

The Authority of Law and the Production of Truth in India

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Authors who have analyzed the linguistic mechanisms by which power is exercised in a formal setting have focused on courtroom interactions and on the strategic use of language in a legal context. Courtroom studies have been undertaken since the 1980s and 1990s by authors working on ethnomethodology or conversation analysis (Atkinson and Drew 1979; Matoesian 1993; Conley and O'Barr 1998; Drew and Heritage 1992). By drawing mostly on Foucault's notion of "micro-power" (1977:26-27), these authors have studied how lawyers and judges regulate the turn-taking process, the role of silence, the forms of questioning or of interrupting, and the imbalance of power that emerges from courtroom dialogues. The aim of these works has been to study how power is concretely enacted in a day-to-day situation by examining the face-to-face interactions that constitute courtroom proceedings and the microdetails of discursive practices. Here, power is seen as emanating from courtroom-defined speaking roles, from linguistic mechanisms of talk in the courtroom, and from professional speech styles. It is the power to control a setting where rules and turns of speech are very different from those in everyday conversation, where some are authorized to speak and others are restricted to giving answers, and where, by using a legal technique of interrogation, professionals transform a dialogue into a self-serving monologue (Conley and O'Barr 1990:21).

Some of these works focus on the "rigidity" of court interactions and on the asymmetrical distribution of communicative resources (Conley and O'Barr 1990:21). Others have shown the more creative, improvisational nature of these features of speech, the "relative narrative and conversational freedom" of the lawyer and the witnesses that enables them to produce various strategies to utilize these interactions for their own pragmatic purposes (Gnisci and Pontecorvo 2004:967). In a case-study involving an Italian political leader, Gnisci and Pontecorvo show, for example, that although the formal asymmetry of roles during the hearing might make the legal professional appear as the "powerful director of the conversation" (2004:982), observations of trial interactions reveal that the witness disposes of various devices to make their point: they can change the topic, broach other topics, comment on evidence, modify the duration of turn, or interrupt. Within this study they show how a form of arena for verbal combat is created with the witnesses orienting their strategies to give an "elaborate answer" that not only aims at satisfying the requirements of the question, but also at imposing their own line of argument. The authors also note that although one option available to the witness is to simply provide no information at all, by saying that he or she does not remember or by evading the question, there are few replies

of this kind compared to elaborate answers due to the negative effect they may have on the witness's credibility (Gnisci and Pontecorvo 2004).

This article draws on this idea of shared control over trial interactions between witnesses and legal professionals to analyze a criminal case observed at Shimla District Court in Northern India. In this case, the complainant along with other prosecutor witnesses turned hostile during the trial and denied all previous accusations. Unlike the high-profile Italian case mentioned above where witnesses were linguistically equipped to engage in a "war of words" (Gnisci and Pontecorvo 2004:981) with the legal specialist, the case analyzed here is in a setting where the linguistic authority of the legal professionals, who speak English and who have mastered judicial procedures, starkly contrasts with the poor content of the replies given by the witnesses, who do not understand English and are completely unfamiliar with juridical notions. By focusing on the mechanism of narrative production and on how oral and written statements are produced in court, I will show how the witness's replies, even though they consist in simply nodding or saying "I don't know" or "It is not true," succeed in demolishing the prosecutor's case and in preventing the judge from convicting the accused. More generally, the case analyzed here demonstrates how the power of language in a trial situation does not necessarily rely on rhetoric and persuasion, but on specific procedural rules that determine the evidentiary value of what the witness says even when their credibility is challenged in court.

The question of the effect that procedure may have in the acquisition of truth has been addressed both in the field of courtroom ethnography (Scheffer 2010; Latour 2004) and more generally by authors who have focused on the study of talk and interaction in institutional contexts (Atkinson 1979, 1982; Atkinson and Heritage 1984; Drew and Heritage 1992; Dupret 2006; Ho 2008). Conversation analysis in particular has attempted to uncover the "often tacit reasoning procedures and linguistic competencies underlying the production and interpretation of talk in organized sequences of interaction" (Hutchby and Wooffitt 2008:12). The primacy of procedure has also been argued in the field of legal history. Langbein, for instance, has shown how the increasing technicality of procedure in English Crown Courts had the effect of silencing the accused, leaving case-making to the control of the lawyer (Langbein 2003). Although this may be equally true regarding the Indian courts inherited from the British, the case presented here shows how witnesses, in spite of their ignorance of legal procedure and even of the language of the court, may end up disrupting the rules of evidence followed in criminal proceedings from the inside.

Filing a Complaint

In September 2007 a young married woman from a rural area, the mother of a two-year-old daughter, was taken to Shimla hospital by some of her in-laws. Anjana, as she was called, suffered burns to 90 per cent of her body and died in hospital a few days later. She had allegedly committed suicide in her marital house by pouring kerosene over her body and by setting herself alight. According to the version given by her in-laws, as soon as they heard her cries, they broke down the door, which was closed from inside, placed blankets over her body, and rushed her to hospital. When the investigations had gotten underway, a diary was found in the woman's

bedroom. Some pages had apparently been written by Anjana about her decision to kill herself.¹ One passage read as follows (suicide note, in court file):

My marriage is a lie. A relationship based on lies will always remain a sham. I could have never imagined that I would end up marrying a person who is a drunkard and a bad man. Neither his presence nor his absence from the house makes a difference

In another passage, Anjana wrote about the lack of affection from her in-laws, and recounted in detail the clashes she had had with her mother-in-law. At the end of this section she addressed a man named Sunny, whom she called “brother” and who, according to her, was in the police (suicide note, in court file):

Sunny, if you consider me your sister, then leave my daughter with my parents or with the Orphanage House. I see no point in living, and I pray to God that he will send me back and I will take my revenge. You are in the Police, so I hope you will render justice.

After Anjana’s death, an FIR (First Information Record) was registered by the police on behalf of her father, which accused the husband and mother-in-law of maltreating his daughter and of harassing her with incessant dowry requests. The case was then considered by the police as a “dowry case” and framed under section 498a, “subjecting a married woman to cruelty,” punishable by three years’ imprisonment and under section 306, “abetting the commission of suicide,” which carries a sentence of 10 years’ imprisonment.² The victim’s husband and mother-in-law were brought before a magistrate and placed in police custody, although they were later released on bail.

Here are some passages from the FIR that were written by the police in Hindi on behalf of Anjana’s father (First Information Report in court file, my translation):

I organized my daughter’s marriage according to Hindu custom After the marriage, Anjana led a normal married life. For the last six months Anjana’s husband and mother-in-law started harassing her for the dowry (*deja ke liye tang kiya*). They used to taunt her saying that her father didn’t even include bedding in her dowry.

In the report, the father also referred to some arguments that took place between Anjana and her mother-in-law. The complaint ends with the sentence (First Information Report):

¹ Suicidal notes are frequently found in such cases, though their authenticity is often challenged in court either by the prosecutor or by the defense lawyer, depending on what is written in the diary. In the present case, the note had been legally authenticated as belonging to Anjana.

² Srinivas (1984) calls the “new dowry” the money or property the husband or his family demands from the bride’s family after the wedding. These demands, which may be protracted even years after the wedding, may end in the girl’s murder (presented as an accident) or her suicide.

I believe that Anjana's husband and mother-in-law harassed her to such an extent that she was helpless and thus she poured kerosene over herself, set light to herself and tried to end her life. Legal action is to be taken.

The story reported in the FIR is a reframed version of an interaction between the complainant and the police officer.³ Formulations used in the report, for instance that the in-laws used "to harass" the woman saying that her father "didn't even include bedding in her dowry," are very common in these cases and appear to correspond to a conventional style of writing aimed at producing an "authoritative document" (Komter 2006) on which the investigative process is based.

It is worth noting that in India, as in other adversarial systems, or common law systems where the opposing sides must both collect and submit evidence as well as cross-examine witnesses, police officers are independent of legal officers, and investigations are led under their own authority.⁴ Although some high-ranking police officers have their offices within the court complex and sometimes, as in Shimla, even next door to the prosecutor's office, the prosecutor is not supposed to become involved in the investigation until the *challan* (charge sheet) is presented to the court.

During the investigations, the relationship between the police officers and those questioned (the accused and witnesses) is one of power because the police represent and are empowered by the state authority.⁵ According to section 161 of The Code of Criminal Procedure (2006 [1973]:84), for example, a police officer may "examine orally any person supposed to be acquainted with the facts and circumstances of the case . . . [He] may reduce into writing any statement made to him in the course of an examination."

The people I spoke to during my fieldwork often referred to the police's habit of readily reverting to physical violence or other forms of abuse. They also presented police officers as open to negotiate with one party or the other involved in a case and to formulate the case in a particular way in exchange for some form of compensation. The police officers' authoritative position during the investigation is very often overturned at the time of the trial, during which the prosecutor's witness, even the one who filed the complaint, starts contradicting or completely denying what is written (on their behalf) in the police report. By referring to some sequences of the trial which involved Anjana's husband and mother-in-law, I analyze an example of how the police report was deconstructed by the witness during the trial and the way this situation was managed by the Court.

³Although I do not know what was actually said between the police and the complainant in the case here (since it took place two years before), I have based my observations on other cases that I was able to follow at Shimla police station during my stay.

⁴Since 1973, the police in India have been a separate agency from the prosecutor.

⁵This is very different from what happens in inquisitorial systems where, at every stage in the criminal law process, legal professionals monitor all the police officers' decisions regarding the case (Komter 2002).

Hostility on Record

The trial took place in 2009, almost two years after Anjana's death. Anjana's father, an illiterate man, was summoned by the prosecutor to repeat before the court what he had supposedly said to the police. He had travelled in from the countryside and was waiting outside the courtroom along with some members of the in-laws' family who were also scheduled to give their testimony the same day. Before being heard by the Court he had been called to the prosecutor's office to be reminded about what he had said to the police during investigations. I did not attend this meeting, but when the trial began, the prosecutor looked rather worried. In the courtroom, lawyers were attending the hearing. The two accused stood at the end of the courtroom near the entrance.

The judge addressed the witness in Hindi and asked him to repeat an oath: "What I will say I will say the truth, on behalf of *dharma*." He then asked him some preliminary questions and, after each reply, he dictated in English to the typist the content of the question-reply interaction by reformulating it in the form of the witness's first-person narration. The first lines of this transcription go as follows (court file):

Stated that Anjana was my daughter. She was married with accused Susheel. Her marriage took place 5 years back. She gave birth to a female child who is now 4 years old. After the solemnization of her marriage Anjana resided to her matrimonial house peacefully.

The use of English creates a barrier between the judge or other legal professionals and the witness, who does not even understand the language into which the judge translates the witness's replies before dictating them.⁶ The judge plays an active part in the interactions, questioning witnesses at length, especially when he estimates that the prosecutor is not doing his job properly. This is in keeping with a specific Supreme Court directive whereby a District Judge must not be a "silent spectator" during the hearing in *Shyam Narayan Singh and Ors. vs. State of Bihar* (Abidi 1993:16). It also reflects the judge's need to dispose of all the information he requires to write his decision. In fact, although a Session Judge is the highest authority at District level, his work is supervised by High Court and Supreme Court judges, who can completely overturn his judgment and censure him if he makes any mistakes.

At the very beginning of the trial, when Anjana's father started by saying that his daughter lived happily with her husband in her marital house, the judge seemed puzzled. "Did your daughter ever complain to you?" The judge asked him. "No, Sir," the father replied. The judge, in a solemn tone of voice and looking at him sternly, dictated to the typist in English, "My daughter never complained to me or to my family members of any cruelty to her at the hands of the accused." Then, again shifting to Hindi "What did you say in the statement to the police? What did you dictate?" "I didn't say anything," replied the father, "I said to the police whatever they [the in-laws] told me; they told me that there was just some disagreement between them, I only said that, and nothing else."

⁶It should be noted that there is no popular jury in Indian Courts, which renders discussions much more technical and juridically oriented than in a trial with a jury.

The judge, visibly annoyed, dictated in English: “The accused did not maltreat my daughter at any time after the marriage nor did I state the same facts to the police.” He then dictated in English to the typist a conventional formula to indicate that the witness had turned hostile (court file):

At this stage the learned Public Prosecutor put forth a request that he be allowed to cross-examine the witness because the witness has resiled from his previous statement. Request allowed.

The formula indicates a shift in the rules for questioning the witness. Technically speaking, it indicates a shift from the examination-in-chief, during which the witness is asked open questions, to the cross-examination where the questions presuppose the answers and to which the witness must reply “yes” or “no.” In fact, the passage mentioned above shows how the judge had already used a leading question by asking the father, “Did your daughter ever complain to you?” This was his immediate reaction to what the father had just said that Anjana had been living happily with her husband and her in-laws. The judge no doubt wanted to see how far the witness would go in denying all the accusations before dictating the conventional formula, indicating that the witness was now going to be cross-examined.

The shift from examination-in-chief to cross-examination implies much more than merely a different way of formulating the questions. It points to a radical change in the relationship the witness has with the prosecutor, from being someone who supports his case—and in this case who actually lodged the complaint—to being the main cause for the prosecutor’s defeat. The witness will in fact be declared “hostile,” which is a way of saying that he is lying to the Court. In fact, the formula mentioned above “At this stage . . .” implies that the witness is no longer to be trusted. To say that a witness is “hostile,” that he has retracted or contradicted his previous statement, is to “cast doubt on his credibility”—another expression commonly used in judicial jargon.

The reason for writing this formula in the court report is not to inform the witness, as the witness does not even understand the language in which the formula is dictated. As a matter of fact, this kind of formula has first and foremost a written value. By going through the evidence records, any legal professional can immediately see the point beyond which the witness’ credibility is challenged. In the court report of the hearing, these passages are clearly visible because the typist conventionally marks them in bold print and in a separate paragraph “Cross-examination (or ‘xx’) by Sh . . ., learned P. P. (Public Prosecutor) for the State.”

Although the request is always formulated in the report as if made by the prosecutor, in this case (as in many others), it was the judge who decided to use it. After the judge dictated the formula, the prosecutor looked frustrated and resigned. It was clear that, as he had already surmised after his meeting with the witness, he regarded the case as already lost. He said to the judge, “Sir, he has now reached a compromise with the accused . . .” The judge, however, was not ready to give up. He looked at the witness straight in the eyes and asked him directly, in a very disappointed tone of voice, “Did you come to a compromise with them?” The father replied nervously: “Yes sir, there is talk going on between us.”

The existence of a private compromise between the parties is very frequently assumed by a judge in cases where the witness turns hostile, although it is rarely revealed explicitly during

the trial. Even in this case, however, where the existence of a private arrangement was admitted by the complainant, the trial proceedings could not be suspended. In fact, the offenses that had allegedly been committed by the accused (abetment to suicide and maltreatment) are considered to be “not compoundable”; they cannot be compromised by the parties. The trial then proceeded and followed all the regular stages.

As if ignoring what the father had just said, the judge continued with the cross-examination. He asked him many questions, trying to get him to confirm his previous statement. “Did your daughter tell you that they [the in-laws] told her that she did not bring any bedding from her father’s house?” “No Sir,” replied the father. The judge dictated in English (court file):

My daughter never complained that she had not brought the bedding from the house of her parents in dowry. [Confrontation with portion A to A of the statement . . . in which it is so recorded].

In the court report this last sentence is recorded in brackets at the end of the dictation. This is another conventional way of recording the fact that the witness is not to be trusted. By recording the reply given by the witness in court and by comparing it to the statement he had previously given to the police, the transcription enabled the judge to point out the contradiction. The formula [confrontation with . . .] is again expressed in English and pronounced in order for it to be put on record rather than to be actually understood by the witness.

The judge continued to ask in Hindi, “Did the police read the statement that you’d made? Were you shown the written statement?” “No Sir.” “You just tell us whether you said this to the police or not?” said the judge, irritated. “No Sir,” said the father. The judge dictated to the typist in English: “The statement EX.PW-1 was not read over and explained to me by the police. I am quite illiterate and only know to put my signature.”

This last sentence was dictated by the judge as a logical implication of what the witness had said; that he did not know what was written in the report that the police had written on his behalf and had asked him to sign. This sentence is commonly used in such a situation and appears to be a ready-made formula. The judge then continued to dictate in English (court file):

I had not stated in my statement that 6 months prior to her death, the accused had started maltreating and taunting Anjana for not bringing dowry or even bedding (confrontation with portion A to A of statement Ex. PW-1/A in which it is so recorded).

The judge, then, addressed the father in Hindi, “Look, her mother-in-law and her husband were mistreating her. This is all you told the police. Did you tell the police this in particular?” “No, I didn’t tell the police,” replied the father.

The judge then continued dictating (court file): “Nor did my daughter complain to me that the accused had started treating her with cruelty nor did I make such a statement to the police. [Confronted with portion B to B of statement Ex PW-1 /A in which it is so recorded].”

At the end of the cross-examination, after the witness had denied many other points which were mentioned in the police report, the judge, rather annoyed, asked him: “Then why did you register the case with the police?” “It was a mistake,” said the father. “Now tell me,” said the

judge, “have you reached a compromise or are you just telling a lie?” “Yes, a compromise has now been reached,” replied the father, “and I am telling the truth.”

The witness had already admitted at the beginning of the hearing that a compromise had been reached although the judge had not put this information on record. Then, as a conclusion to the written report of the hearing, and without asking the witness any further questions, the judge dictated in English to the typist (court file):

This case has been made by me by mistake. It is not true that due to compromise now I am deposing in favour of the accused to save them from legal consequences.

The use of the formula “It is not true . . .” used at the beginning of the last sentence, “that I (the witness) am deposing in favour of the accused . . .” allows the judge to suggest on record that the witness has just denied that he “is telling a lie” because of the compromise he has reached with the accused.

The procedures used to write up the cross-examination enable the judge to ensure that the major points in the police report figure in the evidence record that is drafted by the court—implicitly, through the witness’s denial of the questions put to him during the cross-examination and through the references made in brackets after each sentence. The result is a two-layered narrative or a “dual truth”: 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 (Berti and Tarabout, forthcoming). The truth thus established is then restricted to a procedural truth.

The witnesses’ attitude of turning hostile in court is routine in India, with no action usually being taken against them. A reason often suggested to explain the recurrence of this attitude is that the statement given to the police is not signed by the witness and therefore is of no legal value.⁷ However, even in cases such as the one presented here where the witness, who is also the complainant, had to sign the report, no action was taken against him. In fact, when I questioned judges or prosecutors on the topic of hostile witnesses, the prevalent attitude was one of resignation.

In order to prevent witnesses from turning hostile, a former Session Judge in Shimla tried to adopt a practice which became a bone of contention, especially among defense lawyers. Instead of first questioning the witness during the examination, the judge dictated directly to the typist what was written in the police report that was in front of him. Defense lawyers in particular were uncomfortable about the situation and the atmosphere in court was very tense. When the judge was transferred to another court, the lawyers breathed a sigh of relief because they could once again hope to win their cases easily.

⁷According to section 162 of The Code of Criminal Procedure (2006 [1973]:84) “No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it.”

The Production of a Counter Story

The witness's father was then cross-examined by the defense lawyer even though he now fully supported the accused. The consensual interaction the witness had with the lawyer strongly contrasted with the one he had just had with the judge. To each question, the father replied in the affirmative and the lawyer (or alternatively the judge) dictated to the typist (court file):

It is correct that the accused never demanded any dowry from me till the death of my daughter Anjana . . . It is correct that my daughter never complained of any cruelty to her at the hands of accused. It is correct that the accused treated my daughter Anjana like her own daughter.

The trial interrogation and transcription techniques, particularly during the cross-examination, provided the defense lawyer with an effective means of allowing the witness the possibility of confirming what the lawyer wanted to put on record.

The lawyer's aim was also to provide a plausible reason for Anjana's suicide. "Anjana was a very beautiful girl," he told me during a conversation. "She married a man who was not good-looking and had not had any education." Anjana's "beauty complex," or, as the lawyer put it, her "superiority complex," was evident in the note she left in her diary which, according to him, showed how "she was of a particular stature and intellect," but also that "she was suffering from depression."

She thought she could have made a much better match than with this person whose status was not likely to improve . . . She was also short-tempered and got annoyed about petty matters. She used to leave the house without telling her mother-in-law or her husband, and used to stay away for two days . . . I have come to know . . . even if this is not on record for the case . . . that the victim had an extramarital relationship with the police officer, Sunny, whom she called brother in her diary.

The picture the lawyer gave of Anjana's personality—for example, the fact that she was "short-tempered"—partly corresponds to a standardized, script-like version that is commonly used by lawyers in such cases.

During the trial, the lawyer strove to bring out this picture of Anjana's personality through the questions he put to the witnesses.⁸ In cross-examining the father, he also referred to an episode described in the police report according to which Anjana would have been slapped by her mother-in-law. He wished to suggest that the reason given in the report, that this slap was related to dowry demands, had been completely invented by the police. Here are some passages from the court interactions translated from Hindi (court file):

Lawyer: This Anjana was "short-tempered" (this expression is used in English)

The father nodded.

Lawyer: Your daughter told you that she was slapped. Did you ask her why she was slapped?

⁸Although I was not been present at any encounter between the lawyer and the witness, I know from the conversation I had with the lawyer that he had instructed the father about the way to reply at the hearing. On the importance of lawyers preparing the witnesses for the court interaction, see Kidder (1973).

Father: I don't know.

Lawyer: She was your daughter, and they [the in-laws] also loved her like their daughter.

Father: Yes, sir.

Lawyer: If the youngest makes a mistake, it is the duty of the elders to scold them and to bring them back to the right path.

Father: Yes, sir.

Judge, puzzled by the lawyer's question he addressed the lawyer in English: What has that to do with the case?

The judge did not accept this kind of defense and asked the lawyer to stop asking that kind of question.

Lawyer, to the judge: Nothing sir. There was a misunderstanding between the mother-in-law and the daughter-in-law. The point about the slap is that this was recorded by the police against the witness's will and in order to make a stronger case. That's the way it works.

The judge looked at the witness who said quietly "I don't remember anything sir."

Following the lawyer's explanation, the judge then dictated in English: "I don't know whether under police pressure I stated that my daughter had disclosed to me that she had been inflicted slaps by her mother-in-law in order to make out a case against the accused."

The idea that a witness's, or even, as in this particular case, the complainant's statement was written under police pressure is also frequently suggested by lawyers. It corresponds to a discourse which some judges in India often hold, according to which the police do not hesitate to "exaggerate" the facts reported by the witness in order "to make the case stronger" (Berti 2015).

While talking to me about the Anjana case, the lawyer told me that when a woman commits suicide, the police systematically make reference to dowry demands and dowry harassment "to attract" sections 306 and 498a.

The statement in the FIR is written in such a way that it meets the necessary conditions for the case to be investigated. They need to meet the village people's expectations and to show them that they are the real protectors of the locality . . . If a person loses their life in such a terrible way and the police do not take any action it would give a very wrong message, especially in the village where the events took place. Thus a case is registered in order to calm the situation.

He also told me that, sometimes, police officers register a case in favor of one party or the other due to the relations they entertain with them, or with the intention of obtaining some financial compensation from the parties.

The idea that the police had invented the case against the accused was again suggested when the investigative officer was cross-examined. At the end of the cross-examination the defense lawyer dictated on his behalf:

It is incorrect to suggest that in order to meet the provisions of Section 498-a of the Indian Penal Code, I manipulated the accused falsely and falsely recorded the statements. It is wrong to suggest that in connivance with the witness [the father], I had made a false case against both the accused.

The theory of a “false case,” which was explicitly denied but implicitly suggested by the text the lawyer dictated, was not completely shared by the judge. In a conversation I had with him in his chambers, he told me that, though he was of the opinion that the father had “manipulated the dowry issue,” he was personally convinced that Anjana had been maltreated by her husband and mother-in-law. He also appeared to be touched by what Anjana had written in her diary and interpreted the woman’s act as the result of incompatibility between her personality and the in-laws’ attitude toward her. He also added, however, that though “morally” he was convinced of “the veracity of these facts,” he needed to be convinced “from a legal point of view,” and in this case, the evidence was not enough to prove the allegations. With the complainant and other prosecution witnesses all denying what they had supposedly stated to the police—that Anjana had been harassed by her in-laws—and with Anjana making no reference to dowry demands in her diary, the prosecutor’s case could not be proved.

Whether the dowry issue was raised by the police or by the father, the case shows the encompassing effect of the implementation of dowry legislation. As Vindhya pointed out for Andhra Pradesh, the primacy given to dowry-related violence hides the other reasons for abuse suffered by women (Vindhya 2000). In her research on the reaction of the judiciary system to dowry deaths, Vindhya notes how, despite legal recognition of the criminal nature of non-dowry harassment, the judiciary perception of the institution of marriage and womanhood reinforces the view that violence against women in the home is a matter that belongs to the “private domain of the family,” rather than to the state. She also shows how, if it is proved that a woman has committed suicide for any other kind of harassment other than dowry-related demands, she will be defined by the court as “emotionally over-reactive,” and “prone to suicide at slight provocation”—all kinds of expressions that have also been evoked in Anjana’s case.

At the end of the trial, the accused (the husband and the mother-in-law) were acquitted. In a 15-page ruling, the judge stressed the fact that the main prosecution witnesses were now on the side of the accused. This is a short passage from his order (*State of Himachal Pradesh vs Neelam Safri & Susheel Kumar* 2009):

In view of the evidence discussed above, there is no evidence on record based on which it can be concluded that any of the accused committed the offences for which they stood charged. Even, PW 1 [Prosecution witness number 1], the father of the victim, has turned hostile and [. . .] has not deposed any fact showing the involvement of the accused in the commission of alleged offences. . . . In view of the findings recorded, the prosecution case fails. The accused are acquitted of the charges.

Due to the compromise that had already been reached by the parties, to which the father referred at the beginning of the trial, there was no way for the judge to prove that Anjana had been abetted to commit suicide due to harassment by her in-laws about her dowry. Consequently, all the initial allegations about dowry demands that were reported in the police record did not

become effective since all the prosecution witnesses had denied in Court ever having made such allegations. Even though all the prosecutor witnesses were declared “hostile,” the counter story they gave before the judge—that the accused had never mistreated Anjana—became effective in determining the judicial outcome. As Kidder (1973:124) noted in his work on civil courts in Bangalore, the case shows how “room for manoeuvre is provided by relationships and procedures operating at several levels simultaneously.”

Conclusion

In a volume entitled *Authority without Power: Law and the Japanese Paradox*, Haley refers to the German distinction between *Autorität*, intended as legitimacy or “entitlement to command” and *Macht*, meant as the “capacity to coerce” (1991:13). He notes how, although these two concepts are often used synonymously, their distinction is crucial for the political and legal context he analyzes. He argues more specifically that, despite the pervasive presence of the State’s authority in Japanese public life, the State’s capacity to coerce and compel its subjects is relatively weak. As a result, Japan relies principally on extralegal informal mechanisms of social control as a means of maintaining order in society.

A similar distinction between authority and power may also be made in the case at hand. We have seen how despite the judge’s authority to conduct the trial and to make a decision, he is forced by the rules of evidence and of procedure to give a verdict that is against his personal opinion. Informal extra-legal negotiations that took place between the parties occurred once the judiciary process had already been set in motion, which led the prosecution witnesses to turn hostile.

The problem of witnesses withdrawing their previous statements is particularly relevant in an adversary system of justice under which the court “has no independent fact-finding apparatus but [. . .] is dependent on the contending parties for the presentation of evidence” (Galanter 1989:xxxii). In common-law countries this issue has been the object of a very long debate mostly focused on the possibility of one party disproving or impeaching his own witness’s credibility (Bryant 1982). In England until the nineteenth century, for example, the idea of cross-examining one’s own witness was forbidden by some courts, though opinions might diverge on the matter.

In India the practice of cross-examining one’s own witnesses is standard routine due to the almost systematic tendency of prosecution witnesses to turn hostile. We have seen how the “principle of orality” and the questioning technique enable the witness to contradict what is written in the police report. On the other hand, the practice of putting these contradictions in writing using various formulae also gives consistency and ensures durability in these interactions. These transcripts will in fact be critically examined by the appeal judge (at the High Court or Supreme Court level) many years after the trial when no witnesses will be heard in court. As a matter of fact, a witness’s statement may sometimes not be “effective” at the time of the hearing, yet prove to be relevant later on when appeal judges re-examine the case on the basis of what has been “put on record.”

Appellate Courts in India are far from unanimous about how to deal with the statements of prosecution witnesses who have turned hostile, and, in their rulings, they may give opposing directives. For example, in a case similar to the one presented here, although a trial judge at a Court in Hyderabad convicted the accused despite the prosecution witnesses turning hostile, the appeal judge reversed the judgment on the grounds that the judgment did not comply with the principles of burden of proof (*Katkuri Ravinder Reddy And Anr. vs State of A.P., Through Its . . .* on 20 September, 2004 2005 (2) ALD Cri 36):

Be that as it may, in the present case, almost all the witnesses were declared hostile, but despite the same, the learned Judge recorded findings holding the accused guilty of the offences charged with, placing strong reliance on the presumption. This approach adopted by the learned Judge definitely is not in conformity with the settled principles of burden of proof in Criminal Jurisprudence. Hence, this Court has no hesitation in holding that the findings recorded by the learned Judge suffer from the legal infirmity and are liable to be set aside. . . . the prosecution miserably failed in establishing the guilt of the accused . . .

Judges, in fact, find themselves in a delicate position. On the one hand, they are the court's superior authority, yet, on the other hand, they themselves are the "source of authority," since they have to interpret the rule of evidence and guarantee that procedures are respected. As the example presented here shows, the primacy assigned to procedure rendered effective the witness's spoken words even when they were not considered to be true.

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References

- Abidi 1993 [1991] S. H. Abidi. *Shyam Narayan Singh And Ors. vs State Of Bihar on 18 November 1991*. CriLJ 772. <https://indiankanoon.org/doc/1943075/>.
- Atkinson 1979 J. Maxwell Atkinson. "Sequencing and shared attentiveness to court proceedings." In *Everyday Language: Studies in Ethnomethodology*. Ed. by George Psathas. New York: Erlbaum. pp. 257-86.
- Atkinson 1982 _____. "Understanding Formality: Notes on the Categorization and Production of 'Formal' Interaction." *British Journal of Sociology*, 33.1:86-117.
- Atkinson and Drew 1979 J. Maxwell Atkinson and Paul Drew. *Order in Court: The Organisation of Verbal Interaction in Judicial Settings*. London: Macmillan.
- Atkinson and Heritage 1984 J. Maxwell Atkinson and John C. Heritage. *Structures of Social Action: Studies in Conversation Analysis*. Cambridge: Cambridge University Press.
- Berti 2015 _____. "Binding Fictions: Contradicting Facts and Judicial Constraints in a Narcotics Case in Himachal Pradesh." In *Regimes of Legality: Ethnography of Criminal Cases in South Asia*. Ed. by Daniela Berti and Devika Bordia. New Delhi: Oxford University Press.

- Berti and Tarabout (forthcoming) Daniela Berti and Gilles Tarabout. "Questioning the Truth. Ideals of Justice and Trial Techniques in India." In *Truth, Intentionality and Evidence: Anthropological Approaches to Crime and Tort*. Ed. by Yazid Ben Hounet and Deborah Puccio-Den. London: Routledge.
- Bryant 1982 Alan W. Bryant. "The Common Law Rule against Impeaching One's Own Witness." *The University of Toronto Law Journal*, 32.4:412-43.
- Conley and O'Barr 1990 John M. Conley and William M. O'Barr. *Rules Versus Relationships: The Ethnography of Legal Discourse*. Chicago: University of Chicago Press.
- Conley and O'Barr 1998 _____. *Just Words: Law, Language, and Power*. Chicago: University of Chicago Press.
- Drew and Heritage 1992 Paul Drew and John Heritage. *Talk at Work: Interaction in Institutional Settings*. Cambridge: Cambridge University Press.
- Dupret 2006 Baudouin Dupret. *Le jugement en action. Ethnométhodologie du droit, de la morale et de la justice en Egypte*. Genève: Droz.
- Edwards and Potter 1992 Derek Edwards and Jonathan Potter. *Discursive psychology*. London: Sage Publications.
- Foucault 1977 Michel Foucault. *Discipline and Punish: The Birth of a Prison*. London: Allen Lane.
- Galanter 1989 Marc Galanter. *Law and Society in Modern India*. Ed. by Rajeev Dhavan. New Delhi: Oxford University Press.
- Gnisci and Pontecorvo 2004 Augusto Gnisci and Clotilde Pontecorvo. "The Organization of Questions and Answers in the Thematic Phases of Hostile Examination: Turn-by-Turn Manipulation of Meaning." *Journal of Pragmatics*, 36:965-95.
- Haley 1991 John Owen Haley. *Authority without Power: Law and the Japanese Paradox*. New York: Oxford University Press.
- Ho 2008 H. L. Ho. *A Philosophy of Evidence Law: Justice in the Search for Truth*. Oxford: Oxford University Press.
- Hutchby and Wooffitt 2008 Ian Hutchby and Robin Wooffitt. *Conversation Analysis*. Cambridge: Polity Press.
- Kidder 1973 Robert L. Kidder. "Courts and Conflict in an Indian City: A Study in Legal Impact 1." *Journal of Commonwealth & Comparative Politics*, 11.2:121-39.
- Komter 2006 Martha L. Komter. "From Talk to Text: The Interactional Construction of a Police Record." *Research on Language and Social Interaction*, 39.3:201-28.
- Langbein 2003 John H. Langbein. *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press.
- Latour 2004 Bruno Latour. *La fabrique du droit. Une ethnographie du Conseil d'État*. Paris: La Découverte.

- Matoesian 1993 Gregory M. Matoesian. *Reproducing Rape: Domination through Talk in the Courtroom*. Chicago: University of Chicago Press.
- Reddy 2004 Katkuri Ravinder Reddy And Anr. vs State of A.P., 2004 [2005 (2) ALD Cri 36].
- Scheffer 2010 Thomas Scheffer. *Adversarial Case-making: An Ethnography of English Crown Court Procedure*. Leiden: Brill.
- Srinivas 1984 Mysore Narasimhachar Srinivas. *Some Reflections on Dowry*. New Delhi: Oxford University Press.
- Universal Law 2006 [1973] *The Code of Criminal Procedure, 1973*. Reprint. Delhi: Universal Law Publishing.
- Vindhya 2000 U. Vindhya. "Dowry deaths in Andhra Pradesh, India: Response of the Criminal Justice System." *Violence Against Women*, 6:1085-108.
- Wolff 1995 Francis Wolff. "Trois techniques de vérité dans la Grèce classique. Aristote et l'argumentation." *Hermès, La Revue*, 15:41-71.

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