

# Lay Justice in India

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Popular Justice

Beyond Judges v. Juries

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# The failure of a legal transplant?

- . About trial by jury, the Law Commission of India wrote in 1958 that this “transplantation of a practice prevailing in England” has “failed to grow and to take root in the country”.
- . For a legal historian, convinced by the importance of legal transplants in studying comparative law, the 1960 abolition of criminal jury in India is a source of questions about development of lay justice until today.
- . On one hand, India is an interesting example (with South Africa) of critics about jury trial provoking its abolition in a common law country.
- . On the other hand, independent India has tried until today to reform its administration of justice. In order to limit judicial arrears and to associate citizens in judiciary processes, many attempts have been made to create new kinds of “popular justice”.
- . These attempts, as we will see after studying the story of the criminal jury in India, have not really succeeded. The question remains open : which kind of justice is the most suitable for a multi-religious, multi-cultural and multi-class society?

# Introduction of jury trial in India

- The first case decided by an English jury in India happened in Madras (today Chennai) in 1665. It is described by Professor M. P. Jain in his *Constitutional history*.
- One Mrs Ascentia Dawes (probably a British woman) was charged by a grand jury with the murder of her slave girl. Then a petty jury, with six Englishmen and six Portuguese, found her guilty “but not in manner and form”. The Governor asked the jury for a second clearer verdict... and Mrs Dawes was acquitted.
- This first case is almost the summary of a rather sad story: the introduction of the jury as a biased institution in favour of British colons, with many acquittals taking aside acts of extreme violence committed by colonizers against indigenous people.
- One century later, with the development of the East India Company empire in India, the jury system was implemented inside a dual system of courts:
- In Presidency Towns (Calcutta, Madras, Bombay), there were Crown Courts (with a first Supreme Court in Calcutta since 1774, later in the two other towns) and in criminal cases juries had to judge British and European people (as a privilege) and in some cases Indian people.
- In the territories outside the Presidency Towns (called “*moffussil*”), there were Company Courts (composed with Company officials) without jury to judge most of the cases implying indigenous people (British and European people tried to avoid them).
- When Macaulay arrived in India in 1834 as a penal law reformer, he was immediately struck by this unequal system and the risks of partiality, especially in cases of violence committed by colonizers towards their domestics.

# The jury system during the Raj

- In 1858, the end of the powers of the Company and the establishment of the Crown Government of India (*Raj*) was followed by the adoption of the Indian Penal Code (1860) and the Indian Code of Criminal Procedure (1861, amended in 1872, 1882, 1898).
- The criminal jury was obligatory only in the High Courts of the Presidency Towns; elsewhere, it was optional and rarely used. According sections 274 and 275 of the Code of Criminal Procedure, the jury was composed from 3 (for smaller offences judged in session courts) to 9 (for severe offences judges in High Courts) men.
- When the accused were European or American, at least half of the jurors have to be European or American men. The argument was that the jury must be “acquainted with theirs feelings and dispositions”
- A recent study of Elisabeth Kolsky has shown how many “perverse verdicts” were delivered by white juries in trial of “European British subjects” charged with murder, assault, confinement of Indians.

# The decline of the jury system

- In 1920 a British Governor wrote that “trial by jury in India was an exotic plant which is unsuitable to the country”
- In 1931, Gandhi said that he was unconvinced by the superiority of “untrained juries” in comparison towards trained judges; for the future independent India, he wanted a judiciary independent from religious and castes prejudices.
- When Gandhi was assassinated on 30 January 1948 by Nathuram Godse in Delhi, it was decided (according a Delhi Act of 1912) to use a special court without jury. The court, composed of a single judge, sentenced Godse to death. It was argued that a “vindictive” jury would have frustrated justice in a climate of political violence.
- The jury found no place in the 1950 Indian Constitution, it was ignored in many Indian States and the Law Commission recommended its abolition in 1958 (14<sup>th</sup> Report).

# The abolition of the Jury system

- **The Nanavati Case**

- In April 1959, Commander Nanavati of the Indian Navy (a Parsi linked with the Nehru-Gandhi family) shot dead his wife's lover. He was acquitted by a Bombay jury (by a majority of eight to one). According to the law, the verdict was returned to the High Court. Two judges sentenced Nanavati to imprisonment for life.
- The sentence was confirmed by the Supreme Court in 1961. It was said that the verdict was "perverse" and influenced by medias.

- **A discrete abolition**

- Curiously the jury trial was abolished in India by a very discrete process during the 1960s, finishing with the 1973 Code of criminal procedure, always in force (Court of sessions without jury)

# A Judiciary with a very small number of professional judges

- **The Supreme and High Courts**
  - The Supreme Court is composed of 29 members and is judging more than 50 000 cases every year
  - 21 High Courts (for 28 States and 7 Union territories) are composed of about 750 judges and they are judging all appeal cases
- **The subordinate courts**
  - 16 000 judges (district judges) are corresponding to the civil and criminal (Criminal Courts of session) courts.
  - There is a great number of vacancies and about 10 judges for one million people
- **Pending cases for more than 350 years!**
  - 35 millions of cases are delayed and the weight of this backlog is huge

# Special Courts with lay assessors

- **Juvenile Courts** have been created first in Madras during the Raj (in 1920), then in other States and Union territories (according the 1960 Children Act). First there was a professional judge and exclusion of lawyers' counsel until 1978. Then the legislation has been unified for the whole India (1986 and 2000 Acts, the latter after the ratification of the UN Convention for the Rights of Children). Normally Juvenile Justice Boards are composed of one magistrate and two social workers (whose one is one woman). The implementation of this legislation has encountered many obstacles in different Indian States (illegal imprisonments since 1986).
- **Parsi delegates** are lay assessors (a panel of five in each court concerned by this population of 60 000 persons) who are present in courts judging matrimonial (marriage and divorce) cases according the personal law (since 1936) of Parsi people.
- **Land tribunals**, with representatives of the farmers have functioned in several Indian States since the 1970s for land reforms.



# Lay Assessors, Family and Consumers Courts

- **Lay assessors** are present, besides one professional judge in different specialized tribunals: for taking off compensations, railways tariffs, work accidents compensations, rent control... some of the lays assessors are in fact experts in technical matters.
- **In 1984 Family Courts** were created for promoting women rights in matrimonial cases. These courts are established only in cities with more than one million habitants, with a professional judge and the preference for settlement by professional conciliators. Although the 1984 act has foreseen for a majority of women judges, there were (2002) 18 women judges out of 84 family courts.
- **In 1986 Consumers Courts** were established with two lay assessors (persons interested in this matter, obligatory one woman). They are judging many complaints against public services.

# Village Courts

- India has known \_ at least since the British colonization \_ village courts called “Lok Adalats” (People’s Courts) or Nyaya Panchayats (Justice of the Villages) with villagers mediating between contending parties. They were recognized through the 1888 Madras Village Court Act, then developed (after 1935) in various provinces and (after 1947) Indian states. The model from the Gujarat State (with a judge and two assessors) was praised from the 1970s onwards. In 1976 the new article 39A of the constitution promised “opportunities for securing justice” to any citizen through legal aid. In 1984 the Law Commission recommended to create Nyaya Panchayats in rural areas with laymen (“having educational attainments”).
- In 2005 a Draft Bill followed the Law Commission report, but the National Advisory Council (chaired by Sonia Gandhi) rejected the concept of lay judges as “cumbersome, dilatory and expensive”. The Gram Nyayalayas Act, passed in 2009, have foreseen 5 000 mobile courts in the country for judging petty civil (property cases) and criminal (until 2 years of prison) cases. Social workers can be appointed as civil conciliators.

# Indian arguments (from the 1986 Law Commission and from the 2000s debates)

- **Arguments in favour of lay persons**
- It is an “unwarranted belief”, “fed by the legal profession” to think that no one is capable of rendering justice unless he (or she) is trained in law; knowledge of society and culture is also useful.
- **Arguments against lay persons and juries**
- Juries are not suitable for a multi-castes society; they risk to provoke racial and social discrimination. The risks are greater with personal laws in family matters and community violence (like in Gujarat against Muslims in 2002, with more than 2 000 persons murdered).
- Lays persons are not a good solution for diminishing the pending cases in good conditions, because of of the number of illiterate people (40 %?) and the openness to corruption. Would it not be better to increase the number of lawyers (now one million in India)?