

**CASE COMMENT: ZAKIA AHSAN JAFRI V. STATE OF GUJARAT  
AND ANOTHER**

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**INTRODUCTION**

Ethnic and religious discrimination along with aggressive fanaticism in India has a complicated and sordid history. The bloodbath during the Partition in 1947, when the nation was founded, has left a scarring impact on our minds. Since then, countless more instances have occurred in the country that has been labelled "sectarian riots." Political viewpoints and aspirations are central to both the genesis and propagation of sectarian mass violence. There has historically been a correlation between sectarian movements and electoral violence.

The term "hate crime" has no unified legally binding interpretation; however, the following elucidation is universally believed, "A hate crime, also recognised as a discriminatory crime, is a criminal offence perpetrated against an individual, property, or community that is encouraged, in its entirety or in portion, by the perpetrator's discrimination against a race, ethnic background, religion, sexual orientation, or national origin."<sup>1</sup> Hate crimes are typically harsh, brutal and terrorizing but can also be committed in less apparent ways. In this kind of crime, the victim is singled out because of the community to which he belongs or from which he is considered to be coming. Another issue to address is the distinction between conventional crimes and hate crimes. Hate crimes entail both a psychological and physical aspect, like murder, theft, and assault. But, the element of hate may draw a harsh punishment in comparison to a conventional crime. Some variation of this crime is a commonplace in many nations throughout the world. Unfortunately, India is no different in being a nurturer of hate crime due to the diverse cultures present in India. Although other types of bigotry are also very much an element of the hate crimes perpetrated, bigotry based on religion and caste is more axiomatic in India. The state involvement and collusion in

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<sup>1</sup> Desikan, S.H. (2021) "Legal Regulation of Hate Crimes in India: A Look at the Current Regime and its Shortcomings," *International journal of Law Management and Humanities*, 4(5), pp. 1230–1244. Available at: <https://doi.org/https://doi.org/10.1000/IJLMH.112027>.

violence, and amnesty of state and non-state factors have always been blizzarding through the chronology of events.<sup>2</sup>

This issue makes an effort to contextualise itself in the Gujarat riots that took place in 2002 which shook the nation to its core. On the morning of February 27, 2002, at 7:42 a.m., the Sabarmati Express hauled at the railway station at Godhra, a rural town in the northwest Indian state of Gujarat, which has been governed by a Hindu socialist government since 1995. There are still conflicting accounts of what transpired at the railway station and immediately thereafter. However, there are things that can be pieced back together with reasonable certainty.

The Hindu right's activists (karsevaks) were returning on the Sabarmati Express from Ayodhya, where they had advocated passionately in pursuit of constructing a Ram temple on a disputed territory. It has been reported that there was dissension and a fall out at the Godhra railway station between Hindu activists and Muslim boys who were selling tea. After completing its planned stop at the platform, the train's emergency rope was pulled as it began to accelerate. This caused the train to stop in an area populated mainly by Muslims, where it was allegedly ambushed by a Muslim mob as if they were waiting for the opportunity. Two carriages went up in flames, immediate help of fire-fighters came rushing in but all their efforts went in vain. The flames took the life of 58 passengers of the Sabarmati express, many of them were children and women.

The state saw widespread bloodshed as a result of the vengeance. Hindu vigilantes destroyed mosques and graveyards, set fire to Muslim residences and businesses, and slaughtered men, women, and children. The state government sanctioned mass executions rather than alienating the Muslim criminals responsible for the train attack and penalising them legally as what is expected in a lawful society. Through the following weeks, over a thousand people lost their lives. More than a hundred thousand Muslims were compelled to seek refuge in the state's derelict refugee camps, where even the most basic necessities were scarce and conditions of living were dreadful.

It was a poignant reminder of the vast socioeconomic fragmentation in our society that these acts of vigilante-violence and mass-killings represented. Furthermore, they quickly revealed

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<sup>2</sup> “The invention of hate crimes” (2019) *Tough on Hate?* pp. 23–44. Available at: <https://doi.org/10.36019/9780813562322-003>.

flaws in the criminal justice system. Authorities' ineffectiveness in stopping the violence was observed by commentators and activists. The victims, the survivors, and social framework as a whole paid exorbitant cost for this kind of violence.

## **BACKGROUND**

The Indian Constitution, the ultimate legislation that controls all aspects of life within the boundaries of the State of India, incorporates the secularist ideal into its own structure. Several pieces of legislation that were meant to complement the Constitution have been guaranteeing the fundamental human right to religious freedom to all its citizens, regardless of their background. Modern India is characterised by many instances of militantly derogatory language used against members of society who make up minority communities in an attempt to eradicate their culture. The weaponization of hatred, promoted under the pretence of a supposedly humanitarian populism, is an embodiment of this abhorrent trend.

Hate crimes have persisted across time and across geographic boundaries. It is a potent weapon in the hands of the strong to diminish and incapacitate religious minority. From the Imperial repression of Christians to the awful mistreatment of Jews during Nazi Germany's authority, there is no shortage of examples of hate crimes with a religious rationale. Even in India, the suffocating chains of religiously motivated violence have not been avoided. A large portion of the Indian population was mercilessly suppressed by the British government's odious laws. However, when the British were in control of India, they used harsh methods of subjugation that affected the whole Indian populace. Since India's independence from colonial authority, hate crimes—defined here as acts of violence motivated by racial hatred raised their ugly heads, with many cases unable to fade away from the country's ostensibly secular cultural structures.

A terrible occurrence on September 20, 1969, shows the depths of religious antagonism when a young Muslim demanded retribution after his property was destroyed. The crowd attempted to force him to yell "Jai Jagannath" but failed. Someone in the crowd suggested killing him after their failure. Wood from shattered businesses was gathered, a fire was prepared in the centre of the street, fuel was sprayed on the pyre and the youngster, and he

was set ablaze ruthlessly with no Hindu opposition. This was Gujarat's first serious sectarian conflict including killing, burning, and plundering.<sup>3</sup>

In numerous discrete occurrences from 1989 to 1990, 300 Kashmiri Pandits were massacred. Native Urdu periodicals Aftab and Al Safa called for Kashmiris to fight Indians in the guise of religious struggle and expelled all Hindus remaining in Kashmir. In pursuit of jihad, the myth of Hindu elimination was propagated. Armoured men with AK-47s ran through the streets, slaughtering Hindus who resisted to leave the area. All Hindus were told to leave within 24 hours or die. The invasion of Islamic militants has led the Kashmiri pandits to leave the country leaving less than 0.1% pandits in that region since the conflict assumed a sectarian character.<sup>4</sup>

Vishwa Hindu Parishad Bajrang Dal supporters tore down the 430-year-old Babri Masjid on December 6, 1992, arguing that the mosque had been built on the site where the Hindu deity Rama was born. Mutilation caused more than 1000 fatalities. A subatomic image of the carnage caused by Hindu ideologists was represented in riots in Mumbai. As a result of the riots, Hindus migrated into neighbourhoods with a greater proportion of Hindus while Muslims moved into regions with a greater proportion of Muslims, changing the city's dynamics.<sup>5</sup>

These were the instances of hate crime that occurred before the Gujarat pogrom.

## **FACTS**

In a nutshell, the horrific Godhra incident took place on the morning of 27.2.2002, when Karsevaks riding the Sabarmati Express train back from Ayodhya were allegedly invaded and coaches of the train were set ablaze at the Godhra Railway Station at around 7.45 a.m.,

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<sup>3</sup> Jacques Waardenburg, *Muslim perceptions of other religions: a historical survey* (Oxford University Press, 1999)

<sup>4</sup> *The Kashmiri Pandits: An Ethnic Cleansing the World Forgot* (no date) South Asia Terrorism Portal. Available at: <https://www.satp.org/islamist-extremism/data/The-Kashmiri-Pandits-An-Ethnic-Cleansingthe-World-Forgot> (Accessed: October 26, 2022).

<sup>5</sup> *Explained: Ayodhya's Ram Mandir's journey, the Babri Masjid demolition, and the foundation-laying* (2022) <https://www.outlookindia.com/>. Available at: <https://www.outlookindia.com/national/explained-ayodhyaram-mandir-journey-the-babri-masjid-demolition-and-the-foundation-laying-of-temple-news-199800> (Accessed: October 20, 2022).

killing 58 people and the 59<sup>th</sup> victim succumbing to injuries the following day. There was rioting and turmoil across the whole state of Gujarat following that catastrophe. The spouse of the petitioner, Zakia Ahsan Jafri, was one of 69 people killed when a mob invaded the neighbourhood of Gulberg Society in Meghaninagar.

Zakia Jafri, the petitioner, was married to Congress MP Ehsaan Jafri, who was among hundreds murdered at Gulberg Society in the carnage that followed the killings of Hindus at Godhra in February 2002. Mrs. Jafri lodged a police complaint in June 2006, accusing 63 people, including the then Chief Minister of Gujarat, Mr. Narendra Modi, of wilfully neglecting their responsibilities to avert the massacre. She charged an "orchestrated outpouring of violence," police collusion, hate speech, and bureaucratic ineptitude.

When Jafri first reported the incident to the police, they did nothing. To have the 2002 pogrom's bigger plot investigated, she petitioned the Gujarat High Court to have her allegation regarded as a FIR. This petition was denied by the High Court on November 2, 2007. Next, on March 3, 2008, Mrs. Jafri approached the Supreme Court with the identical request. At that point, a Special Investigation Committee (SIT) had already been established by the Supreme Court to examine into the riots in Gujarat. The SIT had been ordered by the court to look into Mrs. Jafri's claim as well.

The SIT produced a report clearing the defendants and giving them a "favourable ruling" before hearing Mrs. Jafri's side of the story. When she wasn't satisfied with the results of the SIT's inquiry, she moved her case to the Supreme Court, where she initiated a petition known as the protest petition. The SIT's closing investigation and the protest petition were sent to the Magistrate's Court by the Supreme Court. According to Jafri, the Magistrate erred in tossing out her plea by not taking its 'fundamental elements' into account. She expressly asserted that her case has never been connected to the Gulberg Society tragedy specifically. Even though the situation surrounding Gulberg only occurred on a single night, her story necessitates an examination of the greater conspiracy at stake in the wave of violence that followed Godhra. She claims the Magistrate's handling of her case was similar to that in the Gulberg case.

In response to the SIT's ruling, Mrs. Jafri took her case to the High Court of Gujarat. The High Court declined in October 2017 to vehemently disagree with the SIT's assessment, explaining that the Supreme Court had exercised oversight over the SIT's operations. But it

did provide Jafri the right to petition for a new inquiry in whatever court she saw fit, whether the Magistrate's Court, the High Court's divisional bench, or the Apex Court.

Thus, Jafri submitted a petition for special leave to the Supreme Court in 2018. This current petition is an appeal of the Magistrate's rejection of her Protest Petition. The Magistrate's handling of Jafri's protest petition is contested, to the degree that the ruling of the High Court of Gujarat in 2017 upheld that approach. Jafri has asked the Supreme Court to look into the plot and schemes from 2002.

## **ISSUES**

1. Whether the Magistrate was duty-bound to examine any evidence in addition to the SIT's closure report while disposing of Mrs. Jafri's protest petition?
2. Whether the Magistrate addressed all the complaints in Mrs. Jafri's protest petition?
3. Whether the Gujarat High Court made factual and legal errors when upholding the Magistrate's decision to dismiss Mrs. Jafri's protest petition?
4. Whether there should be a separate legislation regarding hate crime in India?

## **LEGAL PROVISIONS**

Section 153A IPC criminalises "promoting animosity between groups based on religion, race, place of birth, domicile, language, etc. and activities harmful to maintaining peace."

Section 153B IPC condemns "imputations, representations harmful to national-integration."

Section 295A IPC penalises "intentional and deliberate actions designed to offend religious sensibilities of any class."

Section 505(1) and (2) IPC criminalises "publishing or dissemination of any remark, rumour, or report creating public mischief and animosity, hate, or ill-will between communities."

The IPC provisions designate offences based on 'religion, ethnicity, caste, or sexual orientation' as antagonistic to 'public order,' which is detrimental to the country's social fabric and hence sufficient to be deemed a crime.

The court ruled in *Babu Rao Patel v. State of Delhi*<sup>6</sup> that section 153A applies to more than just religious bigotry; it also covers hatred motivated by factors like, the individual's appearance, where they were born, their caste or community, or even their native language.

## **SUBMISSIONS**

On behalf of the petitioner:

Mrs. Jafri's counsel, Senior Advocate Kapil Sibal, maintained that the Court-appointed Special Investigation Team (SIT) and the Magistrate assessing the SIT's report failed to consider key evidence of conspiracy in exonerating those implicated by Jafri. Mr. Sibal spent the following

days of hearings presenting the allegedly overlooked material. It was further argued that the Magistrate erred by not taking note of the crime and by not ordering further inquiry, both of which were within his purview. Mrs. Jafri's counsel claimed that the SIT established by the SC had failed to consider important evidence of conspiracy in writing its report. She additionally claimed that the Magistrate the Supreme Court had asked to review her complaint did not provide an unbiased evaluation of the evidence. He uncritically agreed with the SIT's assessment.<sup>7</sup>

Despite Jafri's argument that the Magistrate is not obligated to acknowledge the final report but is free to take notice and even order additional inquiry, nothing in the law requires the Magistrate to approve the protest petition or order such an investigation.

On behalf of the SIT:

Attorneys representing the SIT, including Senior Advocate Mukul Rohatgi and Solicitor General Tushar Mehta for the Gujarat government, contended that the SIT had done a comprehensive inquiry before issuing a clean check to the SIT. They both maintained that the state government of Gujarat was singled out for criticism because of Mrs. Jafri's cause.

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<sup>6</sup> *Babu Rao Patel v. State of Delhi (Delhi Admn)* (1980) 2 SCC 402: 1980 SCC (Cri) 500: AIR 1980 SC 763: 1980 Cri Lj 529 (1980) 6 ALR 321

<sup>7</sup> *Zakia Jafri #1: Petitioners argue case not limited to events at Gulberg Society* (2022) *Supreme Court Observer*. Available at: <https://www.scoobserver.in/reports/zakia-jafri-gujarat-riots-protest-petitionhearing-report-day-1-oral-hearing/> (Accessed: October 15, 2022).

After being instructed by the Supreme Court to probe the allegations in the case, SIT claimed that it "left no question unanswered" in doing so. It was claimed that the 32 specific claims were addressed in the final report, and that the case against each of the 63 people identified in the complaint was addressed independently.

It was also argued that the SIT was only tasked with looking into whether or not the information referred to in the complaint revealed the commission of any offence of significantly bigger conspiracy at the highest level and the participation of any person other than the people accused of crimes in Gulberg Society, according to the Supreme Court's directives.<sup>8</sup>

## **JUDGEMENT**

Mrs. Zakia Jafri claimed that there was a bigger conspiracy behind the 2002 Gujarat Riots, but on June 24th, 2022, her protest that the investigations into her claim were insufficient and prejudiced was denied by Justices A.M. Khanwilkar, Dinesh Maheshwari, and C.T. Ravikumar. The Judgment is signed by all three judges, although it is unclear who drafted it.

The Court found that the SIT may only look into offences that were not being looked into by other agencies. The SIT might look into Mrs. Jafri's claim that an elevated plot led to widespread violence. However, the evidence she presented that was disregarded, went beyond this narrow threshold. The Judgment made clear that a breakdown in government administration, which is to be anticipated during riots, is different from state-sponsored violence and a scheme to incite riots. Complaints of governmental failure were beyond the scope of the SIT's investigation but those of conspiracy were not. The only way for Mrs. Jafri to establish conspiracy would be to provide evidence of a deliberate and protracted effort to undermine the rule of law. The judges claimed that while presenting evidence, a certain causation and chronology needs to be presented and events of isolation cannot be considered by the court.

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<sup>8</sup> *Zakia Jafri #9: Sit argues Jafri's complaint was investigated and witnesses lack credibility (2022) Supreme Court Observer*. Available at: <https://www.scobserver.in/reports/zakia-jafri-protest-petition-gujarat-riotssit-hearing-report-day-9-oral-hearing/> (Accessed: October 29, 2022).



It is important to note in the judgement that the amicus curiae (Raja Ramachandran) had concurred with the final report of the SIT with one exception: he had argued that the then chief minister had committed violations executable under the IPC pertaining to promote animosity.

Mrs. Jafri's convoluted conspiracy allegation has probably come to an end with the Judgment.

### **ANALYSING THE JUDGEMENT**

The Supreme Court asserted in its dismissal of Jafri's appeal, a "cohered attempt of the dissatisfied officials of the Gujarat state government along with others was to generate commotion by making disclosures which were untrue based on their own understanding." Those who had the "courage" to "challenge the veracity of every functionary" in the court system for the better part of 16 years while seeking justice for the victims of 2002 were afterwards characterized as "having the temerity" to do so in the verdict. An "underlying unethical motive" was identified by the Court to be the driver of their actions. The court concluded, all individuals responsible for this abuse of process, "ought to be in the rack and dealt with in conformance with law."

There has been substantial speculation about a conspiracy "conceived at the highest level in the State," and the Supreme Court has devoted much time and energy to disproving the idea. It's possible that the court didn't find proof of a conspiracy because of the arguments made by the amicus curiae, but it doesn't answer the issue of what motivated the violence. Why was the state administration unable to effectively and swiftly halt the mass-killings? The then Chief Minister Modi testified before the bench and claimed that he had issued "unambiguous and definitive directives to promote peace and religious tranquillity at whatever cost," and the judge appeared happy with his explanation. The SIT and the Supreme Court did not investigate the circling issue behind why, despite such "directions," violence overtook Gujarat. The Court may have ruled that no conspiracy was demonstrated in order to address this issue, but it would not exonerate the defendants of criminal wrongdoing. The mass-crimes committed may have suggested to the Parliament to consider revisiting and revising the Indian Penal Code to add the idea of command or higher responsibility for prospective wrongs (such permitting countless innocent men, women, and children to be slaughtered under one's command). The above principle should be derived from the legal maxim

Respondent Superior. According to Article 28(b) of the Rome Statute instituting the International Criminal Court, a superior may be held criminally accountable for a subordinate's crimes against human race, mass slaughter, or crimes against tranquillity and harmony if those crimes were within the impactful ability and command of the superior and the superior "refused to implement all reasonable and justifiable measures within his or her ability to prevent or repress the happening of such terrorising crimes."

The Amicus Curiae Ramachandran appointed by the court is the only one to challenge the Chief Minister's accountability to the administration or the constitution. There is nothing to substantiate that the CM acted on 28.02.2002 while the disturbances were taking place to avert the riots, Ramachandran writes in his letter to the Highest Court, which is included as the first attached document to the ruling. "If the Chief Minister had adopted all necessary measures to ensure the safety of the country's minority populations, it would have been shown by his actions and directives on February 28th, 2002." Neither the Chief Minister nor his deputies have commented on the activities they took on February 28th, 2002. No one in the highest ranks of law enforcement or government has mentioned any concrete action taken by the Chief Minister.

The Supreme Court's decision lacks credibility since it does not address the constitutional obligation of the Chief Minister or determine whether or not the Chief Minister in this instance did everything possible to prevent the crimes from occurring in 2002. The lack of evidence for a felony of conspiracy does not prove that individuals who held positions of power and authority within the state did not perform criminal acts.

Unfortunately, the Apex Court went even farther by endorsing the idea that the events of Godhra occurred spontaneously and that only low-level authorities may be held accountable for the atrocities that took place. Numerous fact-finding studies made by social movements, including one by a nine-member 'Concerned Citizens Tribunal - Gujarat 2002' led by former Supreme Court judge, Justice V.R. Krishna Iyer, disproved the premise of instinctive occurrence. When the Best Bakery burned in 2004 while children and women were trapped inside, the Supreme Court noted that "the contemporary day 'Nero's' were looking elsewhere and were presumably contemplating how the offenders of the atrocity may be spared or safeguarded."

After the judgement had been pronounced, three key people (R.B. Sreekumar, Teesta Setalvad and Sanjiv Bhatt) were arrested who had testified against the state administration of

Gujarat. Setalvad is a tenacious advocate who relentlessly explored all available legal options to deliver justice to the victims of the catastrophe. Bhatt, a former deputy information commissioner of the Intelligence Bureau in Gujarat, had accused Gujarat's then-Chief Minister Narendra Modi of participating in the 2002 pogrom in an affidavit that was submitted to the Supreme Court in 2011. R.B. Sreekumar was a former ADGP(Intelligence) in Gujarat who had filed affidavits demanding the administration's actions and inactions during the Gujarat tragedy.

The Supreme Court's own work was part of the long-standing effort to hold those responsible for the atrocities of Gujarat 2002 accountable, but the court disregarded this in its ruling. From comparing the perpetrators to "modern day Heroes," to saying that the fight for justice has the "temerity" to "challenge the credibility of every functionary," the Supreme Court has come a long way.

## **SUGGESTIONS**

Hate crimes in India are not a new phenomenon, but the country is seeing the rise of new types of bigotry and hatred. However, religious conflicts have escalated in both severity and frequency since the middle of the twentieth century. Current events in India have highlighted the problem of mob lynching as one of the worst ways to show contempt for a group, this kind of behaviour also shows blatant disrespect for the law and obliviousness to human life. Approximately 120 occurrences in the previous four years have been driven by "cow vigilantism or love jihad."<sup>9</sup> The lack of information is quite worrying since it stops people from understanding the full nature of the issue. It is also important to address the connection between hate speech and mob lynching. The majority of mob lynchings have been triggered by the proliferation of fake news on social platforms.

Hate crimes are an essential issue that must be tackled both in India and internationally. The targeted community might become more intolerant and fearful if nothing is done. There is a pressing need to expand existing laws to include hate crimes because of the disproportionately high damage they inflict on both the victim and the larger society. Assault

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<sup>9</sup> Kanwal, S. (2021) *India: Hate crime by identity of victims*, Statista. Available at:

<https://www.statista.com/statistics/980033/identity-of-hate-crime-victims-india/> (Accessed: October 30, 2022).

is four times as likely to be a component of a hate crime as it is of any other kind of crime. Since existing laws can only govern conventional or equivalent crimes, and hate crimes have the potential to cause major conflict between communities and a sense of fear among targeted groups, they call for legislation's custom - made to counteract them. An effort to safeguard persons who have endured disproportionate amounts of intentional abuse, laws that prohibit hate-motivated crimes are a step in the right direction.

## **CONCLUSION**

The powerful have always been able to take advantage of the weak since the beginning of civilisation. In certain locations, the majoritarian cult's repressive methods have taken the form of racial prejudice, while in others, they have been plainly on display in the form of the persecution of religious minorities. The second custom is widely followed in India. The people of India have become desensitized to stories of innocent people being used as a political tool. Whether it has shown itself in acts of murder or caustic discourse, hatred creates social categorization and aids in creating a mentality of "us" versus "them." As widespread as religion is in our culture, so too is the frisson behaviour of causing anguish on individuals made susceptible by their religious identity.

Those in authority want complete and utter submission from those below them, to the point that the submissiveness borders on obsequiousness, and the submissive seem willing to commit horrific acts of violence against those below them, no matter how little their supposed wrongs may be. By remaining quiet, society shows its implicit tolerance of atrocities committed against the vulnerable, many of whom are used as puppets in an effort to confuse the public and construct a dividing picture.

In light of the above, we conclude that there is much to be accomplished by governmental bodies in terms of the development, implementation, and interpretation of laws in order to create a society free of hate crimes. Even if we accept the possibility that hate crimes will never be completely eradicated, we can see that India still has a long way to go before the general public is uninvolved and those who are victimised see such dangers as having little to no bearing on their day-to-day existence.

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