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How Should the Other be Judged?: Justice and Cultural Difference in French Assize Courts

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The few remarks which follow ensue from a double question. On the one hand, how possible, and indeed legitimate, is a naïve observation of the manner in which assize court trials proceed in France: can the ethnographer ignorant of law who, as Bruno Latour hopes (2002: 139), 'can put the weight of his incompetence to good service by not distinguishing too quickly the essential from the accessory', come close to grasping the 'functioning of justice'. On the other hand, how might one get beyond the difficulty of perceiving 'the cultural dimensions of justice' when these are those of an observer who is him- or herself located within that culture?

An initial contact with the French judicial world leaves some contradictory impressions. An ignorance of its procedures can make it seem extremely formal and full of strange rituals. And yet this world is still that of the observer, who is supposed to espouse the common presuppositions that lie behind these procedures, the constituent markers of the attitudes of everyday life (Garfinkel, 1967), and in principle more spontaneously than when she or he is engaged in studies of fields said to be 'exotic'. How, therefore, can one find the correct distance to allow one to become conscious of the particularities proper to judiciary practice in France? A necessary decentring could be brought about by an implicitly comparative stance, by adopting the perspective of the foreigner. The heuristic virtues of comparison, concerning which the foundation article of Marc Bloch (1963) still deserves a reading, that art of effecting 'the discovery of dissonances' (Detienne, 2000: 13), thanks to which 'a familiar category […] might become uncertain, become fissured, and fall apart' (Detienne, 2000: 45), might be found in the observation of the interactions between the French judicial world and those defendants who have come before it who are of foreign origin, in the present case, those from South Asia.

The difficulties presented by these interactions, ones which are observable during the course of a court sitting or trial, bring out clearly what could remain implicit in a more ordinary procedure. The relationship with the foreign 'other' acts here like a photographic developing fluid or magnifying glass: on the one hand, the pre-suppositions which underlie the course of judicial acts become visible; on the other, the foreigner becomes profiled as the limit case in an interaction whose codes are very unequally mastered.

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As ethnomethodology has shown, the functioning of a court of justice rests *a priori* on taking 'for granted' what provides a 'social competence' (Garfinkel, 1967: 273) and allows the different protagonists to inter-react and reach a result. But do all those who appear before the courts share these 'taken-for-granted', that common sense knowledge, those descriptions of a society that its members [...] use and treat as known in common with other members, and which other members take for granted' (Garfinkel, 1967: 77)? The actors of the judicial system, when confronted by persons of foreign origin, are aware of these difficulties and perceive in the *culture* of the other an obstacle to their understanding. The way the courts read the notion of culture deserves close examination. Far from the theoretical debates of anthropology, the notion of culture in the courts is most frequently reified and essentialized; in particular it is understood as being 'traditions of others'.[1] A social worker expressed his criticism: 'We act as though only people of foreign origin had a culture', a point which Prakash Shah (2009: 127) puts more radically: 'There is a prevailing assumption that they [the Western presuppositions] are culture-free, [that] their supremacy is taken for granted.' In the courts, the reference to culture tends to serve as the final explanation for accounting for the bizarre actions or attitudes of the other.

We are thus in France far from the so-called principle of 'cultural defence', under dispute in the United States where, in the words of Alison Dundes Renteln (2005: 48):

> Legal systems must acknowledge the influence of cultural imperatives as part of individualized justice […]. Taking a person's cultural background into account is fundamentally no different from judges taking into consideration other social attributes such as gender, age and mental state. Insofar as individualized justice is an accepted part of legal systems, the cultural difference is simply another factor to review in the context of meting out condign punishment. Well-established principles of law support the use of the cultural defense. These principles include the right to a fair trial, religious liberty, and equal protection of the law. If individuals who come from other societies are entitled to these rights, in is incumbent on legal actors to take cultural differences into account.[2]

The French position is the opposite. In the words of a prosecutor (quoted in Fortier, 2000: 44):

> The applicability of a foreign custom does not remove the presence of culpable intent. […] [The defendant] invoked ancestral custom in vain since, under French public order, the motive has no juridical influence on the existence of the offence nor in particular on that of the intention or how it is qualified.

The universality of French law, the constitutional principle of equality according to which '[a]ll those brought before the courts, whatever notably may be their nationality, must be treated in identical manner by French jurisdictions' obviously implies a uniform norm of treatment and of procedure. Nevertheless, the system in practice is confronted by the real and by that other norm which requires that any person charged should both be understood and understand.

The context: foreigners in what sense?

We shall adopt here a broad definition of foreigner, that of Edwige Rude-Antoine (2001: 147): 'a definition of the foreigner [as being] any person of foreign nationality regularly residing in France or any French person of foreign origin who retains close links with his or her milieu of origin while residing on French soil.' In this particular article we shall be referring to persons of South Asian origin, principally from Sri Lanka, who had arrived in France since the 1960s, having obtained or, in the case of some, having been denied, the right of asylum. Their immigration and socio-economic statuses vary: some are officially settled and are integrated into French society,

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others have been forced into self-withdrawal, to vulnerability and to the clandestine employment that is the lot of those without proper papers.[3]

The court appearances referred to here all took place in the assize courts, hence all being criminal cases. It is in effect in the assize courts that the functioning of justice can best be seen in all its complexity and its contradictions: the time taken for the sittings allows the accused to be heard, but the ritual formality is also the most marked in this setting. It is thus in the assize courts that the gap between the ideal norms and the realities of practice will be the most perceptible.

Every interaction begins with language

An assize court is a space devoted to the spoken word. Any judicial, or even administrative, procedure is deemed valid only if the person concerned is questioned in a language which they understand. This is a frequently referred to requirement and which, if it is not fulfilled, will for example annul a procedure for the expulsion from the territory of a foreigner who has entered illegally. To that effect the courts, like the frontier police and police stations, maintain lists of interpreters in all the necessary languages. In the assize court, as the trial opens and when the presiding judge addresses the accused person to ask him or her to state his or her identity, it is the first thing that the judge wishes to ascertain: does the defendant understand French, and if not, is an interpreter present? In fact, for the most part the accused does understand and speaks a small amount, but is certainly not familiar with the language used in the court. The witnesses as well, although sometimes relatively competent in French, will often prefer to speak in their language and interact by way of the interpreter.

Who are the interpreters? For South Asia, they are generally members of the community who have gradually established their reputation and who are thenceforth regularly summoned by the court registrar several days in advance for criminal trials. There would be around fifty interpreters in Hindi/Urdu and around fifty in Tamil for the Parisian region, but very few are accredited under oath, that is, officially recruited by dossier by a commission set up for this purpose and who have sworn an oath. The non-accredited interpreter must, like the witnesses, swear at the beginning of the trial to speak the truth, the whole truth and nothing but the truth, before taking his or her place in front of the defendants' box, beside the lawyer for the defence. The *a priori* role of the interpreter is to provide a translation that is the most exact possible of the accused's words and of the words addressed to the accused or concerning him or her. The interpreter must therefore be perfectly at ease in the two languages to be able to translate in both directions, and to be familiar with legal vocabulary and turns of expression. In fact, the purely verbatim translation is a fiction. On the one hand, as has been shown by the discourse analysis, the oral interventions, and all the more so the declarations, of the accused are frequently punctuated by hesitations, by silences, by hedges and fillers that the interpreter eliminates, while the latter sometimes also adds his or her own hesitations or empty words.[4] It is therefore impossible for the audience to perceive in the discourse of the accused those slight vagaries in the flow of speech, his or her way of stumbling over words, or conversely a tone of assurance that carries conviction. But on the other hand, even though listening only to the words actually spoken, the hearer may quickly become aware of an obvious quantitative distinction, as in the case where a vehement flow of Tamil from the accused is succinctly summarized by the interpreter as: 'it wasn't me, I wasn't there', or inversely, where an intentionally short and sharp question by the presiding judge: 'Is it yes or no'? is 'translated' by the interpreter to the accused in the form of a long whispered statement. It is therefore obvious that interpreters do much more than simply translate: they explain, they make comments, they get points sharpened up that they know through experience are those that the judge will want to know. So are they in effect going beyond their proper role? A study of interpreter performance speaks of 'over-performing

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for the court' (*débordement par le haut*) when the interpreter ranges him- or herself on the side of the law and takes on to some extent the role of the judge, and 'over-performing for the accused' (*débordement par le bas*) when the interpreter sides with the person he or she is translating and whose response he or she will sometimes even unconsciously shape (Larchet, 2012). Indeed it often seems that, as the trial progresses, the importance of the interpreter grows to the point that frequently the judge will address him or her directly, thus reducing the dialogue with the accused to an indirect one, saying for example: 'Interpreter, please ask the accused if …' or 'Say to him that he must tell us whether he really did …' And when a statement leaves the court uncertain of its meaning, the go-between role of the interpreter then takes on all its significance. It is the interpreter who is asked to clarify terminological subtleties, relations of kinship that are foreign to our codes, or even to supply information about a political situation (Bouillier, 2011).

The interpreter is expected to translate to the accused everything that is said, from the long and often monotone reading of the charge by which the trial is initiated up to and including the statement for the prosecution and the defence lawyer's plea. He or she will be constantly on their feet in front of the accused, turning alternatively towards the court to be addressed in French and in a strong voice, and towards the accused, whispering in Tamil the translation of the words exchanged and the questions put. There then often occurs a kind of parallel dialogue when for example one sees the accused react to certain statements given in evidence (particularly psychological expertise) which have been translated for him but whose comment in response is audible only to the interpreter. That creates a kind of free but private discourse, whereas officially the accused has the right to speak only when given leave by the judge to respond to questions.

The intermediary role of the interpreter necessarily introduces a further gap between the body language and facial expressions of the accused and the understanding of what he says. Those listening to the trial, the jurors, the judges, are limited in their ability to align their visual impressions and the information that they are hearing. The body language of the accused that accompanies his statements is in the end addressed only to the interpreter who for his or her part can only render the bare words. When one considers the importance for any verbal interaction of all the non-verbal aspects that accompany it – gestures, ways of looking, shifts in tone of voice – one can well assess the poverty of the communication under these conditions. If the accused is refuting the charge, it is over to him to convince the jurors, to get across his point of view, or else to elicit their indulgence or even pity, and to do this the way he projects himself physically is essential. Lynch and Bogen (1996: 49) even speak of 'performance' in their famous study of the trial of Colonel Oliver North by describing the physical attitudes which came into play in the evaluation of the witness's credibility. Thus, North often resorted to the excuse of having no memory of the matter alleged and showed considerable 'performative sincerity': 'a convincing performance of such characteristic expressions of "forgetting", and being absorbed in a search for the elusive information, is part and parcel of a witness's evidently sincere testimony.' It should be added that body language, out of phase with the oral language by reason of the translation, is also culturally marked. One thinks of the smiles which in the Far East often accompany embarrassment or sorrow, or else the side-to-side head movements which in South Asia mean acceptance, not negation. Such things can easily lead into error a jury little familiar with these types of attitudes and can make it suspicious or even hostile.

Sometimes, the time taken for the translation to occur, together with a vague knowledge of French, can be to the accused's advantage by giving him a certain time to prepare his answer. All justice professionals complain about the slowing up of the proceedings eventuated by having to go through an interpreter along with the absence of spontaneity and the impossibility of pushing the accused on to the back foot by a tight interplay of rapid questions. The presiding judge seems less the master of time when he is faced with an accused accompanied by his interpreter. This problem of language, of the understanding and sharing of codes of expression, which makes justice

acceptable, is particularly highlighted in the case of foreigners. Having an interpreter available represents an attempt partially to address this: but it is not just a question of them. The linguistic divergence is omnipresent. As a young under-aged offender of Algerian origin in the Fleury-Mérogis prison put it:

> I don't talk real French. I talk street French, the French of the bro's. Sometimes I don' understand. Like with the Judge, she talks French. I don't get it. When I'm with the judge, I can't talk. There's always sumpin stoppin' me. I think I can't talk good, like that. But you understand or not, they don't give a stuff! (Le Caisne 2008: 295)[5]

Emotions

Judges and lawyers unanimously deplore the fact that 'translation stifles emotion'. But why do they regret this? What role, then, does emotion play in the courtroom? Who should feel it or express it, and how? For the accused to be able to show a certain register of emotion is considered desirable, but should this emotion be considered dangerous for the 'serenity of the debate' when it is felt by those participating in the various judicial roles? And overall, what do we mean by *emotion*?[6] This opens up a vast debate which bears upon an essential aspect of criminal trials; in that context as well, observation of the court interactions with people of a different language and culture tends to bring out certain contradictions.

Contrary to certain classical theoretical positions in law, which propose that law and judgement should be put entirely on the side of reason, one can well think that what is called emotion is in fact necessary in judicial proceedings, especially in the assize court, for this subjective state is capable of manifesting or authorizing the empathy that enables judgements to be made: the rational examination of the facts is enhanced by the capacity to be affected by their circumstances and their consequences, whether this be from the point of view of the victim or the accused.[7] It is this faculty for feeling on the part of the jurors which is intentionally addressed in the speeches of the defence lawyers and the prosecutor: the tension becomes palpable between the different protagonists of the courtroom drama, between the accused, the victim and the jury. In such cases, whatever might be the verdict (or the bitterness of certain jurors), the trial will have proceeded as it should, and will have been therefore a 'good trial'.

For the accused to use an emotional register is fundamental, whether to persuade of his sincerity or his remorse. In such use, foreigners are at a disadvantage. As mentioned, translation does not allow the intensity, the strength of conviction, or the hesitancy of the speech to be conveyed. We may cite the case of a woman from South India, accused of maltreating her child and speaking through an interpreter, who had not managed to convince her judges. Recalled before the court, and required this time to speak directly in English without an interpreter, she had, through the force of her way of speaking, removed their doubts.

Generally, people from South Asia are not culturally accustomed to showing their emotions in public in this type of situation. More often they withdraw into themselves and are not very demonstrative, hence becoming quickly taxed with indifference and being thus poorly perceived both by the public and by jurors. One may as an example quote press reports published after the trial of a Nepalese who had murdered his French wife. It seems that there was a dramatic contrast between the strong emotions of the victim's family and friends, and of members of the public present at the hearing, at the description of the facts of the case, and the absence of any emotional response on the part of the accused. As a court reporter wrote: 'The courtroom atmosphere was very charged and laden with emotion […] that feeling grew when faced by the man who showed no emotion, or hardly any […] X remained expressionless, withdrawing behind a non-understanding of the language' (Dubarry, 2008).

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The lawyers for the defence strive to counter the tendency of defendants to maintain their silence or their denial. They try to bring them to speak of the sufferings they may have gone through, what led them to perpetrate the murder. Above all they try to get them to express remorse. At the very end of the addresses, when both the chief prosecutor and then the main defence lawyer have spoken, the presiding judge will invite the accused to speak a final time. At such moments the defence lawyer is often seen to be turning tensely in his seat towards his client, and one can almost hear him say to himself: 'If only he says what he should, what I have told him to say'. Indeed he had explained to the accused that he should ask for pardon, express his remorse, his genuine sorrow and his intention henceforth to lead an irreproachable life, in short, to touch the jurors and induce them to show clemency. But if often happens that an accused fails to heed their lawyer, their mentor on things judicial, and goes off on a final vindictive tirade, even directing a charge against their victim, which has the most deleterious effect in the courtroom. In such circumstances one can feel the jurors' attitudes hardening, the lawyer observing the effects of his plea fading to nothing while the prosecutor displays a sarcastic smile …

If the manner of speaking of the accused must conform to certain conventions, it is clear that these conventions differ according to gender association. According to a study by Natalie Z. Davis on pardons sought for emotional reasons in sixteenth-century French courts, it was acceptable for women to show they were disturbed, bewildered, desperate or even jealous, but aggressiveness and anger were tolerable only on the part of men (Davis 1987, quoted in Conley and O'Barr, 2005: 121). One might ask whether it is any different today in France. Such codified emotional registers, which may be expected of the accused, contribute towards disposing juries in their favour.

As for the jurors, if they are required to take care not openly to show any emotion whatsoever, on the other hand it is impossible for them inwardly to remain insensitive. It is therefore always with the jury in mind that the speakers in judicial proceedings, the lawyers and the prosecutor, engage in a form of verbal jousting which privileges this register; their key aim being to arouse and mobilize the feelings of the jurors. This stratagem is particularly marked in the address of the counsel for the aggrieved party (*partie civile*), who will make use of the whole range of emotions: horror, pity, indignation, anger. Generally, the description of a victim's body by the police officers, then by the coroner, spares the jurors no details but the accusation even insists on them: the lawyer for the brothers of the victim, for instance, may give a detailed description, backed up by hand gestures, to show how the body had been hacked to pieces, while his clients, the dead man's brothers, sob more and more violently. Or again, as in a case of arson in an apartment building, where the counsel for State health and social welfare services brought forward the sole surviving child of a family in order, she said, that he be shown that justice was being done. In such cases the pity of the jurors cannot fail to be aroused. Sometimes the life circumstances of the victim are skilfully evoked enabling the oratorical effect to hit home: in relation to one victim who was a Sri Lankan political refugee, the lawyer representing the aggrieved family cried: 'He came looking refuge in France and it is his death that he found!' On occasions a victim may have been alone in the country without any family, and has no representation; in these circumstances it is over to the prosecutor to play the role both of the defender of society and the defender of the victim (as in the North American system).[8]

As for the presiding judge, he or she will take care to avoid any emotional excess. Conducting the debates, he or she will question both the accused and witnesses, keep control over the often vehement exchanges between the prosecution and the defence, and must enable a probable and reasonable truth to emerge from often contradictory accounts. Generally remaining extremely courteous and measured, the judge plays a subtle balancing role and strives most often to contain recourse to emotions that s/he judges to be unhelpful for the demonstration of the truth. Thus, a judge may have withdrawn from a dossier of photographs the most graphically horrible shots, so as to spare

the jurors, despite the prosecution's reticence. Or else the judge will seek to calm a witness, urging that person to recover their composure and set out clearly what they want to say.

The philosophy of the trial and cultural difference

When a case comes to trial in the assize court, it is at the end of a thorough process of judicial investigation which has established, with the support of evidence which is in principle solid, the probable guilt of the person 'placed under investigation' who now takes the status of the 'accused'. Under the French judicial system, the direction of the trial is much more towards the confirmation of facts already established than to the building of a prosecutory case (Garapon and Papadopoulos, 2003: 160–161). As Susan Terrio, an American analyst of the French system of juvenile justice, says (2009: 49), there prevails in this system 'the presumption that the charges are synonymous with the facts of a case', since 'only one word in French, *les faits*, indexes both the charges alleged during the investigation as well as the facts established during the trial'. In this confirmation of a truth established through the judicial investigation, the accused is expected to collaborate. As Myron Moskowitz has a European judge say:[9] 'Our goal is to find the truth, and the defendant is in a very good position to help us accomplish that task. What is wrong in asking him to tell us what he knows?' (Moskovitz, 1995: 1138). Nevertheless, an American lawyer might well object: 'Still, it doesn't seem fair to put a defendant in a position where he has to hang himself by talking' (Moskovitz, 1995: 1136). The French system therefore rests on a 'culture of confession' (Terrio, 2009: 45), an ideal outlook where the accused recognizes the veracity of the *facts* which the judicial investigation has enabled to be established, confesses his guilt, feels remorse for this and accepts the sentence as just and prison as a stage towards rehabilitation within society.[10]

An accused person from South Asia shares neither the same conception of the person nor the awareness of the 'taken for granteds', of what is implicit in this judicial system. Thus his responses and his behaviour are often at odds with these and risk remaining misunderstood by those who will be judging him. It is in the direct addresses to the jurors that this conception is most prominent. Thus, the presiding judge will declare to the jurors before requiring them to take the oath: 'You will swear […] to come to your decision according to the charges brought against the accused, and the means of his defence, following your conscience and your intimate conviction, with the impartiality and firmness of mind appropriate to a person of probity and freedom of character' (Code of Penal Procedure, art. 304). And at the very end of the trial, when the jurors are about to retire to their deliberations, this same presiding judge must read to them again from the Code of Penal Procedure:

> The law does not require account of those who judge for the manner by which they reach their convictions, nor does it prescribe for them rules upon which they must particularly assess the completeness and sufficiency of any evidence. It prescribes rather that they examine themselves in silence and self-reflection and that they weigh up, in the sincerity of their conscience, what impression has been made on their reason by the evidence brought against the accused, and the means of his defence. The law asks of them only this one question, which encapsulates the whole measure of their duty: "Have you an intimate conviction?"' (art. 353)

No appeal to the view of God in the secular state of France but to the conscience, to an internal seat of judgement which is not necessarily transferable to other cultures.

The intimate conviction of the jurors, their overall impression, hangs upon the evidence but also upon a general apprehension of the circumstances of the criminal act. The task is to judge and to punish, not an abstract crime but an individual who has committed a crime. Justice seeks earnestly to understand what led to the crime, its context and the motivations for it. That is why criminal

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trials all include an element centred on the personality of the accused. It is firstly to him that the presiding judge directs many questions, asking him to tell the story of his life, to talk about his parents, his family relationships, his schooling, his work experience, his love life, etc. Very often the interpreters convey a reticence of the accused with regard to these questions, which can be measured from the brevity of their statements: they do not understand at all the reason for these questions which they judge indiscreet and which relate to modes of introspection that many find foreign to them. 'I have killed someone and I am being asked to talk about my mother, but that has nothing to do with it!'

When an accused person recognizes their guilt, it sometimes happens that they think that justice is satisfied and the procedure over. A woman arrested for murder and who recognized the fact, when placed on remand declared to the interpreter: 'I said it was me, what more do they want?' Another prisoner thought that his appearance before the investigating judge (*juge d'instruction*) implied the possibility of an arrangement and tried to negotiate a release on bail by applying the principles of American (or Sri Lankan) plea bargaining.

When the accused denies the facts with which he is charged, he is not necessarily giving thought to the idea, as French justice does, that the truth is unique and invariable and that the trial is there to bring it out. Faced with a defendant who changes his story, the judges are particularly irritated and the defence is put at a severe disadvantage. During a trial for attempted murder in a park, the accused in turn denied the sequence of facts, then denied that he was present at the location and finally, faced with the photographic evidence, suddenly alleged the involvement of a third person whose presence he had suppressed for fear of reprisal. His lawyer tried to adapt his plea to this latest revelation, but the presiding judge retorted in exasperation: 'He is constantly changing his story. This is a new version. It is impossible to say what he did. That is rare in the Assize Court!' The severe verdict handed down laid greater sanction on the accused's lack of co-operation than on the act itself, which remained stained with mystery (the victim, who had managed to survive the attack, had left the hospital and disappeared). One must be aware that the accused who, during the judicial investigation, then the trial, was asked many times to tell what he had done, came to think thereby that his first explanation was not convincing. If he was constantly being asked the same questions, that meant that he should try something else and so he multiplied the versions, trying to find the right one that the judges would finally believe!

The refusal to accept guilt undermines the re-educative function of imprisonment. 'I think I am in prison for nothing' said one accused. Punishing the crime and rehabilitating the criminal are in effect the two pillars of the carceral function. The behaviour of a prisoner on remand is the object of a detailed report read out at the trial, which may influence the opinion of the jurors. A prisoner who wilfully remained isolated in his cell and refused all contact, even with his lawyer, because, he said, as soon as he went out of the cell he would be assaulted by other prisoners who accused him of being an informant, saw his explanations waved away with the wave of a hand. On the other hand, Mme X, who became the confidante of her whole prison floor for whom she cooked and who called her 'Maman', and to whom the prison management entrusted young women in a depressed state, benefited from a very favourable report, reinforced by the testimony at the bar of a prison visitor. The emotion with which the latter spoke of the accused woman and the generosity that she demonstrated in prison presented a striking contrast with the horrific description of the act which she had perpetrated. When that same visitor declared in a trembling voice: 'This poor woman told me that the years spent in detention were the happiest in her life […] She had had a terrible life in a culture in which she, like many other women, were kept in severe subjection, […] one in which the men beat their wives', the sympathy of the courtroom and the jurors was entirely on her side. Nevertheless the temptation to interpret this model behaviour in terms of an acceptance of guilt, of remorse and redemption, did not hold up in the face of the accused's final declaration where she

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launched into a vehement diatribe against her unfortunate victim, the lover whom she had murdered, to the great chagrin of her defence lawyer. That final hate-filled outburst wiped away for the jury the sympathy that her life circumstances, then her exemplary behaviour in prison might have aroused, and which without any doubt would have played a role in her sentencing.

The attempts at judicial solutions

French justice, as it is practised, is not blind to cultural difference and to the risk of misunderstandings that this brings. The investigating magistrate, the defence lawyer or the court will often ask the interpreter for information, trying, for instance, to understand a form of name ('they call him Roshan, was that his nickname in the Tamil Tigers?'; 'No', smiled the interpreter, 'that is his name in Tamil'), or kinship relations: 'Mr interpreter, in Sri Lankan is the word for father and uncle the same?' or else 'He said that his brothers were alive and now he is stating that one of his brothers died in the tsunami. Ask him who, of his family in the French sense, has died?'

But it is the reports of the personality experts which present most of the elements considered as cultural, that is to say linked to the accused's origin. The problem is that, for the most part, these experts are not prepared for this role, do not have any knowledge about the country or any background in anthropology. They rely necessarily and once more on the interpreter, who is present during their interviews with the accused.

These reports, which are read or presented in person in the court by their authors, are of three kinds: a personality investigation and expert psychological and psychiatric reports. The personality investigator, who is often a member of an association and sometimes is a trained psychologist, bases her or his report on what the accused says as well as on the comments of the accused's close relatives (whose names and addresses have been supplied by the accused); the investigator must retrace, following a pre-established pattern, the various stages of the accused's life, his family and social relationships, his likes and dislikes etc. In the case of Sri Lankan refugees in particular, the investigator is drawn into enquiring about the accused's position in relation to the civil war, and thus succinctly to present the issues at stake in the Sri Lankan context, which sometimes gives rise to some disconcerting approximations. As when a prosecutor asked of an investigator: 'It is very complicated to get into that community. How do you set about it? Do you have access to reports for the OFPRA?'[11] To which the investigator replied: 'We do not have the resources to do so. The cultural explanations are supplied by the person who is acting as the interpreter. I work only on the basis of what I am told. All the items quoted are matters as stated [by the charged person or his family]'. This is to say that concerning Sri Lanka, investigators' accounts are quite stereotyped: the war, seen naturally from the Tamil point of view, and the tsunami, always mentioned as an ultimately shared experience, a trauma of transcultural dimensions: a psychiatrist had even considered that the various aggressive episodes of one accused person corresponded, more or less, to anniversaries of the tsunami.

The psychologist's report picks up certain aspects of the life history of the accused, but this time adds an assessment which gives an expert opinion on the latter's personality. Here once again the dependence is great on the interpreter, who must for example give his or her opinion on the language capacities and levels of the accused. But a great difference in the reports can be observed, especially in relation to the type and level of training of the psychologist: some try to get interviewees to take Rorschach or TAT tests when the latter are little in the mood to co-operate in these and are disconcerted by what they may think are children's games, while others are ethno-psychologists who provide very detailed reports on kinship or gender relationships in Tamil society.

As for the psychiatrist, his or her role is to assess the level of responsibility of the accused at the time the acts were committed, and to state if the latter shows any mental pathology and whether he is amenable to corrective sanction. One particular psychiatrist reacted vehemently against the

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clear-cut categories of the psychiatry of a bygone era that were still being demanded by the court, saying that 'the judges were getting him to do their job in their place', and that it was not up to him to decide on the level of guilt.

Right throughout the trial, reference may constantly be made to aspects qualified as being cultural, without their ever being elaborated or set within a particular construct. For example, it is sometimes claimed that 'Sri Lankans do not show their emotions, they do not express their feelings, they are naturally reserved, it is in their culture'. And when a defence lawyer attempts to justify certain incoherencies of his client, he may exclaim: 'His behaviour remains determined by the cultural influences of his origins', without anyone being the wiser as to what this refers to. In the same vein, a presiding judge was heard to sigh rather wearily: 'He never answers directly. Sri Lankan is a difficult language, yet the interpreter is very precise!' Each of the principal actors involved in the judicial process tends to have his or her own conception of the role that 'culture' can play in such and such an affair, and may choose or not to bring forward elements deemed to be explicatory of these. One accused asserted that he was suffering from auditory hallucinations, which his defence counsel put down to a traumatic socio-religious context, with the appearance of wandering spirits which were demanding vengeance and inciting the accused to commit incendiary acts. Nevertheless, when questioned about this by the presiding judge, the psychiatrist involved in the case declared he had never heard the accused talking about that. On one occasion, mention was frequently made of curses or acts of sorcery perpetrated in the past: the court listened to these stories which it considered far removed from its daily reality without being aware that, as the interpreter recounted later, the family of the accused had come into the courtroom keeping their hands in their pockets where they were surreptitiously squeezing lemons, destined according to Tamil beliefs to ward off evil spells…

Most often, the reference to cultural influences is coupled with a confession of helplessness. As the prosecutor recognized in the case of the earlier mentioned Nepalese murderer, 'Account must be taken of the enormous cultural difference!' or much more bluntly by the counsel for the aggrieved party in the same case: 'You can't import like that someone who comes out of the Middle Ages directly into Paris!' (Dubarry, 2008).

Conclusion: an aporia

The ideal of French justice affirms equality before the law, the absence of discrimination between individuals relating to factors associated with gender, race or religion. But the personalized dimension of any penal sanction equally supposes an attention to the different parameters which explain a personality, and thus a necessary attention to the socio-cultural context. How then might one navigate between these two shoals? As a judge of South-Asian origin said: 'We must be very careful. The media and people in general very easily accuse the court of having culturalist arguments, if not to say racist ones.' These remarks met with an almost immediate echo in a press article accusing a prosecutor: 'He gives validation to an ethnicizing perception of delinquency to the exception of any social explanation […]. In doing so he makes himself the judicial underwriter of a racist stereotype.'

Susan J. Terrio directs a vehement charge against what she qualifies as a 'legal fiction': 'These fictions are that France recognizes only individual citizens and in this way ensures those citizens' equal treatment under the law' (Terrio, 2009: 27). She shows that although all reference to race is banned from the court, the same thing does not apply to the culture, but as a reified culture, reduced most often to ethnocentric stereotypes (Terrio, 2009: 145).

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> Judges attended to the role played by cultural difference in one of two ways […] Either they stigmatized and neutralized it through the standard interventions at their disposal or they medicalized and treated it through the specialized services of university-affiliated ethnopsychiatrists […] In either event, culture was an obstacle to be surmounted.
>
> Court personnel […] conceive of culture as an internally homogeneous and geographically bound system […] These cultural hierarchies function like race to ascribe certain immutable traits to the people born within them. Because culture, like biology, is understood to determine the practices of the people born into it, particularly in what many French people see as less evolved non-Western cultures (Terrio, 2009: 29).

Over all, as she concisely sums up: 'Prosecutorial summaries […] tended to criminalize the cultural difference of minority groups' (Terrio, 2009: 239). This is a severe observation that denounces the hypocrisy of a system which, in her view, tends to mask the vocabulary of racism behind that of a caricatured culture.

Yet an observation of judicial interactions with foreigners originating from South Asia tends to nuance this extreme point of view. To observe the functioning of justice in its interactions with people of other origins and cultures allows for a certain distancing and decentring, and brings out the implicit presuppositions, the underlying norms which govern how a trial proceeds, and, beyond these, the conception of what is justice. Their ignorance by a foreigner who is charged with a crime is penalising. Symmetrically, the ignorance or perplexity of judges faced with an Other, with someone whose cultural references are strictly unknown to them, makes the possibility of reaching a just verdict highly approximate. The foreignness of that Other who is the accused renders visible the contradictions and difficulties of justice, which the appearance of sharing in a common culture tends to obscure.

Translated from the French by Colin Anderson

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Notes

1. See the brilliant synthesis of Terry Eagleton in *The Idea of Culture* (2000: 26): 'Herder […] is the first to use the word culture in the modern sense of an identity culture […]. Culture, in short, is other people. As Frederic Jameson has argued, culture is always "an idea of the Other". […] To define one's lifeworld as culture is to risk relativizing it. One's own way of life is simply human; it is other people who are ethnic, idiosyncratic, culturally peculiar.'
2. For a more nuanced approach see Good (2008): 'Problems [are] arising when culture is teleologized in courts of law, by being treated as "objective evidence" or as the direct cause of persecution or delinquency.' See also Roberts (1999), Van Broeck (2001) and Rosen (1977) on the subject of judicial matters implying the concept of 'race' or of 'culture/acculturation' applied to tribes in India in the years 1960/1970, and the debate around the concept of 'cultural insanity' or of 'social incapacitation'. Rosen (1977: 568) mentions the case of a former Indian 'untouchable' accused of the murder of a female student who had rebuffed him, and the refusal of the court to accept the evidence of an anthropologist relating to the cultural context which could have justified a decision of diminished responsibility.
3. See the recent (2011) dossier *Diasporas sri lankaises. Entre guerre et paix* [Sri Lankan Diasporas: between War and Peace] compiled by Antony Goreau-Ponceaud for the journal *Hommes et Migrations* which focuses on immigration from Sri Lanka.
4. See for example the linguistic analysis conducted by Sandra Hale (2002) of the work of Spanish language interpreters in an Australian court. See also Conley and O'Barr (2005, especially ch. 9).

5. Trans. note: The English version given here is an attempt to convey a similar language register to that of the quoted French.
6. On the difficulties of definition and for an overall reflection on the place of emotion in the conception of justice I refer the reader to the volume edited by Susan A. Bandes (1999) and particularly to her introduction, which begins with the words: 'Emotion pervades the law'.
7. There is a tendency, in classical legal positions, to contrast emotion and reason, or to make a distinction between acceptable emotions (compassion) and unacceptable ones (vengeance, hatred), 'so that emotion does not encroach on the true preserve of law: which is reason' (Bandes, 1999: 2). But as more recent studies on cognition show, 'it is not only impossible but undesirable to factor emotion out of the reasoning process: by this account, emotion leads to a truer perception and, ultimately, to better (more accurate, more moral, more just) decisions' (Bandes, 1996: 368).
8. The opinion of Susan Bandes (1996) and of other jurists merits comparison with the French system and the victim-oriented stance of the latter (Salas, 2005). In Bandes' view: 'Victim impact statements […] as narratives […] should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing' (1996: 365), 'they block the jury's ability to hear the defendant's story' (392), 'they deny the humanity and basic dignity of both defendant and victim' (395).
9. This refers to an article which sets out, in the form of a theatrical play, a confrontation between the American and European procedures around the reconstruction of the murder trial of O. J. Simpson.
10. See an analysis of the place of remorse in the American judicial process in Sarat (1999: 169): 'Traditionally law has encouraged remorse by rewarding it […]. Some now believe that there is no place for the assessment of remorse, that the focus of punishment should be on the acts committed by the offender, not the offender's emotional response to those acts', since there may well be residual uncertainty as to the sincerity of those demonstrations of repentance.
11. The French Office for the Protection of Refugees and Stateless Persons (trans. note).

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