

Mass Crimes Committed in Gujarat in 2002

Immediate Need for a Mass Crimes Law

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Anita Abraham is a lawyer with an independent practice based in Delhi. She has been involved in litigation and research in the areas of gender rights and communal violence. Her practice is in the areas of criminal law, matrimonial law and civil law. Anita was a visiting fellow at CSLG from July 2009 till January 2010.

MASS CRIMES COMMITTED IN GUJARAT IN 2002

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Anita Abraham*

We need to fully understand the fact that the rule of law in India also at the same time marks the constitution of the reign of terror. There exists an operational multi-party consensus in India that regards use of force and fraud in doing of politics as legitimate. Organized political violence against individuals or groups has become a way of doing politics. We need new political vocabularies that describe this complex reality. We need for example, to expunge the phrase communal violence from activist discourse (Upendra Baxi).¹

THE COMMISSION OF MASS CRIMES

In February and March 2002,² mass atrocities or gross human rights violations were committed in the State of Gujarat under severe instigation by the Sangh Parivar and with the active

*I thank Harsh Mander, Prita Jha, Pratiksha Baxi, Arvind Narrain and Shrimoyee Nandini for their invaluable inputs. I thank the entire Nyayagrah Team for their unending support.

¹ Baxi, Upendra. 2002. *Notes on Holocaustian Politics*, Seminar. <http://www.mnet.fr/aiindex/UBaxiApr2002.html>.

²The post-Godhra incidents which began on 27 February 2002 went on till 2 March 2003 and continued sporadically for weeks thereafter. The post-Godhra incidents began after the burning of the S-6 compartment of the Sabarmati Express Train

connivance of the State government, in which around 2000 Muslims were killed,³ women were raped and subjected to the worst forms of sexual violence,⁴ properties of Muslims which includes residential and commercial properties worth crores of rupees were burnt, looted and destroyed, mosques were attacked, razed and damaged, and atleast 1,50,000 persons were internally displaced.⁵ The violence was singularly directed against the Muslim community. During this period the State had turned against its citizens and fundamental and legal rights became unavailable to Muslim citizens in Gujarat. The attacks took place in a pre-planned and systematic manner and the protection and redressal machinery, that is, the police force, the political executive and administration, wholly ignored the incessant complaints of people being subjected to the worst forms of crimes. Even those persons against whom crimes were committed in full view of the police were not provided any form of assistance. As a result the entire Muslim community within the State of Gujarat were left feeling threatened, vulnerable and helpless and all Constitutional concepts of citizenship and the rights that may be exercised under it became overwhelmingly uncertain and inaccessible to the Muslim community in Gujarat.

which took place on the morning of 27.02.2002 in which 59 passengers were burnt alive. Of the victims many were Kar Sevaks who had boarded the train at Ayodhya. Even before any facts could be ascertained the media in Gujarat highlighted the incident to indicate that the compartment was set on fire from the outside by a mob comprising Muslim terrorists which became the justification for right-wing Hindu mobs to begin a retaliatory spree across the State.

³ Official figures state that 850 persons were killed whereas unofficial figures estimate a much higher figure of around 2000.

⁴ See *How Has the Carnage in Gujarat Affected Muslim Women?*, A National Womens Panel Investigates, Sponsored by Citizens Initiative, Ahmedabad. Conducted from 27–31 March, 2002. The panel comprised a six-member team, Dr. Syeda Hameed, Ruth Manorama, Sheba George, Malini Ghose, Farah Naqvi, and Mari Thakaekara.

⁵ See also Mander, Harsh. 2009. Fear and Forgiveness: The Aftermath of Massacre. Penguin.

The mass crimes that claimed the lives of thousands of people, and due to which the Muslim community in Gujarat has still not regained firm footing as citizens entitled to claim their political and legal rights, have frequently been referred to as communal riots or communal violence. While the term communal riots or communal violence creates a perception that violence was initiated by one group of people belonging to one religious community upon the other group belonging to another religious community, either due to provocation or for purposes of self-defence, the incidents of violence that took place in Gujarat have nothing in common either with a spontaneous riot or of a mob fight.

According to P. Baxi, judicial discourse naturalizes certain forms of violence, by attributing them to communal riots, while it elides other forms of violence. In this way, such discourses sanction the illegal use of violence by the state—either by acts of commission or omission. Judicial discourse ascribes the inability to prosecute such crimes to the nature of the violence while disregarding the role of the state in producing the nameless mob. Moreover, legal discourse *feminises* crowd violence thereby successfully silencing testimonies to sexual violence during communal violence, and at the same time uses this absence of recorded testimony as a discursive strategy to distinguish riots from genocidal violence (2007:99–100).⁶

The violence which took place on a mass scale comprising gross human rights violations ranging from mass killings, mass rapes, sexual torture, mass destruction of properties, and which has been sold to the general populace as being spontaneous and spur of the moment crimes of passion committed for communal reasons, was in fact the end-result of a very well-planned strategy by right wing political parties in order to perpetuate and practice an extreme right-wing

⁶ Baxi, Pratiksha. 2007. Adjudicating the Riot: Communal Violence, Crowds and Public Tranquility. *Domains* (Special Issue), edited by Deepak Mehta, Volume 3: 70–105.

political ideology within the State of Gujarat.⁷ A Fact-Finding Report by Communist Party of India (Marxist) [CPI(M)] and the All India Democratic Women's Association (AIDWA) to Gujarat between 10–13 March, 2002, states that:

The events in Gujarat following February 27 have rightly been described as an example of a State sponsored carnage against the Muslim community. It would be quite wrong to use the term riot ... The pattern of violence and targeting of Muslim owned properties including those with names, which would not denote community identity, show careful planning. We were told that house checks in the guise of census data collection had been done only recently. The use of cranes, shovels and even trucks to demolish walls were not by any definition spontaneous.⁸

Paul Brass takes the argument further by stating that

... [W]hat are labelled Hindu-Muslim riots have more often than not been turned into pogroms and massacres of Muslims, in which few Hindus are killed ... Further, in these sites, persons can be identified who play specific roles in the preparation, enactment, and explanation of riots after the fact.⁹ Till date mass atrocities/ crimes or gross human rights violations have not been defined in national legal jurisprudence and neither have specific types of mass crimes been acknowledged to have been committed by the Indian

⁷ Phillip Gourevitch in his book on the Rwandan genocide states, 'But mass violence too must be organized; it does not occur aimlessly. Even mobs and riots have a design, and great and sustained destruction requires great ambition. It must be conceived as the means towards achieving a new order, and although the idea behind that new order may be criminal and objectively very stupid, it must also be compellingly very simple and at the same time absolute. The ideology of genocide is all of those things and in Rwanda it went by the bald name of Hutu power.' See Gourevitch, Philip. 1999. *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda*. Picador, USA.

⁸ Report of the visit by CPI(M) and AIDWA to Gujarat, March 2002.

⁹ Brass, Paul. 2004. *The Gujarat Pogrom of 2002*. Contemporary Conflicts, March 26, 2004, <http://conconflicts.ssrc.org/archives/gujarat/brass/>

State. Gross human rights violations in the nature of torture and disappearances which have taken place and continue to take place in Kashmir, Punjab and the North-East or mass killings, mass rapes such as was committed in Gujarat have not yet been identified and defined as such, either by the Central or State government or by any justiciable body within the Indian State.

Indian punitive laws do not cover group crimes with the exception of some enactments such as the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*, enacted precisely in an attempt to bridge the gap of historical wrongs committed against an entire caste of people. Across the country offences have been committed by groups of people belonging to one group/ community against another group/community based on several historical, political and social factors at the local and national level, such as the political presence, political ideology, percentile presence of these communities, economic welfare, socio-political standing, and so on. Laws that govern these fact situations wherein crimes are committed against a group of people based on religious or ethnic identity are grossly lacking. Further, there are no laws nor is there any form of legal jurisprudence that criminalizes gross human rights violations committed by the State against its citizenry.

The *Prevention of Corruption Act, 1988*, is an example of a punitive legislation enacted to prosecute and penalize public servants¹⁰ for the commission of offences of illegal ‘gratification’, amongst other similar offences. Some Sections of the Indian Penal Code can also be invoked to charge public servants for offences of economic crimes committed during the performance of their official duties. Seemingly with the enactment of the *Prevention of Corruption Act, 1988*, there is an acknowledgement of a specific type of crime that can be committed by public servants during the discharge of their

¹⁰ Public servant has been defined both in Section 2(c) of the Prevention of Corruption Act, 1988 and in Section 21 of the Indian Penal Code, 1860.

official duties (though sanction is necessary for prosecution). No such recognition of the offences of murder, rape, pillage, arson, destruction of places of worship, etc. which have been committed on a mass scale by ranks of leadership have either been recognized or acknowledged through legislation till date. Upendra Baxi suggests that ‘activists should recourse to prosecutions for sedition by incumbent Ministers. That offence is rather peculiar in that it penalizes acts causing disaffection towards lawful governments ... now is the time when political actors should be imaginatively prosecuted for their conduct, which has the result of producing such disaffection. We ought to use colonial legality against our still colonial masters!¹¹

International law through the enactment of the Rome Statute, preceded by the Nuremberg Charter & Trials, the Genocide Convention, the Geneva Conventions, Ad-hoc tribunals i.e. the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), amongst others, have laid down a voluminous legal jurisprudence for the prosecution and punishment of perpetrators of mass crimes, which includes heads of state and other ranks of leadership.¹² The Rome Statute, the legal basis for the existence of the international criminal court, defines four substantive types of mass crimes i.e. Genocide, Crimes against Humanity, War Crimes and Crime of Aggression. Adopted in 1998 the Rome Statute was enacted as a result of decades of negotiations between countries in order to enact a law internationally making mass crimes triable and punishable and was accepted by countries

¹¹ *Supra* note 1.

¹² Article 4 of the Genocide Convention states: ‘(P)ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’. Customary international law mandates an obligation for states to prosecute those accused of crimes against humanity. (See P. Scharf, Michael. 1999. *The Amnesty Exception to the Jurisdiction of the International Criminal Court*. 32 Cornell International Law Journal, 507).

across the globe. Several countries have enacted national legislations making genocide and crimes against humanity triable and punishable under the local laws of the country. To begin with, it is pertinent for the Indian State to accept that there is a lacuna in the existing laws to address the situation of the commission of mass violence as it took place in Gujarat in 2002. In my paper I seek to enumerate that in fact, the incidents of violence that took place in Gujarat have no adequate redressal machinery put in place by the Indian State since no provision for their redressal has been made either in the form of enactments or even by judge made laws. Further, there is a necessity to create legal concepts and jurisprudence for the description and criminalization of specific forms of state criminality. There is also a necessity to enact additional laws for the appreciation of evidence to adjudicate upon gross human rights violations or mass crimes in extraordinary circumstances. This paper also attempts to examine the approaches to justice undertaken by the Indian State and the judiciary, both at the national and state level in order to address the mass violence committed in Gujarat in 2002. Finally the paper concludes that a law on mass crimes or mass atrocities must be enacted in order to address the commission of mass crimes in addition to or instead of the proposed communal violence law.

PROCEDURES ESTABLISHED BY LAW

In many of the cases registered during the commission of the incidents of mass violence in Gujarat in 2002, the actual facts of the case were different from the facts recorded by the police in a given case.¹³ In many cases the *modus operandi* of the perpetrators of the violence were to go in very large groups/mobs to the houses and

¹³ The author of this paper has studied some of the cases registered in the State of Gujarat during her work with Nyayagrah, the Justice Program of Aman Biradari, based in Ahmedabad, Gujarat. The views of the author are her own and do not necessarily reflect those of the organization.

areas in which the Muslim families were residing. Hence in some areas or villages, Muslim families were killed and properties destroyed whereas in another areas the Muslim families were threatened, house and shops and establishments burnt, looted and destroyed owing to which they had fled to relief camps. Sexual violence of the worst kind was committed against women and young girls. Many of the people accused of the crimes lived in the same area/locality as the victims. As a result the vulnerability of the victims was even higher because the aggressors were fully aware of details of the Muslim families such as the composition of the families, size of houses, etc. The mobs approached the house, commit the killings; in some cases the residents managed to flee for their lives out of fear and panic, and subsequently the houses were looted and then set on fire. Since the victims knew many of the perpetrators, the victims in most cases could identify them.

On the other hand, a perusal of the First Information Reports (hereinafter referred to as FIR) registered by the police reveals that all details of the offences were left out. FIRs were recorded in such a way by police personnel that instead of recording details of the offences that were committed against each person along with his/her family, a summary of the destruction of an entire village or locality spanning 3–4 kilometers would be written down in 6 to 12 sentences. In many cases it was made to appear that an altercation broke out between two communities/groups of people which lead to the violence, and these cases would go to trial as cross-cases in an attempt to justify the violence as communal riots. FIRs which covered offences which were committed over large areas were referred to as ‘omnibus’ FIRs i.e. instead of referring to each offence pertaining to each person or each persons property, a few general sweeping statements would be made in one FIR in order to cover all of the crimes without naming either the victims or the perpetrators. Statutorily, it is mandated that when the commission of an offence is alleged, an FIR must be registered at the local police station giving all relevant details varying from time of incident, date of incident, exact location, weapon used

for the commission of the offence, possible eyewitnesses, number of victims, offences committed against them, what the victim was doing at the time of incident (if known), and so on. In other words, Section 154 of the Code of Criminal Procedure, 1973, (hereinafter referred to as Cr.P.C.) envisages that the description of the event be given in the best possible manner to determine the manner in which the incident took place. The FIR is considered the fulcrum of an investigation and further and potential investigation turns on the details stated in the FIR. Hence recording of omnibus FIRs giving little or no detail and in many cases, false details of the incident is the first step towards ensuring that the scales of justice are tilted in favour of the accused persons.

An example of the manner in which an omnibus FIR was registered in Gujarat during the commission of mass atrocities is as follows:

Place of Incident: A, B and C where A, B and C are areas which cover a total area of 3 kilometers.

Name and address of the accused: A mob of 1000 Muslim persons; a mob of 1500 Hindu persons.

Description of the Offence: In the aforementioned place of offence the accused viz., the Hindu and Muslim mobs constituted unlawful assembly with the object to cause damage and loss of life and property of each other and by attacking each other by using lethal weapons with an object to attack each other and committed the offences punishable under Sections 143, 147, 148, 149, 336, 435, 436, 427 of the Indian Penal Code and under Section 135(1) of the Bombay Police Act.

Many complaints were filed using the above language, giving rise to a new situation which requires new forms of jurisprudence. On a basic perusal of an FIR with details as minimal as given above and in the absence of supplementary statements and/or a very efficient and truthful investigation leading to a revelation of the true facts, it seems fairly obvious that the accused would surely be acquitted.

In Gujarat even in those cases where the complainants would make individual written complaints, those complaints were not filed by the police (nor investigated) and instead the police would file their own, rather general and vague FIR ensuring that this document does not in any way incriminate the persons responsible for the offences committed by them.

Pertinent to mention is the fact that very often FIRs were registered in which the description of the event would be a complete lie. In the example given above, the true facts of the case were that a very large group of people propagating right-wing Hindutva ideology barged into the houses of Muslims in an entire area and threatened the persons living in each house, apart from looting the house and setting it on fire as the victims fled to save their lives. In the FIR the facts recorded were that one group of persons instigated another group of persons as a result of which persons from both communities got hurt. The truth of the events of the case were thus completely irrelevant to the investigating agency and the entire exercise of taking down the victims complaints was conducted in a manner that shielded and protected perpetrators. Hence the procedure was manipulated to hide the facts and enable the perpetrators to deny that anything had happened. Arguably, the entire state machinery connived to abstain from providing legal protection to the victims of the crimes committed against them in 2002.

It is pertinent to mention herein that even if the information registered in an FIR is sparse and insufficient, if strong, reliable information is obtained subsequently during investigation, that information can be placed on record by the investigating agency either through supplementary statements as well as at the time the investigating agency files its chargesheet. These steps which are mandated by the law are more than sufficient to bring on record a transparent and truthful revelation of facts revealing the manner in which the offence was committed so that accused persons are ably prosecuted. Nevertheless, even though the law provides adequate measures for the investigating agency to determine the truth in a

given case, what the law does not envisage through statute is a situation in which the investigating agency at the behest of the executive uses that same power to abstain from recording information in a truthful way or from investigating cases in an efficient and unbiased manner as a result of which inaccessibility to legal redress becomes a part of the package that ensures that not only are mass atrocities committed but that legal redress and remedies for the atrocities committed will not be availed of either.

After the registration of an FIR, ideally, the case in question must be investigated. In the context of the incidents that took place in Gujarat, the investigations were often shoddy, inefficient and untruthful. Even if the investigating agency was aware of the exact details of the case, those facts would never be recorded in the charge sheet and the facts as recorded in the FIR would be reiterated. Relief to some extent was delivered by the Supreme Court in the decisions of *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.*,¹⁴ *National Human Rights Commission v. State of Gujarat*,¹⁵ and others. The Supreme Court issued guidelines in the aforesaid cases in an attempt to ensure that fair investigation and fair trial were carried out. In other words, until the intervention of the Supreme Court the investigation and trial of many cases were a mere farce.

In a situation where, in the rest of the State, cases are conducted with a sense of normalcy and by following relevant legal procedures, the lack of redressal mechanisms for the victims of the incidents that took place in Gujarat, appears to have been undertaken in order to achieve an invisibilization of the mass violence that took place against the Muslims in Gujarat in 2002. Pertinent to mention here is the fact that the police statements recorded under Section 161 Cr.P.C. at the time of the incidents also contribute to the acquittal of many accused persons. Statements under Section 161 Cr.P.C. are used in

¹⁴ (2004)4SCC 158

¹⁵ (2003) 9 SCALE 329; (2009)3 SCC Cri 44.

criminal trials by the accused persons to contradict the testimonies of witnesses during a trial. Hence if the statements do not mention names of accused, manner of incident and other relevant details it can be used in cross-examination by the accused to bring to fore the fact that the witnesses have improved their statements or have contradicted their initial statements leading to the benefit of doubt being given to the accused persons. This principle of law while it protects the civil liberties of accused persons, is a factor which allows for the testimony of witnesses to be impeached in trials of mass crimes due to the possibility of the victims/witnesses not being able to give a full statement in an atmosphere of fear and threat. Also pertinent to mention is the fact that the police personnel who functioned in a biased and arbitrary way refused to record the statements of the witnesses as given by the witnesses. The intrinsic dilemma of balancing the civil liberties of an accused person with the rights of victims has been captured in the case of *Harendra Sarkar v. State of Assam*¹⁶. In the said case, the Supreme Court while adjudicating a case in which 3 persons were killed on 14.12.1992 by a mob following the Babri Masji demolition, on a perusal of the statements recorded by the police under Section 161 Cr.P.C., found some omissions in naming the accused in the statements as a material reason for coming to the conclusion that the culpability of the accused was therefore questionable. The 2-judge bench dealing with the appeal took two different stances. Justice S.B. Sinha while capturing the essence of the complexity and the difficulty of trial of persons accused of the commission of communal riots stated:

The courts, in order to do justice between the parties, must examine the materials brought on record in each case or its own merits. Marshalling and appreciation of evidence must be done strictly in accordance with law; wherefor the provisions of the Code of

¹⁶ AIR 2008 SC 2467

Criminal Procedure and Evidence Act must be followed. It, in my opinion, would not be proper to contend that only because an offence is said to have been committed during a communal riot, the provisions of the Code of Criminal Procedure and Evidence Act would not be applied differently vis-a-vis a so-called ordinary case. They are meant to be applied in all situations. Appreciation of evidence must be on the basis of materials on record and not on the basis of some reports which have nothing to do with the occurrence in question. Only because in some parts of the country police investigations attracted severe criticism, the same in no manner should be applied in all the cases across the country. Each accused person; even a terrorist, has his human right to be tried in accordance with law.

In the absence of principles governing the appreciation of evidence in the context of mass crimes, the aforesaid observation captures the essence of the problem during appreciation of evidence in cases of mass atrocities. The principles of appreciation of evidence cannot be done away with or applied in a flexible manner based on different circumstances in which a crime may be committed in order to protect the civil liberties of accused persons. As a result, the probability of victims being left with justice being undone is high since the circumstances under which communal riots are committed are vastly different from the circumstances in which a crime is committed in times of normalcy owing to which police statements are not recorded in the manner given by the complainant which includes all details such as name of the accused, etc. or in other instances complaints sent to the police by the victims are not deliberately received and recorded by the police. This eventuality is hugely harmful for truthful prosecution of accused persons. Police personnel registering and investigating the crimes are part of the milieu allowing for the commission of mass crimes which is the subject of the investigation. Legal jurisprudence has to evolve principles of law, which accommodates a situation wherein the requirements of Sections 154–156 Cr.P.C. are not met with by

the police personnel in a situation of communal violence precisely because the police working under the instructions of the executive abstain from providing legal redress to the victims. While the Supreme Court has addressed this issue in several cases by ordering retrials and/or further investigations, these cases are few in number in comparison to the total number of pending cases and do not address the remaining cases pending in the State of Gujarat. The case of *Zahira Habibulla H. Shaikh v. State of Gujarat*,¹⁷ has been referred to as an extraordinary case and that retrial was directed due to the existence of extraordinary circumstances on the grounds that the entire trial was a farce. There is a need for the executive, legislature and judiciary to acknowledge that all cases which occur in a context of mass violence or alleged communal violence take place in exceptional circumstances or other-than-normal-circumstances.

The co-judge of the 2-judge bench in the case of *Harendra Sarkar*¹⁸, Justice H.S.Bedi, disagreed with his brother-judge and came to another conclusion. It was observed by Justice H.S.Bedi that it was not possible to evaluate a crime committed in the normal course with a crime committed during communal riots and stated:

India is a signatory to the Universal Declaration of Human Rights. Article 2 thereof provides for rights without discrimination, without restriction of any kind based on race, language or religion etc., Article 7 provides for equality before law and to the equal protection of the law for all, Article 8 postulates the availability of an effective remedy in law for acts violating the fundamental rights guaranteed to an individual and Article 12 provides for the right to a fair trial. These rights are enshrined in Articles 14 and 21 of the Constitution of India as well. Can it be said in all honesty that the investigation and prosecution in matters relating to communal riots

¹⁷ 2004 Cri L J 2050 (SC); See also *Satyajit Banerjee v. State of W.B.*, AIR 2005 SC 4161.

¹⁸ *Supra* at 15.

which is really based on protecting human dignity and the right to life, accord with the above principles? The question posed must, of necessity, give cause for introspection. Such being the background, can we evaluate a murder committed during a communal riot as a crime committed in the normal course—a common place crime as ordinarily understood? The answer must be in the negative and for the reasons already quoted above. It is in this background that the arguments raised have to be examined.

Justice H.S. Bedi further observed:

It would be seen that the arguments raised by the learned Counsel for the appellants are on the premise that the incident had happened in a normal civil society where the access to the police is presumed to be easy and where the investigation suffers from no bias. These arguments, from their very nature, cannot be applied to a case where there is a complete break down of the civil administration, the police has lost control of the situation, a curfew imposed and the Army called out and the real possibility (if precedents are to be applied) that the investigation could be directed against the complainant who belonged to a minority community. From the reports that have been quoted above, several broad principles are discernible:

- (1) that police officers deliberately make no attempt to prevent the collection of crowds;
- (2) that half hearted attempts are made to protect the life and property of the minority community;
- (3) that in rounding up those people participating in the riots, the victims rather than the assailants are largely picked up;
- (4) that there is an attempt not to register cases against the assailants and in some cases where cases are registered loopholes are provided with the intention of providing a means of acquittal to the accused;
- (5) that the investigation is unsatisfactory and tardy and no attempt is made to follow up the complaints made against the assailants; and finally
- (6) that the evidence produced in Court is often deliberately distorted so as to ensure an acquittal.

15. In this background and situation some of the arguments raised by the learned Counsel for the appellants can have absolutely no relevance, and the court must, of necessity, lean even more heavily on the statements of the eye witnesses.

As a result in the aforesaid case Justice S.B.Sinha allowed the appeal of the accused persons while Justice H.S. Bedi dismissed the appeal. The case was referred to a larger bench due to the difference in opinion between the two judges.

MECHANISMS FOR LEGAL REDRESS

Commissions of Inquiry

Since the commission of mass atrocities in Gujarat, two Commissions of Inquiry were set up by the Government under the *Commissions of Inquiry Act, 1952*. The first was the Nanavati-Mehta Commission¹⁹ set up by the Government of Gujarat *vide* Notification dated 06.03.2002 and the second was the U.C. Bannerjee Committee set up by the Railway Ministry in 2004. The finding of the U.C. Bannerjee Committee was that the fire to Coach S-6 was due to an accident and was not due to a pre-planned conspiracy as alleged by the state government. Disagreeing with the finding of this Committee, the Report was challenged in the High Court of Gujarat which in October, 2006 found the U.C. Bannerjee Report to be illegal and unconstitutional. An appeal was filed by the Centre before the Division Bench and the recommendations of the Report

¹⁹This Commission initially comprised one member, i.e. Justice K.G. Shah, a retired judge of the High Court of Gujarat. Thereafter in May 2002, the government increased the number of members in the Commission to two members and appointed Justice G.T.Nanavati, retired Judge of the Supreme Court, to join the Commission as the Chairman. In March 2008 before the Commissions Inquiry had been completed, Justice K.G. Shah passed away and the vacancy of Justice K.G. Shah was filled in by Justice A.H. Mehta, a retired Judge of the High Court of Gujarat.

were stayed till final disposal of the matter. In the meantime, the Nanavati-Mehta Commission released the first part of its report dated 18.09.2008 stating that the burning of Coach S-6 was due to a pre-planned conspiracy. It is pertinent to mention herein that some of the findings of the Nanavati-Mehta Commission were based on confessional statements of three of the accused persons who were under trial for the alleged commission of the train-burning incident, and the commission unequivocally and without challenge used those confessions to come to the finding that the burning of the coach was a conspiracy carried out by the accused persons. The Commission failed to take into consideration that the accused persons had retracted their confessional statements and held ‘All these three persons have retracted their confessions but that by itself is not a good ground for throwing them out of consideration’²⁰. The Commission had also held:

A Commission of Inquiry appointed under the Commission of Inquiry Act is only for the purpose of making an inquiry into a definite matter of public importance. It is neither a judicial inquiry nor a quasi judicial inquiry. The Commission has to make an inquiry and submit its report to the appropriate Government for taking further action. Though the Commission is given certain powers of the civil Court for certain purposes, the proceeding before it does not become a judicial proceeding ... Under the Act the Commission can obtain information from any person and can cause an investigation to be made by any officer or investigating agency of the appropriate Government and can utilize such information for recording its conclusion. The only requirement in that behalf is that the Commission should satisfy itself about the correctness of the facts regarding the information obtained and correctness of the facts and the conclusion arrived at in the investigation report. The Commission can record statements of the persons by way of

²⁰ <http://home.gujarat.gov.in/homedepartment/downloads/godharaincident.pdf>

evidence but those statements cannot be used in any civil or criminal proceeding except for prosecuting a person making the statement if it is found to be false. The nature of the inquiry being thus quite different from a judicial proceeding we see no reason why the Commission should not take into consideration such confessions. The inquiry before the Commission is a fact finding inquiry and therefore, the Commission can look into and consider any piece of evidence for finding out the correct facts provided it is satisfied about its correctness.²¹

The mandate of Commissions of Inquiries is largely to provide information to the existing government. The Supreme Court has held that a report and findings of a Commission of Inquiry are meant for information to the government and the Courts civil or criminal are not bound by the findings of the Commission.²² As a result of the restricted mandate of Commissions of Inquiries in India, the Commissions have failed to deliver a sense of justice to the victims of mass crimes. The Commissions of Inquiries quite often are used as tools in the hands of the existing government in order that the findings and conclusions of fact finding reports are ultimately in the interests of the government. Further, since Commissions are not required to follow any fixed adjudicatory procedures, there is no guarantee that the Commissions have arrived at factually correct conclusions, since the Commission can use its rather wide discretionary powers to accept any statement of either party that is placed before it in arriving at its conclusions and findings.

²¹ Id.

²² *T.T.Anthony v. State of Kerala*,AIR 2001 SC 2637; See also *Dr. Baliram Waman Hiray v. Justice B. Lentin & Ors*,AIR 1988 SC 2267 in which the Court held ‘a Commission is obviously appointed by the appropriate Government for the information of its mind in order for it to decide as to the course of action to be followed. It was therefore a fact-finding body and was not required to adjudicate upon the rights of the parties and has no adjudicatory function. The Government was not bound to accept its recommendation or act upon its findings.’

The Commission can absolve or implicate persons with guilt of commission of crimes based on discretion and the principles of criminal jurisprudence such as proof beyond reasonable doubt do not apply to a Commission. Further it is not mandatory that the findings and recommendations of the Commissions of Inquiry be implemented and neither do the Commissions of Inquiry have *suo moto* powers to initiate prosecutions against persons whom they have received adequate information against, whereas a court of law and even an investigative agencies have a mandatory obligation to register a complaint and initiate either investigation/inquiries or trials on the receipt of such information.

There is thus a need for a rehaul of the *Commissions of Inquiry Act, 1956* in order that additional powers are given to the Commission to address mass atrocities. Another option would be to increase the powers and functions of the National Human Rights Commission. At this juncture it would be pertinent to examine some of the provisions of the *Protection of Human Rights Act, 1993*, the law under which the National Human Rights Commission and State Human Rights Commissions have been established in order to determine whether increasing the scope of the NHRC to include within its functions, fact-finding in situations of mass violence. Widening of the scope of the *Protection of Human Rights Act, 1993* to make it a fact finding body on the commission of mass atrocities could in turn lead to a more democratic manner of determining the facts of mass atrocities crimes. An additional number of 4 persons of high moral character and recognized competence in the field of human rights could be appointed solely for the purpose of fact finding during the commission of mass violence/gross human rights violation. Pertinent to mention is Section 18(a)(ii) of the Act under which the Commission has the power to initiate proceedings for prosecution²³.

²³ Section 18. Steps during and after inquiry:

The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:

Section 30 of the Act mandates the constitution of a human rights court for speedy trial of offences arising out of a violation of human rights.

It is thus absolutely essential in the context of mass atrocities that the commission constituted is a human rights commission set up for the determination of facts by collecting testimonies and by documentation of mass atrocities including the commission of individual crimes. That based on the crimes that are made out from the facts collected by the Commission, the Commission by using powers equivalent to section 18 of the *Human Rights Act, 1993, suo moto* and consequently must initiate proceedings for prosecution

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- (a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority
 - (i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary;
 - (ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons;
 - (iii) to take such further action as it may think fit;
 - (b) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;
 - (c) recommend to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;
 - (d) subject to the provisions of clause (e), provide a copy of the inquiry report to the petitioner or his representative;
 - (e) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
 - (f) the Commission shall publish its inquiry report together with the comments of the concerned government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

and refer the case to the appropriate Court of Law for Trial, where necessary. This is the only way in which a Commission of Inquiry can do justice to the catena of information it receives from victims of mass atrocities.

In *Kandhamal: The Law Must Change its Course*,²⁴ the Report, while critiquing the two Commissions of Inquiry, the Panigrahi Commission and the Mohapatra Commission established by the State government of Orissa to inquire into the violence perpetrated against the Christians in 2007 and 2008, quotes Archbishop Raphael Cheenath as follows:

[T]he Justice Panigrahi Commission is more interested in covering up the misdeeds of the State government and its police force whose actions have been truly shameful, rather than to identify the organizations and prominent individuals behind the fascist attacks. The Commission wishes to produce its report in undue haste with a view to giving the Chief Minister and his officers a clean chit. In the circumstances I have no hesitation in stating that I have no faith whatsoever in the Justice Panigrahi Commission.'

The Report discussing Commissions of Inquiry further states, 'At one end of the spectrum are those Commissions that are set up precisely to exonerate the state of any responsibility, and in whose impartiality and independence the victim-survivors have no confidence. On the other end of the spectrum are those Commissions that prepare a report based on facts and rigorous analysis that hold perpetrators responsible (including public officials) only to be kept aside and the recommendations not implemented by the State governments concerned. The Srikrishna Commission that inquired into the communal violence in Mumbai in 1992–1993 is an example of the latter.'²⁵

²⁴'Kandhamal: The Law Must Change its Course', Vrinda Grover (ed.), Multiple Action Research Group, 2010.

²⁵ *Id.*

It is therefore essential that a fact finding body in the nature of a truth and reconciliation commission and not in the nature of the Inquiry Commissions (unless the mandate of inquiry commissions is modified) which have been set up by the relevant governments subsequent to incidents of mass violence which have taken place in Gujarat, Orissa, Karnataka, amongst others, none of which have kept either the interests of the victims in mind or have had any motivation to discover the facts of the given situations in order to provide mechanisms for peace and reconciliation within the areas in which incidents of mass violence have been committed thus propagating a political, social and economic atmosphere of conflict, uncertainty and tensions in the aforementioned states.

In the Indian State, which boasts the existence of rule of law, a commission of inquiry in the nature of truth and reconciliation commissions, while necessary, cannot be the sole redress mechanism. Prosecutions of persons who have committed the crimes, especially those in ranks of leadership must be conducted. Mass violence in the form of mass killings, mass rape, mass pillage, mass arson, mass destruction of religious places of worship must be held accountable in a democracy wherein the perpetrators hide under the cloak of either belonging to ranks of leadership and/or the majority community. Hence in order to avoid further incidents of mass violence in the name of religion or ethnicity, rendering accountability by prosecuting and punishing ranks of leadership, amongst others, for criminal actions committed, should be the mandate of every government irrespective of political ideology. Kritz while arguing for accountability states:

In helping societies deal with a legacy of past mass abuses, the process of criminal accountability can serve several functions. Prosecutions can provide victims with a sense of justice and catharsis—a sense that their grievances have been addressed and can hopefully be put to rest, rather than smoldering in anticipation of the next round of conflict. They provide a public forum for the judicial confirmation of facts. They can also establish a new dynamic in society, an understanding

that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable. Perhaps most importantly for purposes of long-term reconciliation, this approach makes the statement that specific individuals—not entire ethnic or religious or political groups-committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution that often produces further cycles of resentment and violence.²⁶

Following from these arguments, I argue below that legal concepts to incriminate ranks of leadership for the commissions of gross human rights violations must be evolved.²⁷

Levels of Culpability

What may also be relevant to address incidents of mass crimes as it took place in Gujarat is to create levels of culpability. The Rwandan government which enacted legislation²⁸ in 1996 in order to address the genocide that took place in Rwanda in 1994, created 4 levels of culpability: (1) The leaders and organizers of the Genocide, and

²⁶ Kritz, Neil. 1998. *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*. Law and Contemporary Problems.

²⁷ Eichmann was convicted by a Court in Israel in 1962 for endless war crimes and crimes against humanity and crimes against the Jewish people. States Nino Carlos While the Israeli Court recognized that Eichmann did not bear direct responsibility for most of these crimes it ruled that in the case of such massive crimes ‘distance’ between the agent and the victims did not diminish responsibility.‘On the contrary in general the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands’. See Nino, Carlos. 1996. *Radical Evil on Trial*. New Haven and London, Yale University Press, Introduction (vii-xii).

²⁸ The ‘Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed Since October 1, 1990, Organic Law No. 08/96 (August 30, 1996) See also H. Morris, Madeline. 1997. The Trials of Concurrent Jurisdiction: The Case of Rwanda. Duke Journal of Comparative and International Law, [Vol 7: 349]

perpetrators of particularly heinous murders and sexual torture; (2) All others who committed homicides (3) Perpetrators of grave assaults against a person not resulting in death (4) Those who committed offences against property²⁹.

According to Kritz:

All those in the first category are subject to full prosecution and punishment. Provision of a series of incentives for people in categories (2) and (3)—by far the largest categories—to come forward voluntarily and confess will hopefully shift some of the burden of preparing cases away from prosecutors and investigators, rendering the number of cases remaining for prosecution slightly more manageable. Specifically, those in these two groups who participate in the ‘confession and guilty plea procedure’ which includes a full confession of their crimes, including information on their accomplices or co-conspirators, will benefit from an expedited process and a significantly reduced schedule of penalties ... those Rwandans who confess to their role in the 1994 genocide in exchange for lenient treatment need to do one more thing: They need to formally apologize to their victims. In managing overwhelming numbers, the Rwandan program assumes that victims will more easily accept leniency for those who committed atrocities if the latter express some remorse. It assumes that, in this way, the process of criminal accountability may be more effective in facilitating national reconciliation. Finally those in category (4) will not be subject to any criminal penalties.³⁰

Part of this pleas agreement package, according to Morris (1997), included a disclosure of any accomplices. ‘This requirement of a detailed confession was considered important for establishing a truthful historical record of the Rwandan genocide, allowing for meaningful verification of the accuracy of the confession and assisting

²⁹ *Id.*

³⁰ *Supra* note 25.

in prosecutors continuing investigations and prosecutions of genocide related crimes.³¹ Morris further states:

Category two perpetrators will receive a sentence of 7 to eleven years imprisonment if they plead guilty prior to prosecution, a sentence of 12 to 15 years imprisonment if they plead guilty after prosecution has begun or a sentence of life imprisonment if convicted at trial. Category three perpetrators will receive a penalty of one third the prison sentence normally applicable for their crimes if they plead guilty before prosecution, a sentence of half the term of years normally applicable if they plead guilty after prosecution has begun and the sentence ordinarily applicable if convicted at trial.³²

The prosecutions of persons who have planned and conspired the mass violence be they from ranks of leadership or otherwise as well and those persons who have actively engaged in the killings and rapes and other major crimes, there is no option but to have the accused persons prosecuted in unbiased Courts of law. As this juncture it is necessary to invoke and incorporate into national law the relevant provisions on responsibility of commanders and superiors as well as the irrelevance of official capacity³³ provided by international law in particular the Rome Statute and the ICTY and ICTR Statutes.

Plea Bargaining and Compounding of Offences

The relevance of the Rwandan justice model to the mass atrocities that took place in Gujarat is substantial. It is pertinent to mention herein that in several cases in Gujarat the accused persons have approached the victims/witnesses to compromise the matter. Pertinent to mention herein is the fact that while some of these cases

³¹ H. Morris, Madeline. 1997. *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, Duke Journal of Comparative and International Law, [Vol 7: 349]

³² Id.

³³ See Article 27 and 28 of the Rome Statute.

may involve offenses related to property which may be compounded even legally, many of the cases in which the accused approach the victims for settlement or compromise are those wherein persons have been killed in the violence which is not permitted under the law. Jha states ‘the technical illegality and the impossibility of a legally valid compromise agreement of non-compoundable riot and arson offences is immaterial, given the prevalent culture of compromise which routinely facilitates hostile witnesses on basis of agreements reached outside court rooms.’³⁴

Not only do the victims have to struggle for basic redressal mechanisms to be available to them in getting complaints registered, getting applications for further investigation allowed, participation in criminal proceedings, compensation, etc., but the victims have to further consider options for survival based on the terms set by the accused persons who quite often are well known persons of the village who use threats, including those of social and economic boycott as well as monetary inducement to compromise a matter. In many cases while the victims categorically refuse to compromise, there are those cases in which the victims accept the compromise in exchange for promises of no-threat and no-social-boycott in order to continue basic modes of survival. Jha states: ‘The phenomenon of compromise whilst illegal is deeply institutionalised in the criminal justice system where the norms of poor investigation, inordinate delays and low conviction rates have been exacerbated by a communalised society where communal offences have not been diligently investigated or prosecuted’.³⁵

While understanding the aforesaid situation, it may be fruitful for the purposes of moving towards long-term reconciliation as well as for deterring such events from taking place in future, if the

³⁴ Jha, Prita. 2011. ‘Paper on Compromise’ (Unpublished paper on file with the author).

³⁵ *Id.*

courts in Gujarat affected the process of a compromise by following legal procedures. This is especially relevant in the context of the fact that after the violence the two communities are even today living together, and to enable the targeted Muslim community is able to live in their hometowns on par with the rest of the village. State intervention and judicial intervention is essential to enable this process to take place.

Sections 320, 265A-L and Section 306–308³⁶ of the CrPC allow for the compounding, plea-bargaining and grant of pardon proceedings provided in criminal law. The provisions of Sections 320, 265A-L, 306–308 CrPC allow an accused to compound a matter, or plead guilty in order that the matter gets settled on the terms as agreeable to and negotiated by victims. This provides for a certain form of closure to the victims who can even ask for a public apology, and compensation where necessary and the entire case gets settled inside Court. Hence a plea bargaining procedure or compounding procedure for less serious crimes such as those involving minor assault on persons or those of property offenses can be undertaken in the context of the violence that took place in Gujarat.

These steps would be an improvement to the current situation in which the victims agree to compromise a matter in a coercive social and political environment so that the targeted Muslim community can at least begin the process of healing. Compounding or plea bargaining in the context of mass crimes for minor offences that are permitted in Sections 320 and 265A-L Cr.P.C., should include an (a)

³⁶ Section 306. Tender of pardon to accomplice. (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

an apology by the accused persons to the victims; (b) a narration of a truthful and accurate account of the facts regarding the commission of the offenses by the accused persons and (c) where relevant a disclosure of accomplices in the manner provided in Sections 306–308 of the Cr.P.C.

Plea bargaining procedures in the context of mass crimes established by the State would assist in reconciliation between the two communities since it would finally allow for the victims to be on par, politically, with the accused persons and it would allow the accused to accept and acknowledge their commission and participation in the mass crimes. These processes have to be undertaken in the Trial Courts in Gujarat and directions for the same can be obtained from either the High Court of Gujarat or the Supreme Court of India.

CONCLUSION

It is absolutely essential that a mass crimes law is enacted criminalizing specific acts and omissions of persons including Heads of State and other ranks of leadership for the commission and/or for conspiring, inciting, instigating, commanding any person to commit acts of mass violence. It is also essential that substantive mass crimes such as genocide, crimes against humanity, political disappearances, torture, etc. are defined and enacted. Further, there may be a need to bring in public prosecutors and judges from out of the state in which the mass violence took place in order to protect against bias and political pressure.

