, as if women’s biographies are emptied of all historical content. Such ‘tragic style of remembering’ is particularly poignant since judges fail to memorialize sexual violence as a historic wrong even when called to interpret a special law aiming to historicize the wrong doing to dalits and tribals.
- Gilles Tarabout (CNRS, LESC): *(Un)spoken Values in Judgments. Cases from South India*
There is an explicit rule not to judge on feelings of morality but on the legal merits of a case. This well-established rule has precedents dating back to the colonial period, when a judge, for instance, affirmed that « A Court of law cannot reject a custom because it is not in accordance with the principles of equity or individual notions of right and wrong. » Times have changed. It is not that Courts do not have any more to base their decisions on legal facts – this would be contrary to their very legitimacy and authority – but the Constitution of independent India provides clear injunctions about « principles of equity » that may now supersede previously accepted customs. And, more generally, a spirit of religious reform and spirituality is pervading nearly all court decisions regarding temple matters, which lead some judges to openly express these values from time to time, and all judges to implicitly rely on them for reaching a decision.
The presentation will go through a few cases, in order to illustrate how Courts have expressed values in their written judgments, be it as a matter of commentary on the situation at hand, or as an argumentative tool for reaching a decision. These explicit statements provide a sort of ideological frame in which many other judgments, which may seem to deal solely with administrative details, in reality convey an implicit but extremely strong valuation of equality and « rationality » for reforming religious practices.

Session III: THE IMPLEMENTATION OF ACTS

Tuesday, January 8th, 10.00 am – 1.00 pm

Discussant: Gérard Toffin (CNRS, CEH)

- Parveez Mody (University of Cambridge): *Love Jurisdiction and Love-Marriage Rights in India*
This paper will look at the place of love-marriages in India through the axes of historic attempts to legislate for civil marriage and the ethnographic experience of everyday marriages in the courts in Delhi. It will explore the ways in which the communal governance of marriage posits self-arrangement and love as particularly dangerous, branding self-arranged marriages as “special” and in a jurisdiction of its own. Through an ethnographic examination of the debates surrounding the first law of civil marriage for Indians enacted in the colonial period (Act III of 1872) and later re-enacted as The Special Marriage Act 1954, this paper will explore some of the ambivalences in the 1872 law in a contemporary legal dispute that continues to motor love jurisdiction and the rights and experiences of love-marriage couples in the present.
- Chandan Gowda (Azim Premji University, Bangalore): *The Devil is in the Implementation: The Prevention of Atrocities Act vs. the Police and the Courts*
Introduced in 1989, the Prevention of Atrocities Act is an ambitious instance at checking a variety of instances of violence against Dalits and Tribals. Based on both primary research and relevant work of other scholars and agencies, my paper describes the various factors that have impeded the effective functioning of this Act, especially institutional agents like the police and the judiciary.
- Joëlle Smadja (CNRS, CEH): *"Don't Terrorise our Territory". Environmental Cases related to Kaziranga National Park (Assam)*
Although wildlife protection in Kaziranga National Park in Assam is a real-life success story, it is being jeopardized by the numerous conflicts due to the Park extensions and to the subsequent displacement of populations as well as to the damage caused by the increasing amount of wildlife. As a result, cases of encroachment and poaching are on the rise. Environmental laws, from the Wildlife Protection Act 1972 to the Forest Right Act 2006 have been enacted to protect both wildlife and the populations. Whether they are implemented or not, the power they bestow on or remove from various stakeholders and the paradoxical aspect of the situation will be explored in this paper.

Session IV: INTERACTING INSTANCES

Tuesday, January 8th, 2.00 pm – 5.30 pm

Discussant: Antoine Garapon (IHEJ)

- Jean-Philippe Dequen (SOAS, University of London): *A Journey to the Brink of India's Legal Landscape: Jammu and Kashmir's Judicial Scenery*
Despite its ontological diversity and its relatively short history as an independent State, India has nevertheless managed to create a unified judicial system throughout its territory; at least as far as ‘official’ law is concerned. This uniformity bears however one important exception: the place of Jammu and Kashmir (J&K) within the Union’s legal frame. If J&K is not the only State which is allowed certain derogations in regards to the implementation of Central Acts, it is however unique in the fact it falls under a sui generis legal status, specifically provided by the Indian Constitution. Indeed, it has its own constitution, legislation and ‘citizenship’ which grant it the attributes of a quasi-State. The underlying question is whether this status has actually helped its integration within India, or pushed it further away. This paper vows to present the legal ‘anomaly’ of J&K in regards to the Indian national framework, and how it will relate to it in the future. It will briefly introduce the type of legal engineering that took place at the time of J&K accession to India, comparable to what France has recently undergone concerning New Caledonia. Unlike the latter however, the aim was radically

different, as to gradually incorporate J&K rather than giving it the tools to a future independence. Based on a ‘black letter’ approach, and informed by an exploratory field study of the Kashmiri judicial system in Srinagar, this paper will argue that this endeavour has been quite successful. Indeed, as more Central Acts are applicable in J&K, the latter has also initiated reforms, particularly in the culturally bound sphere of family law, which puts it more in sync with the national legal framework. Moreover, the Kashmiri judicial system and its actors face the same problems and dilemmas as in the rest of India. Notwithstanding, differences remain and in J&K perhaps more than anywhere else in South Asia, politics are never very far from legal issues.

- Jayanth K. Krishnan (Indiana University-Bloomington), with Centre for Social Justice (Ahmedabad), Jagori (Dharmashala), & National Centre for Advocacy Studies (Pune): *Grassroots Litigation and Rights-Awareness in India*

This study seeks to understand the systemic factors and constraints that affect the extent to which claimants in India are able to access their economic and social rights. The decades of scholarly investigation on the legal system in India – and the manner in which people access justice – has tended to emphasize the upper tier of the judiciary, namely the state High Courts and the Supreme Court. The focus has been on the lawyers who practice in these forums, the constitutional jurisprudence these forums produce, and the judges who render the decisions. But a knowledge vacuum surrounds the vast majority of parties (claimants, lawyers, and judges) who operate in what might be called the lower judiciary – the district courts, sub-district courts, and administrative and quasi-judicial tribunals – where tens of millions of cases are projected to be pending, many for more than a decade. For this reason, we choose to concentrate on these particular adjudicatory bodies. As such, during the course of this research project, we evaluate whether tangible remedies are being offered and delivered to those in need by those with power. And we also wish to better understand public perceptions towards these forums and the extent to which they are seen as instruments of justice by all involved.
- Raphaël Voix (ANR Just-India / CEIAS): *Great Wise Men and the Judges. Fighting for Proper Governance in the City of Bliss*

How do secular instances – local administration and state courts - interact to resolve a religious dispute? In this paper, I address this question by examining in detail the 2002 and 2007 schisms that occurred within Ananda Marga, a hindu religious sect founded in 1955 in Bengal. More specifically, I will centre my analysis on the clashes concerning the right to administrate the sect’s colony of disciples, known as the “City of Bliss” (Anandanagar), which is situated in the Purulia district of West Bengal. By analysing the practices and discourses of the different decision-making bodies engaged in settling these disputes, I will show how the sect’s own governing body, the “great wise men board” (purodha board), is slowly changing the way it functions to adapt to the administrative and legal premises. By analysing the post-charismatic fate of this group, I underline the process of legalising charismatic authority in contemporary India.
- Zoé Headley (CNRS, CEIAS): *A Century of Penalties and Punishments Under the Banyan Tree*

In this presentation, I will explore the nature and scope of fines and penalties awarded by caste panchayats in south-central Tamil Nadu by comparing two sources of material. On one hand, I will examine written documents (paper and palm-leaf) dating from the beginning of the 20th century describing the penalties delivered by panchayattars. On the other, I will rely on recent fieldwork and interviews among present-day panchayattars in the same villages in which the documents were found. Besides the description of the data, my central concern will be to question the continuities and transformations of penalties and punishments over the last century as the caste panchayats weaved their way in, out and around state law.