

Truth Telling, Gujarat and the Law

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Gujarat has produced many kinds of discourses. In some media discourses, the word Gujarat has come to signify violence, murder and rape. Media discourse has been particularly powerful in producing 'truths' about Gujarat. On the one hand, the progressive media has condemned the Gujarat violence in no uncertain terms. On the other, local media has been quite supportive and even encouraging of the violence.

Apart from the media, the other powerful discourse on Gujarat has been the law. This paper seeks to interrogate the law's interface with unimaginable violence and the answers it sought to give. The paper further asks the question as to whether the law can capture the violence in a politically intelligible manner. It seeks to find the answer in the law on genocide.

The Law's 'Truth' about Gujarat

The story of the law's interface with Gujarat is a story of a failure. The failure is at many levels. The most well known failure is the gap between theory and practice. However, apart from this failure, there is also the failure of the legal imagination in the struggles to fit the violence that was Gujarat into the categories of murder, rape, hurt and other IPC offences. The failure can be examined at both levels using the following categories.

The First Information Report (FIR)

The FIR is the first step in the criminal investigation which according to the logic of the law leads to investigation, trial and then either conviction or acquittal. There were numerous problems right from the non-registration of FIRs, to people not being given copies of FIRs, which they are entitled to.

Apart from the numerous ways in which the FIR process was subverted, it is important to note the kind of stories the FIRs narrated. If one takes the case of FIR 33/02, filed in Kalol Taluk, it gives an inkling of the stories that emerged in law.

"My name is RJ Patil, Senior PSI Kalol. I am complaining on behalf of the State that on February 28, 2002 there was a *bandh* declared by the VHP. ... The *bandh* was complete in Kalol, Vejalpur and Dehlol. In ... village (Dehrol?) Hindu religious mob of about 500 people were shouting '*Bharatmata ki jai*' and set fire to the mosque and destroyed it. The police tried to disperse the mob using tear gas. ...

Then at 1230 hrs, the hutments behind the Kalol bus stand and shops nearby were destroyed by a Hindu mob of 6,000-7,000 people. They burnt vehicles and shops. Announcements were made on mikes to disperse the mob. When they did not disperse upon orders from the *Mamlatdar*... (name not clear) PC Uday Singh Pratap Singh (buckle # 1272) fired in the air from his .303 rifle and the mob dispersed.

During the course of the bandh declared on 28/02/2002 by the Vishwa Hindu Parishad, the groups armed with swords, knives, sticks, sickles, stones destroyed and burnt shops, houses, cabins, masjid, vehicles, lorries resulting in a loss of Rs. 500,000/- PI K V Katara was hit on the head by a stone.

Then in Kalol town, between 1335-1510 hrs, a Hindu mob of 6,000-7,000 people and a Muslim mob of 3,000 people confronted each other with weapons, sticks, *dharia*, swords, etc. Both mobs began destroying shops, vehicles and houses. The police used tear gas and fired in the air. *Naib* Police Officer Halol and CPI Halol and police staff announced for dispersal on the mike. But the mob did not disperse. Six tear gas shells were fired but the mob could not be controlled. They pelted stones at the police. The *Mamlatdar* who was present ordered firing. CPI ... (name not clear) Halol, fired one round from his service revolver, but the mob did not disperse. Stone throwing continued. CPI K V Katara was seriously injured when a stone hit him. ... Despite such attempts to quell the mob the situation remained serious.

After that, at 1600 hrs at Kalol Bus Stand area, a mob of fundamentalist people attacked, looted and burnt shops near the Kalol bus stand area and Radhashyam complex. As the District Police Officer, PMS, Godhra and *Naib* Police Officer and the *Taluka* level officer were present at the time of the attack, mike announcements were made to try and disperse the mob. Despite making such announcements, the mob comprising of 6,000-7,000 people became violent. On seeing this, the *Taluka* level officer ordered firing. PC Naranbhai Navlabhai fired eight rounds from his .303 rifle. Also PC Ganpat Singh, Bhoop Singh, fired two rounds from his .303 rifle and Head Constable Veersingh Mansingh fired two rounds and PC with PSI Pawar fired two rounds. This made the mob go out of control and Kalol was put under curfew from 4:30 pm. After this the mob dispersed. Later, a mob of 500 Hindus burnt down a *masjid* at Kalol and on the day of the bandh call by the VHP. Shops and houses were also looted and burnt. Shops, cabins, houses, trucks, scooters, jeeps, etc., were also burned down causing a loss to the tune of approximately 5 lakhs by mobs comprising of both Hindus and Muslims.

The mob, carrying sharp weapons like sickles, swords, knives, sticks and stones, attacked the police and the circle police inspector, K V Katara, was grievously injured in the head".

The above FIR is referred to as an omnibus FIR as it clubs various offences committed at different times under one head. It allows only a partial 'truth' to emerge by not allowing victims stories. Thus, if one analyzes people's individual complaints, the contrast is startling. Individual complaints were sent to the NHRC, SP and concerned police stations but were not registered on the ground that a State FIR already existed on the point.

In a complaint given by Yusufbhai Sheik, for example, which was not registered as an FIR on the ground that there already existed an FIR, thirteen deceased were listed by name and four accused were also listed by name. In the description of the event:

“After the Godhra carnage communal riots had broken out all over Gujarat and in every village of Panchmahal District all Muslim areas were targeted, their lives taken and property destroyed.

On the 28th of Feb 2002 a mob of about 150-200 people entered our village, looted our houses and burnt the remaining property. This made us extremely scared. On the next morning between 9:00 and 10:00 am this same mob entered the village shouting slogans ‘Kill the Muslims, cut the Muslims’. Hearing this, we all ran to save our lives and hid in the vehicles nearby. Around the same time, about twenty-five to thirty Muslims in Delloi village had been massacred. At 4:00 pm twenty of us sat in a tempo belonging to Haroonbhai and left for Kalol. At Kalol-Ambika Nagar Society a mob of approx 100-125 people armed with weapons stopped our Tempo and overturned it. As people started getting out of the Tempo they were killed and then burnt. Ten people were killed instantly, then put in the tempo and the Tempo was set on fire. Three people ran ahead but were caught and killed. Five other people and myself managed to save our lives and escape. We were later admitted to S S G Hospital, Vadodara, for treatment”.

The above is only illustrative of the pattern of legal truths established throughout Gujarat. The legal truth of the FIR elided the significant question of naming the accused and instead produced the anonymous figure of the mob. The State FIR seems to understand the events that happened as instances of random violence, limited to damage to property. Details pertaining to motive were conspicuously absent. Thus, while Yusufbhai Sheik’s complaint points to the killing of thirteen people, the Kalol State FIR does not even acknowledge this. Further, Yusufbhai Sheik’s complaint has in it details which point to motive, statements by the mob such as “Kill the Muslims, cut the Muslims”, which are significantly absent in the State FIR’s record of random incidents of violence by faceless mobs. The legal provisions invoked by the Kalol FIR, if divided into those where punishment is less than seven years and more than seven years, fall mainly into the less than seven years category. The most serious offence invoked by the FIR is Sec. 333 of the IPC, which is “causing hurt to deter a public servant from doing his duty”, and relates to the injuries suffered by Inspector Kataria. The provision relating to murder is not even invoked, in spite of there being at least thirteen killings.

Thus, if one were only to read the State FIRs, the story of what happened in Gujarat emerges within the existing legal framework as a story of random violence that the state was unable to control.

Human Rights Reporting

Possibly no other event in human rights terms in India has produced such rich documentation as the events in Gujarat in 2002. There are a number of important fact finding reports which question the legal truth in every detail. The complicity of the State in violence emerges in painful detail in reports such as the *Citizen’s Tribunal Report*, Syeda Hameed et al, *How has the Carnage in Gujarat affected Muslim Women* (A National Women’s Panel Investigates), Kamal Mitra Shenoy et al, *Gujarat Carnage*, 2002, *Communalism Combat March-April 2002*, Year 8, No 77-78, PUDR Delhi, *Maaro! Kaapo! Baalo!*, *Report of the visit by CPI(M) and AIDWA to Gujarat, 2002*, SAHMAT, *Ethnic cleansing in Ahmedabad: A Preliminary Report*, *The NHRC Report*.

What emerges through the fact-finding reports is a story which counters the FIRs' story of random and meaningless violence by stressing strongly on the planning and instigation which resulted in the violence. The fact-finding reports thus bring to light numerous aspects of the violence that can be categorized under:

>State Complicity in Violence

This is of course brought out powerfully in all the reports. They argue that what happened after the Godhra incident on February 28 is a wilful and mediated State abdication of the responsibility of protecting the life of its citizens. The State stood by and watched murder, rape, destruction of property, and desecration of religious places, and in some cases even aided the process. Perhaps the most compelling reports have been the *Concerned Citizens Tribunal Report* as well as the *NHRC Report*.

The *Citizens Tribunal Report* notes,

"1.4. Shri Modi played an active role, along with at least three cabinet colleagues, in instructing senior police personnel and civil administrators that a 'Hindu reaction was to be expected and this must not be curtailed or controlled'.

On the evening of February 27, two cabinet colleagues of the chief minister, Shri Ashok Bhatt and Shri Pratap Singh Chauhan, met at Lunavada in Panchmahal district along with others. In this meeting, the manner and methods of unleashing violence on Muslims were planned in detail.

2.1. The facts mentioned in this report clearly establish that chief minister Shri Narendra Modi is the chief author and architect of all that happened in Gujarat after the arson of February 27, 2002. It is amply clear from all the evidence placed before the Tribunal that what began in Godhra could have, given the political will, been controlled promptly at Godhra itself. Instead, the state government under chief minister Shri Narendra Modi took an active part in leading and sponsoring the violence against minorities all over Gujarat. His words and actions throughout the developments in Gujarat show that he has been openly defying the Constitution and indulging in actions which are positively detrimental to the interests of the country.

2.2. Shri Modi was the one who took Godhra to the rest of Gujarat. He was the one who directed the police and the administration not to act. He was the one who refused to help the likes of former Member of Parliament, Shri Ahsan Jafri, and the large number of people in Shri Jafri's home, who were all butchered later on".

Similarly the NHRC Report also makes a convincing case for state complicity in the violence. "The Police administration on the 28th of February was acting under dictation of the BJP politicians. Two senior cabinet ministers were present in the Police Control Room – State Health Minister Ashok Bhatt was at the Ahmedabad Police Commissionerate in Shahibaug for more than three hours on February 28th and the Urban Development minister, I K Jadeja, was in the State Police Control Room at Gandhinagar for four hours from 11 am onwards. Home Minister Gordhan Zadaphia was directly monitoring the progress of attacks on Muslim localities from the room of Ashok Raina, Home Secretary".

The NHRC brought these facts to the notice of the State of Gujarat (*Confidential Report*

on the visit of the NHRC team headed by chairperson NHRC to Ahmedabad, Vadodara and Godhra from 19th to 22nd of March, p4) but the State of Gujarat chose not to respond to this report, which has very serious implications. The NHRC in its latest report noted that “the Report of the State Government fails to rebut the repeatedly made allegation that senior political personalities – who have been named – were seeking to influence the working of the Police Stations by their presence within them” (*Proceedings Report of the NHRC*, 31st May, 2002, p 4.).

>Targeted Nature of the Violence

Another fact that emerges powerfully from the fact-finding reports is the selective and targeted nature of the violence. In fact, all fact-finding reports carry in gruesome detail the nature and extent of the violence unleashed against the Muslim community in Gujarat. The violence was selectively targeted at the Muslim community: killing Muslims, raping women, inciting violence against them, destroying Muslim owned property and desecrating mosques, *dargahs* and other places of worship.

As the *Citizens Tribunal* notes, “The carnage was at six levels: physical destruction of a part of the community; economic destruction; sexual violence and rape of a large number of Muslim women; cultural and religious destruction; resistance to rehabilitation; publicly declared desire to physically and morally destroy the Muslim community of Gujarat”.

>Mass Participation

The other shocking detail that emerged in poignant detail is the mass participation of ordinary Gujaratis in the violence. Many fact finding reports recorded masses ranging from a few hundred upwards to 10,000 and 15,000 people participating in the violence. As the *Citizens Tribunal* notes, “Sixteen of Gujarat’s twenty-four districts were engulfed in the most organised armed mob attacks on Muslims between February 28 and March 2, 2002, when most of the attacks were concentrated. Rampaging mobs were at it until mid-March. In some parts of Ahmedabad and Mehsana, they are still on the loose”. (Another three districts had sporadic bouts of organised violence). Nowhere were the mobs less than 2,000-3,000; most often they were more than 5,000-10,000 strong. This, and the fact that they were armed with swords, *trishuls* and agricultural instruments that could kill, the fact that the manner of arson, hacking and killing was chillingly similar, all suggest a carefully laid out plan behind the attacks”.

The Legal ‘Truth’ and the ‘Truth’ of Fact-Finding

What emerges quite clearly is a dissonance between the state’s truth and the truths produced by civil society groupings. The key facts of state complicity, targeted violence and mass participation cannot be captured within existing legal language. This is because the conceptualisation of offences in the Indian context is very narrow. Offenders are perceived as individual entities, and the offences are conceptualised as offences against individuals.

However, the imagination of the law is unable to move further and conceptualize an offence against a group, as well as the possible motive for such an offence. Further, offences under Indian law are treated as offences against the state, but there is no answer

to the question as to what happens when the state is complicit in the offence.

Thus, we see the inadequacy of the law to capture the three significant aspects of the violence. The most the law can do is to bring to book individual offenders for the offences of murder and rape as the most serious offences in the IPC. This is in fact the political struggle which is being carried forward with great difficulty in the trial courts of Gujarat. The *Best Bakery* case – exemplified in the person of Zahira Sheik – embodies this brave quest for justice within a legal framework which has limited our understanding of the violence. To tell the story of what happened in Gujarat in terms of the law, one needs to really look elsewhere.

The 'Universal' Law of Genocide

Genocide was first codified as an international crime by the *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948. Since then, the prohibition against genocide has achieved the status of *jus cogens* and become a norm of customary international law, which is binding on all parties regardless of, whether they are party to the 1948 Convention.¹ Towards the close of the twentieth century, with the re-emergence of violent ethnic conflict in both the Balkans and Rwanda, we had the setting up of Ad Hoc Tribunals, viz. International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal For Yugoslavia (ICTY) by Security Council Resolutions.² Both these tribunals have jurisdiction over the crime of genocide. Finally, we have the setting up of the International Criminal Court under the Rome Statute of 1997, which also has jurisdiction over the crime of genocide. What is important to note is that in the formal instruments of international law, the 1948 definition of genocide has been adopted in both the tribunals and the ICC without any change.

The Convention was born out of the horrors of World War II, and was particularly aimed at preventing the intentional destruction of whole groups of people. In fact, Raphael Lemkin, a Polish lawyer who coined the term genocide, derived the word from the Greek word *genos*, which means "race, nation or tribe" in ancient Greek and *caedere*, which means "to kill" in Latin. In Lemkin's conception, it was "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves".³

The aim of the Genocide Convention was organically linked to human rights instruments such as the Universal Declaration of Human Rights. As Schabas notes, "These instruments concern themselves with the right to life whereas the Genocide Convention is associated with the right to life of human groups, sometimes spoken of as the right to existence. The General Assembly Resolution 96(1), adopted in December 1946, declares that 'genocide is a denial of the right to existence of entire human groups, as homicide is the denial of the right to live of individual human beings'".⁴

What is clear is that the concept of genocide at its widest is meant to protect the rights of entire groups to continue to exist. It evolved in the context of a political history of attempts to exterminate entire groups of people. Probably the first such attempt in modern times was the attempt to exterminate Native Americans by European colonizers.⁵ The European colonizers followed up this early genocide with numerous attempts to exterminate

historically troublesome groups. Mamdani documents some instances of the European genocidal impulse in his writings.⁶ However, true to the racist origins of international law, exterminating entire groups of people of the Third World was never considered serious enough to warrant the description of genocide. It was only the extermination of the Jews by Nazi Germany which was good enough to provoke a response in terms of Lemkin's neologism, genocide, which then became transmuted in international law into the Genocide Convention of 1948.

The Genocide Convention of 1948 is a result of this history of exclusion of people never considered as people, hence deserving no mention under the new law. Among the most troubling aspects of this 'exclusion' is the limited number of groups the destruction of which would constitute genocide. Though the Nazi extermination of Jews went hand in hand with the destruction of the first modern homosexual sub-culture in history,⁷ homosexuals were never seen as worthy of protection under the Convention. Similarly, though historically 'political groups' such as the Communists in Nazi Germany and indigenous people were intentionally exterminated, they were excluded from the protection of the Convention. The only groups deemed worthy of protection under the Genocide Convention, 1948, were national, religious, racial and ethnic groups. As is clear, the 'universal' law of genocide is actually really quite particular defining this most serious of offences in a way in which exclusion is an ever present reality. However, the interesting question is whether this particular and contextual treaty lends itself to appropriation by human rights groups.

Gujarat as Genocide

In the Genocide Convention, 1948, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- >> Killing members of the group;
- >> Causing serious bodily or mental harm to members of the group;
- >> Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- >> Imposing measures intended to prevent births within the group;
- >> Forcibly transferring children of the group to another group.

The elements of the offence of genocide are the *actus reus* defined in Article II (a) to (e) and the mental element otherwise described as *dolus specialis* or special intent. The mental element inherent in the offence of genocide is seen as not just the intent to commit the particular act of killing but a discriminatory intent, which aims through the killing to "destroy in whole or in part, a national, ethnic, racial or religious group as such". Thus it is not enough to merely show intent to kill, one has to discharge the higher responsibility of showing that the killing had the specific intent of "destroying in whole or in part, a national, ethnic, racial or religious group as such".⁸

If we did a legal analysis of Gujarat using the rich fact finding data before us, it is possible to make the argument that what happened in Gujarat was genocide. The crucial category of 'special intention' can be proved using either the particular speeches

or statements of the *Sangh Parivar*, or the tests evolved by the Akayesu judgement as well as the Kristic judgement that were decided by the tribunals on Rwanda and Yugoslavia respectively.

The importance of using the term 'genocide' in the context of Gujarat is that it is a deeply political category which tells the story of racial identities. Mamdani uses the term racial as opposed to ethnic to mean the perception of the other as a threatening, alien presence. Thus, once the 'other' is perceived not as a neighbour but a foreign settler, then the violence becomes understandable as a political move that aims to cleanse the soil of an alien presence. As he notes, "We need to distinguish between racial and ethnic violence: ethnic violence can result in massacres, but not genocide. Massacres are about transgressions, excess; genocide questions the very legitimacy of a presence as alien".⁹ The deployment of the category of genocide points back to the perception of the Muslim in Gujarat, and in India, by the Hindu Right. The Muslim has – like the Tutsi – always been perceived not as a troublesome minority but a threatening alien presence.

Golwalkar, one of the first ideologues of the RSS, expounded on his perception of the relationship between the different communities in India by referring to the example of Nazi Germany: "To keep up the purity of the race and its culture, Germany shocked the world by her purging the country of the Semitic races – the Jews. Race pride at its highest has been manifested here. Germany has also shown how well nigh impossible for races and cultures, having differences going to the root, to be assimilated into one united whole, a good lesson for us in Hindustan to learn and profit by".¹⁰

The lessons that Hindustan was to learn were expanded by Golwalkar when he noted that, "The foreign races in Hindustan must either adopt the Hindu culture and language, must learn to respect and hold in reverence Hindu religion, must entertain no ideas but those of glorification of the Hindu race and culture [...] or may stay in the country, wholly subordinated to the Hindu nation, claiming nothing, deserving no privileges, far less any preferential treatment – not even citizen's rights".¹¹

This is the logic formulated at the beginning of the century which has resulted in Gujarat. Hence the importance of naming what happened in Gujarat as 'genocide'. One needs to move away from the 'truth' of random violence of the FIRs to the 'truth' of an intention to eliminate a group. However one has to note that describing what happened in Gujarat as genocide still does not solve the difficult problem of dealing with the 'popularity' of genocide. There was the active participation of vast sections of the Gujarati population in the violence. This is the element that most fact-finding reports do not address head-on as the 'popularity' of the genocidal act has no easy answers. While it is easy to ask for the punishment for the instigators and planners, what about the executors when they number in the thousands? When Mamdani notes that "the unique moral dilemma of the genocide in Rwanda admits of no easy answers", it applies equally to Gujarat.

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NOTES

1. See DJ Harris, *Cases and Materials on International Law* (Sweet and Maxwell, 1998, London) p. 729. Harris argues that the prohibition against genocide forms part of customary international law reading the various developments in international law including the 1948 Convention and the General Assembly Resolution of 1948 which also declared genocide an international crime.
2. Security Council Resolutions 955 of 1994 and 808 of 1993 respectively.
3. Lemkin, Raphael. "Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress", cf. William Schabas, *Genocide in International Law* (Cambridge University Press, 2000) p. 25.
4. *Ibid.*, p. 6.
5. Zinn, Howard. *People's History of the United States* (Longman, 1996, London) pp. 1-22. Zinn documents a history through which the American Indian population was exterminated through war, conquest, murder and attacks on civilian populations and use of biological weapons such as small pox.
6. Mamdani, Mahmood. *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, <http://pup.princeton.edu/chapters/s7027.html>. Mamdani notes, "Whereas the prototype of settler violence in the history of modern colonialism is the near-extirmination of Amerindians in the New World, the prototype of settler violence in the African colonies was the German annihilation of over 80 percent of the Herero population in the colony of German South West Africa in a single year, 1904". He quotes an official publication, *Der Kampf*: "No efforts, no hardships were spared in order to deprive the enemy of his last reserves of resistance; like a half-dead animal he was hunted from water-hole to water-hole until he became a lethargic victim of the nature of his own country. The waterless Omaheke was to complete the work of German arms: the annihilation of the Herero people".
7. Miller, Neil. *Out of the Past: Gay and Lesbian history from 1869 to the Present* (Vintage, 1995, New York).
8. *Prosecutor vs. Akayesu*, Case No. ICTR-96-4-T, para 497.
9. Mamdani, Mahmood. *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press, 2001) p. 14.
10. Golwalkar, M.S. "We, Or our Nationhood Defined", cf. Christophe Jaffrelot, *The Hindu Nationalist Movement and Indian Politics* (Penguin, 1996, Delhi) p. 55.
11. *Ibid.*, p. 56.



CAUTION

Reporters at Work

