

Gujarat 2002: What Justice for the Victims?

The Supreme Court, the SIT, the Police and the State Judiciary

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Ten years after the 2002 violence, the results of judicial proceedings have been very few in Gujarat. While the heaviest sentences have been handed down in cases where Hindus in Godhra had been victims of violence, a very large number of cases have been closed before prosecution and many others remain pending, with only a handful completed or near completion. The reasons for this failure of the rule of law – whose magnitude will have to be qualified since proceedings are still under way – lie in the grip that Hindu nationalism (as an ideology and a political movement) holds over the state machinery (including the police and the judiciary) in Gujarat and the central authority's relative powerlessness (both at the executive and judicial level) to counteract it. This is so despite the repeated attempts that the Supreme Court has made (including the appointment of the Special Investigation Team), and the activism of non-governmental organisations and some mediapersons.

This article is part of a larger project that I began more than 10 years ago during my first visit to Gujarat in February 2001. In addition to all those from the state machinery who prefer to remain anonymous, I want to thank those who have helped me in this research – in alphabetical order: J S Bandukwala, Shabnam Hashmi, Ashish Khetan, Martin Macwan, Mallika Sarabhai, Teesta Setalvad, Gagan Sethi, Ghanshyam Shah, Mukul Sinha, Vinay Sitapati and M M Tirmizi. I am most grateful to the anonymous referee of this article for very useful comments. The shortcomings remain mine.

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Any society built on the foundations of law would not require the widow of a victim to petition the highest court of the land in order to investigate the reasons behind the state's failure to protect the life of its citizens during those fateful days.

– Siddharth Varadarajan, "The Buck Must Stop at the Very Top", *The Hindu*, 20 November 2010.

In 2002, after the death of 59 Hindus, burnt alive in two coaches of the Sabarmati Express which was bringing them back from Ayodhya, Gujarat was the theatre of anti-Muslim mass violence that affected 151 towns and 993 villages.¹ Twenty-six towns were put under curfew following days – even weeks – of rioting (Jaffrelot 2006). This violence, which in several places took on the scale of a pogrom, claimed approximately 2,000 Muslim lives, including many women and children. The official death toll is lower (1,169) whereas some non-governmental organisations (NGOs) mention the figure of 2,500 victims on the basis of information gathered from families about the missing persons – those whose bodies were never found.²

The judicial aftermath of this violence merits analysis not only because India, theoretically, abides by the rule of law, but also because the holding of trials in due form is generally considered, in such circumstances, as the condition for any possibility of reconciliation. In fact, most of the countries – at least the democratic ones – where such a traumatic event has taken place have set up a commission for justice and reconciliation.

Ten years after the events, the results of judicial proceedings are very few in Gujarat.³ While the heaviest sentences – 11 death sentences – have been handed down in cases where Hindus in Godhra had been victims of violence, a very large number of cases have been closed before prosecution and many others are still pending, with a handful of them completed or near completion. The reasons for this failure of the rule of law – whose magnitude will have to be qualified since proceedings are still underway – lie in the grip that Hindu nationalism (as an ideology and a political movement) holds over the state machinery (including the judicial system) in Gujarat and the central authority's relative powerlessness (both at the executive and judicial level) to counteract it.

1 The Faces of the Perpetrators and the Victims' Thirst for Justice

The faces of the direct perpetrators of the violence in 2002 are known. They appear in footage taken in a sting operation by a reporter for *Tehelka* magazine, Ashish Khetan, who in 2007 managed to approach Sangh parivar leaders by posing as a

sympathiser doing his PhD. Khetan recorded interviews with dozens of people involved in the massacres using a camera hidden in his laptop. In 2008 the National Human Rights Commission – whose records have been impeccable in the post-pogrom developments – directed the Central Bureau of Investigation (CBI) to authenticate the *Tehelka* tapes. The CBI completed this work on 10 May 2009.⁴

On these tapes, the Bajrang Dal leader Babu Bajrangji,⁵ accused of being deeply involved in the clashes that, on 28 February 2002, officially claimed 89 and 110 lives respectively in Naroda Patiya and Naroda Gam (or Gaon), an Ahmedabad peripheral neighbourhood, is seen declaring to Khetan:

In Naroda/Gam/and Naroda Patiya, we didn't spare a single Muslim shop, we set everything on fire, we set them on fire and killed them (...) We believe in setting them on fire because these bastards say they don't want to be cremated, they're afraid of it (...) It has been written in my FIR... there was this pregnant woman, I slit her open... Showed them what's what... what kind of revenge we can take if our people are killed ... I am no feeble rice-eater. Didn't spare anyone ... they shouldn't even be allowed to breed... I say that even today...Whoever they are, women, children, whoever. Nothing to be done with them but cut them down. Thrash them, slash them, burn the bastards (...) I came back after I killed them, called up the/state/home minister/G Zaphadiya/ and went to sleep... I felt like Rana Pratap, that I had done something like Maharana Pratap (Khetan 2007).⁶

Haresh Bhatt, who in 2002 was vice-president of the Bajrang Dal and became the MLA of Godhra afterwards, told Khetan how the assailants were armed:

I have my own gun factory... I used to make fire crackers ... We made all the bombs there ... Diesel bombs, pipe bombs, we made them there... and we used to distribute them from here as well...We ordered two truckloads of swords from Punjab...right here, in a village called Dhariya, we readied everything there...and then we distributed the *samaan* (arms) (ibid: 35).

About half a dozen people have explained their role in the pogrom to Khetan in similar terms.

As regards the victims, the thirst for justice is omnipresent, even, logically, obsessive. Muslims tend to view justice as the condition to make cohabitation once again possible, for both Hindus and Muslims. A survivor declares,

I want nothing more than seeing those who killed my family to go on trial and be punished. I can wait for a job. I can wait to give away my daughter to a good man in marriage. But I cannot rest till those who tore my life apart are brought to justice (Gupta 2011: 101).

While Islamic NGOs played a major role in the rehabilitation process, others concentrated on the reconciliation process at the social level and turned to the state in order to get compensation and justice (Setalvad 2002 and Mander 2009).⁷ Among them can be mentioned Citizens for Justice and Peace (CJP), Act Now for Harmony and Democracy (ANHAD), Sabrang, Jan Sangharsh Samiti and Jan Vikas which displayed an exceptional degree of dedication in their quest for justice. In order to get justice, an NGO-supported Concerned Citizens' Tribunal was set up with, (rtd) Justice V R Krishna Iyer at its helm. This body which comprised lawyers (rtd Justice P B Sawant and rtd Justice Hosbert Suresh), Human Rights activists (K G Kannabiran and Aruna Roy) and academics (T Sarkar and G Shah),

collected – with the help of CJP and Sabrang – 2,094 oral and written testimonies which have been compiled and analysed in a report (Concerned Citizens' Tribunal 2002).

Certain differences emerged between the NGOs which wanted to focus on only a few cases⁸ and those which wanted to fight them all and, also, between those who wanted the trials to be organised out of Gujarat in order to avoid external pressures and those who wanted justice to be delivered where the crimes had been committed. But these discussions did not weaken the resilient mobilisation of the NGOs. If justice has not been satisfactorily delivered, it is in spite of their efforts – and when it has, it is largely thanks to them.

2 What 'Law and Order'?

One of the main reasons for the large number of victims in 2002 was the attitude of the police. As Babu Bajrangji told Khetan, they “shut their eyes and their mouths” (Khetan 2007: 41). Ramesh Dave, the Vishwa Hindu Parishad (VHP) Zila Mantri of Kalupur (Ahmedabad) declared that “they even gave us cartridges” (ibid: 43) and Anil Patel, another state VHP leader claimed that not only cartridges but weapons were provided to the rioters by the police:

They would come and take samaan and deliver it safely to the places it was supposed to go... The police gave us so much support ... Some even said, do something... loot them, break them, finish them... (ibid: 44).

We need to explain, as much as we can, this attitude. But we need also – and in greater detail – to consider its implications for the judicial process.

2.1 A Neutralised and 'Communalised' Police Force

The first reason why the police did not prevent the rioters from accomplishing their sinister mission for at least three days was simple: they implemented Narendra Modi's orders. Indian Police Service (IPS) officer Sanjiv Bhatt, in January 2010, explained to the Special Investigation Team (SIT) appointed by the Supreme Court that as Deputy Commissioner (Intelligence) of the Gujarat Intelligence Bureau from December 1999 to September 2002 and as nodal officer to dispatch useful information to the various intelligence agencies and armed forces, on 27 February 2002, following the Godhra incident, he had taken part in the meeting that Modi had convened at his residence. This meeting was – according to Bhatt – the starting point of “the official orchestration of the 2002 riots in Gujarat” by the Bharatiya Janata Party (BJP), whose leaders had decided that very day not only to take the bodies of the Godhra victims to Ahmedabad and show them on television, but also to take part in the “city shutdown” operation (bandh) announced by the VHP:

The Chief Minister Shri Narendra Modi said that the bandh call had already been given and that the party had decided to support the same, incidents like the burnings of Kar-Sevaks at Godhra could not be tolerated. He further impressed upon the gathering that for too long the Gujarat Police had been following the principle of balancing the actions against the Hindus and Muslims while dealing with the communal riots in Gujarat. This time the situation warranted that the Muslims be taught a lesson to ensure that such incidents do not recur

ever again. The Chief Minister Shri Narendra Modi expressed the view that the emotions were running very high amongst the Hindus and it was imperative that they be allowed to vent out their anger.⁹

The upshot was, the police let the violence run its course. This moreover gave rise to the title of a famous report by a well-known NGO: “We have no order to save you!” (Human Rights Watch 2003).

The police was all the more easily neutralised as it had already been communalised. In the state apparatus, the police force had been Modi’s first target after he had become chief minister of Gujarat in October 2001. Muslims would then be systematically barred from holding executive positions. Out of the 65 IPS officers that the state counted in this capacity in 2002, only one Muslim remained. All the others had been transferred to training duties, railroad surveillance, etc (*Communalism Combat*, March-April 2002, Vol 8, No 77-78, p 119). At the same time, Modi had a vast number of Hindu nationalist sympathisers recruited into the Gujarat Home Guards, a non-nationally regulated body that was developed in the main towns.

During the pogrom most police officers followed Modi’s instructions.¹⁰ All the more so as their hierarchy had allowed two of his ministers and close associates, I K Jadeja (minister of urban housing) and Ashok Bhatt (minister of health), to stay in the state police control room of Ahmedabad, where they interfered with police work for several days (Khetan 2011b: 35).

Ahmedabad Police Commissioner P C Pande, on 28 February 2002, allowed a build-up of the violence in his city, particularly in the Gulberg Society neighbourhood where about 70 Muslims, including former M P Ehsan Jafri would be slaughtered, and which he deserted after a brief appearance. Far from being punished, Pande was to be rewarded. He was first transferred to New Delhi in May 2002 to the position of additional director general of the CBI by the then union home minister, L K Advani.¹¹ When Advani left his post in the wake of his party’s defeat at the polls in 2004, Pande was appointed Director General of Police by the Gujarat government. After retirement, he was appointed chairman of the Gujarat State Police Housing Corporation.

One of his subordinates, M K Tandon, Joint Commissioner in the locality to which belonged Gulberg Society, Naroda Gam and Naroda Patiya, was promoted to various posts and ended his career as Additional Director General of Police. Similarly, K K Mysowala, head of police headquarters in the locality where Naroda Gam is located¹² was reassigned to Gandhinagar before becoming Deputy Superintendent of Police of Rajkot.

Those who were less cooperative have all been penalised.¹³ Rahul Sharma, Superintendent of Police (SP) in Bhavnagar district, was transferred three days after having protected a mosque from a mob on the verge of destroying it. Vivek Shrivastava, SP of Kutch district, met the same fate for having arrested a BJP leader who had just attacked a Muslim family (he was made Deputy Commissioner, Prohibition and Excise for the Ahmedabad region). Himanshu Bhatt, SP in Banaskantha district, was also transferred after having taken action against one of his sub-inspectors who took part in the violence. He left India

shortly afterwards. Satish Chandra Verma, Deputy Inspector General (DIG) in charge of the Indian border for Bhuj district, had ordered the arrest of BJP MLA Shankar Chaudhury for having killed two Muslims. He was reassigned to the State Reserve Police Training Centre in Junagadh.¹⁴

The system of rewards and sanctions explains the police’s behaviour after the violence. First, they destroyed or allowed to be destroyed recordings of their radio communications, thus disposing of an important source of evidence. Second, in many cases, the police did their best to dissuade victims from lodging complaints. And when they persisted, complaints were often not properly recorded: either the facts were not taken down with the necessary detail or the names of the accused were left out. Lastly, no measures were taken to preserve evidence that later could have been used by the investigators: no DNA sampling or post-mortem examinations. As a result, out of the 4,252 complaints finally lodged, 2,032 were dismissed for lack of sufficient evidence. What have the others become?

2.2 An Elusive Justice

2.2.1 What Commission of Inquiry?

The first shortcoming of the judiciary came to light in the investigative procedure that ritually follows communal riots in India. For the past several decades, each of these episodes has resulted in the appointment of a commission of inquiry, usually presided over by a retired judge. Some cases are extremely well documented (such as the Jagmohan Reddy inquiry conducted following the 1969 riots in Ahmedabad); others tend to drag on (cf the clashes in Bhagalpur in 1989). None really leads to prosecution. But, for the victims, that an official document establishes the facts is already a huge victory. Therein lies the major difference between the pogrom in Gujarat and the violence that broke out in Mumbai in 1993, for instance. In the latter case, even if the Srikrishna Commission, named after its chairman, took five years to issue a report¹⁵ – after it was dissolved by the Shiv Sena and BJP government and its successor, dominated by the Congress Party, reconstituted it – and even if nothing came of this report, as Rowena Robinson (2005) writes, “it provided a public, legitimate space for the articulation of suffering” (p 45).

In Gujarat, nothing of the sort has been accomplished. On 6 March 2002, the government appointed a commission whose principal mandate was to investigate the circumstances surrounding the Godhra incident – wherefore its name: the Godhra Inquiry Commission. Its chairman and sole member, Justice K G Shah, was however reportedly close to Narendra Modi and biased.¹⁶ In light of the protest from the victims’ families and the media, another retired judge, G T Nanavati, was appointed alongside him and took over the commission chairmanship. Justice Nanavati had already been in charge of a similar commission of inquiry, appointed by the National Democratic Alliance, that probed the 1984 anti-Sikh pogrom. In the interview that Khetan held with Arvind Pandya, the then advocate general of Gujarat – recorded by hidden camera – this Modi appointee confided that Shah was “our man” and that

Nanavati was in the commission “for the money”.¹⁷ Justice Nanavati proved complacent indeed, declaring during a press conference shortly after his appointment that he had noted no lapse by the police in its handling of the riots.¹⁸

The Nanavati-Shah Commission did its utmost to delay the investigation, its rare initiatives being the result of outside pressures. It was not until spring 2007 that the commission asked the Gujarat government to analyse the CDs containing recordings of telephone conversations between Sangh parivar leaders and bureaucrats in areas devastated by the 2002 pogrom.¹⁹ The CDs had been handed over to the commission (which had not bothered to request them!) by SP Rahul Sharma, an officer who was anxious for light to be shed on the matter. He was DCP (control room) in Ahmedabad in April 2002 when he was put in charge of collecting data in the framework of the investigation into the massacres that took place in Naroda Patiya and Gulberg Society. He asked AT&T and Celforce to provide him with all the communications that had taken place in these areas on 28 February. They contained indisputable evidence of the presence of police officers, who had claimed to be elsewhere, in areas where they should have been attempting to restore order, and of Hindu nationalist cadres that the survivors indicated as being their aggressors. Rahul Sharma compiled CDs of these recordings constituting a wealth of incriminating evidence which he handed over to his superiors in the crime branch – who somehow misplaced them. He gave a copy to the Nanavati-Shah Commission which has not paid full attention to it yet. In September 2009 the commission merely admitted that these data “if found not manipulated, is likely to help this commission in finding out the truth about involvement of these persons in the incidents of violence against the minority community”.²⁰ That was already a reasonable assumption in 2009.

The Congress-led coalition that came to power in 2004 at the centre strived to counter the Nanavati-Shah Commission. Minister of Railways Lalu Prasad Yadav took advantage of his portfolio to appoint a commission of inquiry for the railway police. Its chairman, U C Banerjee, a retired judge, concluded in 2005 that the fire in the railroad car that killed 59 in Godhra in 2002 was accidental and not premeditated for mainly one reason: the burns sustained by victims were towards the lower portion of the body indicating that the fire had started from within and was not because of any fire bombs thrown from outside.²¹

The Gujarat High Court levied a “stay order on all actions regarding the U C Banerjee Committee Report” in March 2006 after having received in September 2005 a complaint disputing the legitimacy of this committee – given that the Gujarat government had already appointed the Nanavati-Shah Commission.²² The high court also declared the Banerjee Committee “illegal” and restrained the centre from placing the report before Parliament for discussion. Members of the Manmohan Singh government went on appeal to the Supreme Court which refused to stay the order of the high court in a decision handed down on 2 July 2006²³ – an illustration of the leverage of the state judiciary.

The Nanavati-Shah Commission finally submitted its first report in September 2008, which concluded, contrary to the Banerjee Committee, that outside criminal elements had been involved in the Godhra blaze and thus described the Godhra tragedy as the product of a conspiracy: “The burning of the coach S6 was a pre-planned act. In other words, there was a conspiracy to burn the coach of the Sabarmati Express coming from Ayodhya and to cause harm to the kar sevaks travelling in the coach”.²⁴

Justice Shah died in March 2008. He was replaced by another retired judge, Justice Akshay Mehta, who had freed Babu Bajrangi on bail a few years earlier.²⁵ There was an uproar, but his appointment was confirmed. Then, the Gujarat government extended the commission for a year in December 2008 – which it has continued to do subsequently. After its 18th extension, in December 2011, the commission announced that it would submit its report before 31 March 2012.

2.2.2 A Judiciary under Orders?

The state magistrates have favoured the Modi government in many other ways. Criminal justice, within the Indian court system, has four components: investigation, prosecution, adjudication and appeal. Investigation is handled by the police, prosecution by public prosecutors, adjudication by the lower judiciary (for e.g. the sessions court), and appeal to the high court (with a possible second appeal to the Supreme Court). It is important to evaluate the relative “independence” of these four links in the chain, to gauge the kind of justice that is happening in post-2002 Gujarat. We have already seen that the police had little independence vis-à-vis the state government since, under the Constitution, the police are an exclusively state subject, and therefore report to the state government.²⁶

The second link in the criminal justice chain is the prosecution services. Sections 24 and 25 of the Code of Criminal Procedure, 1973 deal with the appointment of public prosecutors. In the case of prosecutors in the sessions courts, the appointment powers unambiguously lie with the state government. Though some Supreme Court judgments have suggested that prosecutors are beholden only to the criminal code and not to the state,²⁷ in practice, prosecutors are viewed as arms of the state.

As a result, in Gujarat, in some of the places where Muslims had been badly affected in 2002, Sangh parivar local leaders have been appointed prosecutors.²⁸ In Mehsana, Dilip Trivedi, VHP secretary general in Gujarat, was appointed district public prosecutor, a position he held from April 2000 to December 2007. He was in charge, therefore, of two major cases, Sardapura, where 33 people had been burnt alive and Dipda Darwaja where 11 people were hacked to death. Trivedi’s role is one of the most obvious reasons for the lack of Hindu prisoners in the district jails: whereas 3,000 were arrested in 2002, only between 100 and 150 remained as accused in 2007 – most of them out on bail (46 people in the Sardapura case and 38 in the Dipda Darwaja case). As for complaints, out of the 182 lodged, only 76 were heard and only two of them resulted in charges – and these two were due to the fact that the judges were Muslims, according to Trivedi (2007: 58).

In his responses to journalists, Trivedi did nothing to hide his political leanings. He asked back: “Do people expect the BJP to appoint the supporters of the Congress as public prosecutors? Whichever party comes to power, it appoints its men in key positions” (Rawat 2003). After applications were filed in the high court, Trivedi was replaced in the Dipda Darwaja case – by another VHP lawyer, Rajendra Darji – but he remained district prosecutor till 2007.

In Sabarkantha district, another district that was very badly hit by the 2002 violence, the public prosecutor appointed in 2003, Bharat Bhatt, was also president of the district unit of the VHP. He explained that the six other prosecutors were also Hindu nationalist sympathisers for a very simple reason: “All of them are with us ... since the ruling party makes the appointments, all of them are with us” (Bhatt 2007: 61). Since the accused – whom he was supposed to punish – were his friends, he told them beforehand “not to smile when they see me in court”. To get as many cases dismissed as possible, he did all he could to convince Muslims to withdraw their complaints, in exchange for money if necessary:

Whenever I feel that there is a need to scold ... I tell them you live in the village... settle the issue and keep each other's honour intact, you have all your property there ...live peacefully, whatever had to happen has happened ...the tongue and the teeth are both inside the mouth. Even if the teeth cut the tongue, we don't break the teeth ...Similarly, if you want to live in this village where your fathers and your grandfathers have lived ...and anyway, you won't leave this village and go to Pakistan ...forgive him, he has committed a mistake ... He will say sorry ...you also say sorry... keep each other's honour (...) Some agree after taking money but some also agree on their own... (...) In almost 25% of the cases they agreed... (ibid: 60-61).

In Panchmahals – where 121 riot First Information Reports (FIRs) had been filed – the public prosecutor was also the VHP district president, Piyush Gandhi, who said in an interview to the *Indian Express* in 2003:

The state government appoints people as public prosecutors who it feels are honest and experienced. No political or organisational affiliations work in this. I am associated with the RSS since 1964. In 1982, I joined the Ram Mandir movement and since 1985 I am president of VHP Panchmahals district unit. The VHP is not a political organisation so I don't consider mine as a political appointment.²⁹

In the Ode case – Anand district – regarding the disappearance of 27 people, the public prosecutor was also an Rashtriya Swayamsevak Sangh (RSS) sympathiser who was more candid about his role: “What is new in public prosecutors being political appointees? It has always been like this” (cited in *ibid*).

In Baroda, one of the prosecutors, Sanjay Bhatt, was not only a “VHP advocate”, but also the nephew of the VHP city unit president, Ajay Joshi, who defended the 21 accused in the Best Bakery Case (*ibid*).

The most controversial cases, however, were in Ahmedabad. There, Chetan Shah, a VHP lawyer, had procured bail for hundreds of Hindu arsonists and rioters. In fact, till 2003, he was defending all the 35 accused in the Gulberg Society case. In Gulberg Society, a cluster of 29 middle class bungalows and 10 apartments, 69 people, including ex-MP Ehsan Jafri had

been killed on 28 February 2002 (for more details see Jaffrelot and Thomas 2012: 43-79). A press report tells the rest of the story:

Now, Shah has been appointed the chief public prosecutor at Ahmedabad sessions court where more than 950 riot-related cases will come up for hearing. Shah, who has secured freedom of many of the accused, is now expected to lead the prosecution against the same people. Speaking to Times News Networks, Shah said he would not appear in cases involving the persons whom he had helped secure bail earlier. However, in his capacity as the chief public prosecutor, Shah would still decide which prosecutor handles the cases against persons who were earlier his clients. Incidentally, Shah is defending state law minister Ashok Bhatt in another case, where the latter is accused of leading a mob which killed a police constable in the mid-80s (Mukherjee and David 2003).

H M Dhruv, who had acted as attorney for Chetan Shah, was appointed “special prosecutor” for the Gulberg Society and Naroda Patiya cases after having been the defence attorney in the first case.

As for Arvind Pandya, the “special prosecutor” or “advocate general” acting as the government’s counsel for the defence before the Nanavati-Shah Commission, he turned out to be a most xenophobic ideologue when he justified the 2002 violence in these terms:

[In Godhra, Muslims] thought they could get away with it because the Gujarati is mild by nature (Note that Muslims are not considered as Gujaratis). In the past, they had beaten the Gujarati, they have even beaten the whole world, and nobody has shown any courage... (...) But this time, they were thrashed ... It is Hindu rule now ... All of Gujarat is ruled by Hindus, and that too from the VHP and the BJP (Pandya 2007: 53).

The prosecutor, who uttered words so unbecoming a lawyer, also confessed that during the hearings:

Every judge was calling me in his chamber and showing full sympathy for me ... giving full cooperation to me, but keeping some distance ... the judges were also guiding me as and when required ... how to put up a case and on which date... because, basically, they are Hindus (*ibid*: 62).

From this overview of the Gujarati judicial apparatus – where there was not even one Muslim prosecutor (*Times of India* 2003) – a double-barrelled lesson can be drawn. For one, the personnel of these institutions seem to have an anti-Muslim bias. Second, the BJP’s stint in power brought about a clear politicisation of the courts. SRT (see *infra*) chairman R K Raghavan wrote in his report to the Supreme Court in 2010: “It has been found that a few of the appointees [of Gujarat justice] were in fact politically connected, either to the ruling party or organisations sympathetic to it” (Khetan 2011b: 38).

The dysfunctioning character of Gujarat’s justice catalysed a string of Supreme Court initiatives.

3 Supreme Court vs Gujarat Government and High Court: What Test of Strength?

Thanks to the tenacity of a few plaintiffs backed by equally determined NGOs, a few trials finally began in 2003, such as the one regarding the Ghodasar case in Anand district. Hindus had attacked the Muslim houses of this locality on 3 March 2002,

killing 14 people, 12 of them women who were trying to escape through the fields. Out of the 63 accused on the stand, 48 were acquitted and 12 received a life sentence handed down by the Nadiad sessions court in Kheda district, in November 2003 (*Times of India* 2004 and Rautela 2009). Four years later, a Godhra sessions court sentenced eight persons to life imprisonment, including the former president of the Kalol taluka BJP and VHP local leaders for burning a family alive after raping two girls.³⁰

But most of the complaints came to naught and, therefore, the conflict between the central and the Gujarat governments that was already apparent in 2004 in the appointment of the Banerjee Committee in response to the nomination of the Navati-Shah Commission took a similar turn in the judicial realm: the Supreme Court and the Gujarat High Court began to be at odds in more than one instance.

3.1 Transfer of Trials and (Re)opening of Cases

The difficulties encountered by Muslim victims to see justice done resulted not only from the attitude of the prosecutors, but also from intimidation tactics used on the witnesses. The most telling illustration of this state of affairs – which prompted the Supreme Court to take action – is what is known as the “Best Bakery case”, from the name of a bakery in Baroda (or Vadodara) where 14 persons were burned alive on 1 March 2002. The police began its investigation on the basis of a complaint lodged by a young woman, Zahira Sheikh, 18 years old at the time of the events, who was one of the 73 eyewitnesses called to the stand. The trial began at the Baroda courthouse in February 2003 and went on for several weeks. The government pleader, Raghuvir Pandya, who had just been appointed in 2002 for the district and sessions court in Baroda, was a VHP sympathiser.³¹

In June 2003, the 21 accused were acquitted because 37 of the 73 key witnesses, including Zahira, her mother and her brothers retracted their statements before the judges. Shortly after they said they had “lied in court because they had been threatened with death unless they did so”.³² It was then the legal rights group Citizens for Justice and Peace that helped the victim survivor record her statement before the National Human Rights Commission and thereafter co-petition with her in the Supreme Court – we are back in the “Centre” – to request a reopening of the investigation and a retrial of the case out of Gujarat state. The Supreme Court convinced the Government of Gujarat to request a retrial before the state’s high court. But the appeal was dismissed in December 2003. In January 2004 Zahira – whose courage was then lauded in the media – decided to file an appeal with the Supreme Court, which decided in her favour on 12 April 2004, thereby invalidating the high court decision, and ordered a retrial outside the state of Gujarat, such transfer appearing as the best way to lighten all manner of pressures.

The Supreme Court took this opportunity to remind the high court of its duty “in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the

criminal justice system itself”.³³ The judges of India’s highest court even took their colleagues in Gujarat to task:

When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and there is no fair trial at all, justice becomes the victim... The modern day ‘Neros’ were looking elsewhere when Best Bakery and innocent children and women were burning, and were probably deliberating how the perpetrators of the crime can be saved or protected.³⁴

A retrial was held in Mumbai starting in October 2004. But on 3 November, Zahira held a press conference stating that the first judgment was right. In November and December, Zahira, her mother and her brothers once again retracted, telling the judges that due to the thickness of the smoke they had no idea how their parents died. On 22 December, *Tehelka* broadcast a video online purportedly showing Zahira and her family receiving a large sum of money from the hands of Baroda BJP MLA Madhu Srivastava – who denied it. The trial nevertheless continued and, finally, in February 2006, on the basis of incriminating evidence gathered by the CBI put in charge of the investigation, nine of the 17 accused were given life sentences while the eight others were acquitted for lack of evidence.³⁵ The Supreme Court sentenced Zahira herself to one year in prison for having lied under oath.³⁶

The Supreme Court also deemed necessary the transfer of the trial of the Bilkis Yakoob Rasool case. This woman was five months pregnant when gang raped in her village of Limkheda (Dahod district) on 3 March 2002 by neighbours she knew.³⁷ She had already witnessed the rape of three of her family members and the murder of 15 members of her family including her three-year-old daughter. She lodged a complaint the following day for rape and the murder of 14 members of her family. In recording her complaint the police only mentioned seven of the deaths, claiming that the bodies of the other persons could not be found, and refused to record her complaint for rape. It closed the case in January 2003 for lack of evidence. Bilkis, with the support of several NGOs, including Jan Vikas, and the National Human Rights Commission, petitioned the Supreme Court, which ordered the Government of Gujarat to reopen the case in September 2003. The police then began a campaign of moral harassment of the victim, even waking her in the middle of the night to return to the location of the rape and murders to re-enact the events. The Supreme Court then, in December 2003, directed the CBI to reinvestigate the case. It finally arrested 12 people for rape and murder and six police officers for obstruction of justice. Facing threats, Bilkis sought the transfer of the case in July, something the Supreme Court agreed to. It even got a public prosecutor appointed by the centre in August 2004. Eventually, the case was tried in Mumbai. Thirteen of the 20 accused were convicted and 11 of them were condemned to life imprisonment (Anand 2008).

3.2 From the Godhra Riots Inquiry Committee to the Special Investigation Team

Drawing the conclusions from the failure of the judicial process in Gujarat, the Supreme Court not only intervened in the

Best Bakery case and the Bilkis Bano case, but appointed a Godhra-Riots Inquiry Committee that re-examined 2,107 cases which had been closed within months after the violence. In view of the committee's report, it concluded in February 2006 that 1,594 cases should be reopened and that they required further investigation. Besides, 13 complaints were lodged and 41 police officers involved in the riots indicted. Over 600 accused were thus arrested while waiting to stand trial. The results of this voluntaristic action were nevertheless disappointing due to obstructionist practices on the part of the Gujarat government and high court.

In March 2008, the Supreme Court decided to circumvent the obstacle by appointing an srr. The terms of reference of the srr, outlined by the Court in May 2009, restored the victims' hopes.³⁸ This new body was called on to concentrate on only a half-dozen cases, which amounted to admitting that full justice was impossible, but concurred with the "realism" that some NGOs had recommended from the start. The cases in question were those of Naroda Patiya, Naroda Gam and Gulberg Society in Ahmedabad, Sardarpura and Dipda Darwaja in Mehasana district, Sabarkantha, Ode (Anand district) and Godhra. The first five articles of paragraph 46 in the terms of reference reflect the Supreme Court's impatience:

(i) Supplementary charge sheets shall be filed in each of these cases as the srr has found further material and/or has identified other accused against whom charges are now to be brought.

(ii) The conduct of trials has to be resumed on a day-to-day basis – keeping in view that the incidents are of January 2002 and the trials already stand delayed by seven years. The need for early completion of sensitive cases more particularly in cases involving communal disturbances cannot be overstated.

(iii) The srr has suggested that the six "Fast Track Courts" be designated by the High Court to conduct trial, on day-to-day basis, in the five districts as follows:

(i) Ahmedabad (Naroda Patiya, Naroda Gam).

(ii) Ahmedabad (Gulberg).

(iii) Mehsana (Sardarpura and Dipda Darwaja).

(iv) Sabarkantha.

(v) Anand (Ode).

(vi) Godhra Train Case (at Sabarmati Jail, Ahmedabad).

(iv) It is imperative, considering the nature and sensitivity of these nominated cases, and the history of the entire litigation, that senior judicial officers be appointed so that these trials can be concluded as soon as possible and in the most satisfactory manner. In order to ensure that all concerned have the highest degree in the system being put in place, it would be advisable if the chief justice of the High Court of Gujarat selects the judicial officers to be so nominated (...).

(v) Experienced lawyers familiar with the conduct of criminal trials are to be appointed as Public Prosecutors. In the facts and circumstances of the present case, such public prosecutors shall be appointed in consultation with the chairman of the srr (...). It shall be open to the chairman of the srr to seek change of any Public Prosecutor so appointed if any deficiency in performance is noticed.

Paragraph 8 also deserves to be mentioned because it stipulated, "Whenever considered necessary, the srr can request the Public Prosecutor to seek cancellation of the bails already granted".

Although srr chairman R K Raghavan, a retired ips officer who had headed the cbi and was known for his columns in *Frontline* magazine, enjoyed an excellent reputation, the

biggest weakness of the new apparatus lay in the role it granted to local actors. Not only was the Gujarat High Court responsible for appointing judicial officers, including the public prosecutors, who were to make up the srr, but half of the six members in charge of "leading the investigation" – in already extremely difficult conditions³⁹ – were to be recruited among Gujarat cadre police officers. It was no surprise that the local authorities' choice fell on police officers who supported the Modi government: Ashis Bhatia, former Additional Commissioner of Police in Surat, Shivanand Jha, former Additional Commissioner of Police of Ahmedabad in whose jurisdiction 500 Muslims had died in 2002 (including in Naroda and Gulberg neighbourhoods) and who had become home secretary and Geeta Johri who was even more vulnerable to pressure from her superiors – including Narendra Modi – given that the Supreme Court had taken her off a fake encounter case for misconduct and that her husband, a forest officer, was liable to a disciplinary procedure for corruption. The appointment of these investigators caused great consternation among the victims and their sympathisers. In an open letter to Raghavan, Shiv Visvanathan asked, with regard to Jha, "How is a man seen as accomplice to murder to guarantee justice?" (Visvanathan 2010: 3).

Many of the public prosecutors appointed by the Modi government remained in place. Such was the case, for instance, of Suresh Shah, who had been Special Public Prosecutor in the cases of Sardarpura and Dipda Darwaja since 2004. But others were appointed by the srr after taking the suggestions of NGOs such as the Citizens for Justice and Peace, allegedly, in consideration (*Indian Express* 2009b). However, at least two of those who were nominated in an impartial fashion after the srr was established ended up resigning as they were unable to complete their task. R K Shah, who had been named Special Public Prosecutor for the Gulberg Society case, and his Assistant Public Prosecutor Naina Bhatt, sent their letters of resignation to the Supreme Court on 25 February 2010. In an interview, Bhatt explained:

Generally I found the judge (B U Joshi) unsympathetic to the victims and eyewitnesses. Also, the srr investigating officer, James Suthar (a Deputy Superintendent of Police), was not cooperating much either. (...) All the papers pertaining to the case were not given to me by various investigating agencies handling the matter. At the 11th hour they would give the papers to me and I would not have enough time to study the papers, to talk to witnesses on that aspect of the case.⁴⁰

Eventually, 10 months later, after witnesses and the NGOs supporting them approached the high court, this court transferred Joshi to the Himmatnagar sessions court and appointed a new judge, B J Dhandha (Dasgupta 2011).

The srr was particularly dysfunctional from five viewpoints: (1) Whereas it had no other means of investigating than to call witnesses – who were liable to become accused – to testify, it refrained from summoning persons persistently named for their implication in the violence by a number of the victims who came forward. The transport minister, Narayan Lallubhai Patel, who was allegedly involved in the Sardarpura carnage, was a case in point. (2) The srr refused to make use of its own accord of incriminating evidence such as recordings of telephone conversations

between police officers, senior civil servants and Sangh parivar leaders or footage recorded by Ashish Khetan with a hidden camera for *Tehelka*.

(3) It left the vast majority of accused out on bail. This was the case for 51 of the 65 accused in the Gulberg Society case, for 54 of the 63 accused in the Naroda Patiya case, for 80 of the 89 accused in the Naroda Gam case, for 26 of the 37 accused in the Ode case, for 65 of the 73 accused in the Sardarpura case and for all 84 accused in the Dipda Darwaja case. This state of things – contrasting with the record number of Muslims in custody for the Sabarmati Express case in Godhra by virtue of the POTA (Prevention of Terrorist Activities Act)⁴¹ – enabled the accused to threaten witnesses. Babu Bajrangji was particularly skilled at this, so much so that witnesses who were prepared to speak against him sometimes even left the state.⁴²

(4) The SIT made no systematic effort to protect the witnesses, most of whom were Muslim victims or relatives of the dead and the wounded who generally lived in utter poverty, a situation already conducive to resignation or accepting bribes as the price of silence. In November 2011, a key witness in the Naroda Patiya case was killed in Juhapura (the main Muslim ghetto of Ahmedabad). Nadeem Saiyed was an Right to Information (RTI) activist who had made many enemies after exposing their wrongdoings. Three months before he had confided to Mallika Sarabhai: “Ben, my life is under constant threat. I am afraid they will get to me before I can testify” (Sarabhai 2011). A few days after Saiyed was killed, two witnesses in the Ode case said they were receiving death threats and had written the SIT for protection – in vain so far (*Indian Express*, 2011a).

(5) Raghavan turned out to be an “absentee investigator” – to use Shiv Visvanathan’s expression. He only spent a few days every month in Gujarat, delegating conduct of the investigation to the other members of the SIT. It dragged on as a result, contrary to the wishes expressed by the Supreme Court at the outset.

The Supreme Court called the SIT to order and attempted to put the investigation back on track in 2009, which resulted in a series of achievements.

4 Significant Moves?

4.1 The Arrest of Maya Kodnani and Jaideep Patel

The first significant political arrests came in 2009, seven years after the events. Unable to ignore Rahul Sharma’s CDs any longer, which established that BJP and VHP officials were present in Naroda Patiya and Naroda Gam when the violence took place – and were in telephone contact with police officers – the authorities finally proceeded with significant arrests. In February 2009, the Gujarat government submitted an affidavit to the state’s high court indicating that, “in spite of being an MLA (sic), Kodnani was a leader of the mob instigating them to commit the crimes and in fact even fired her pistol” (*Indian Express* 2009a). Maya Kodnani was arrested as well as Jaideep Patel, a VHP leader who had also allegedly led attackers in the Naroda area.

Kodnani’s implication in the violences of Naroda Patiya and Naroda Gam was largely acknowledged in her constituency.

Suresh Richard, one of the dalit musclemen who instigated his fellow Chharis (scheduled castes)⁴³ against the Muslims, told Khetan:

Mayaben was moving around all day in an open jeep... (...) (She was saying) Jai Shri Ram, Jai Shri Ram ... wearing a saffron headband ... She kept raising slogans ... She said, carry on with your work, I’m here (to protect you)... (*Tehelka* special issue, 2007: 22).

On 20 May 2009, Kodnani and Patel were granted conditional bail by the Ahmedabad city civil and sessions court. That such an offence could have been bailable when bail had been refused to so many others by the same court was revealing of the communal bias of judges who candidly requested the two leaders “not to tamper with evidence or influence the witnesses in the case” (*Indian Express*, 2009c). The SIT, which had got their bail cancelled in March did not go on appeal of this decision.

4.2 Hearing of Narendra Modi

The SIT ignored some key actors (as mentioned above), but it interrogated others, including Narendra Modi.⁴⁴

In June 2006, the widow of Ehsan Jafri, Zakia Jafri and the NGO, Citizens for Justice and Peace, had filed a 119-page complaint with the DGP of Gujarat, P C Pande, “making a case for criminal conspiracy to commit mass murder, destruction of evidence, intimidation and subversion of the criminal justice system”.⁴⁵ Since the Gujarat police took no action, on 28 February 2007, five years exactly after the events, Zakia Jafri and the CJP filed a petition in the Gujarat High Court. In November of the same year, the court dismissed the petition. On 8 June 2008, the same filed a criminal complaint with the Supreme Court. It levelled charges against 63 persons, including Chief Minister Narendra Modi, 11 cabinet ministers and three BJP MLAs, six members or cadres of other Sangh parivar organisations and 38 high ranking IPS and IAS officers.

What was at stake was a long list of malfunctionings of the state machinery that explained the high human toll and the massive destruction of property and buildings. In March 2009, the court directed the SIT to investigate in this direction – without calling on one of the people who was named as an accused in the complaint: Shivanand Jha. (The Supreme Court was to exclude Geetha Johri and Shivanand Jha from the SIT on 6 April 2010, a decision Raghavan contested in a memo to the Court 10 days later.)

On 28 March 2010, Narendra Modi testified before the SIT. The SIT member who questioned him, A K Malhotra (the enquiry officer) was not a member of the Gujarat police force, but he did not have the means to drive the state’s chief minister into a corner and he allowed him, for instance, to claim that he knew nothing about all the reports that the Intelligence Bureau sent to him about what was brewing in February 2002. If that was the case, Modi would be probably the only chief minister of India to ignore the Intelligence Bureau’s briefs.⁴⁶

Indications of Narendra Modi’s implication have been made public through different channels. In addition to Babu Bajrangji’s statements cited above, the responses to Khetan’s questions of

Suresh Richard, another accused in the Naroda Patiya case, are telling:

On 28 February at around 7:30...around 7:15 our Modibhai came... Right here, outside the house...My sisters garlanded him with roses...

Tehelka: Narendra Modi...

Richard: Narendra Modi...He came with black commandos...got down from his ambassador car and walked up here... All my sisters garlanded him...a big man is a big man after all...

Tehelka: He came out on the road?

Richard: Here, near this house...Then he went this way...Looked at how things were in Naroda...

Tehelka: The day the Patiya incident happened...

Richard: The same evening...

Tehelka: 28 February...

Richard: 28...

Tehelka: 2002...

Richard: He went out to all the places... He said our tribe was blessed...

He said our mothers were blessed (for bearing us) (*Tehelka* special issue, 3 November 2007: 22).

Rupa Mody, the mother who lost her son – as shown in *Parzania*, a film that has been de facto banned in Gujarat (Jaffrelot (2009: 199-236) – in Gulberg Society “testified before a trial court in Ahmedabad that Jaffrey told her he had spoken to Narendra Modi too on the telephone about the threatening mob outside the compound but the chief minister had refused to help” Varadarajan 2010).

In spite of several converging elements, the 600-page report that the SRR filed with the Supreme Court in December 2010 was remarkably lenient towards local politicians. While it deplored the “sweeping” and “offensive” comments Modi made against Muslims, deeming that they “showed a measure of thoughtlessness and irresponsibility on the part of a person holding a high public office” (Khetan 2011a: 29), its first conclusions – in this non-final report – were disconcerting: “As many as 32 allegations were probed during this preliminary inquiry. These related to several acts of omission and commission by the state government and its functionaries, including the chief minister. A few of these alone were in fact substantiated (...) (T)he substantiated allegations did not throw up material that would justify action under the law” (ibid: 31).

5 Whose Conspiracy?

The first trial that has been completed after the appointment of the SRR was the one over the burning of the Sabarmati Express in Godhra. While 63 of the surviving 94 accused were released on 22 February 2011 after nine years in prison (five other prisoners died in jail) where they had been sent under POTA,⁴⁷ 31 accused were found guilty and 11 of them – a record – were sentenced to death and 20 others to life imprisonment. This harsh verdict was due to the fact that the judge, P R Patel, following the first Nanavati-Shah Commission report, concluded that it was a planned attack.

This assessment was problematic. First, justice Patel himself contradicted it by acquitting the two men the police considered to have masterminded the operation, Maulvi Umarji and Mohammed Hussain Kalota, the president of the municipality at the time of events. How could they be acquitted if they were behind the conspiracy. Second, the conspiracy theory contradicted

a previous decision by the high court. In 2005, the central POTA review committee had considered that POTA could not apply to the accused in the Godhra case since it was not a case of terrorism or conspiracy.⁴⁸ A division bench of the Gujarat High Court had upheld this decision in 2009 and the Supreme Court had not expressed any objection.

The frustration of those who had been condemned resulted from two additional sources. First, the police officer placed in charge of the investigation by the SRR, Noel Parmar, was not only biased in his alleged description of the Muslims as “all complete fundamentalists”,⁴⁹ but a Gujarat cadre of the IPS who had been well treated by Modi’s government. He had been granted four extensions of service beyond retirement since 2004. In 2008, the state government tried to grant him a fifth one but the Supreme Court objected. Human rights activists had raised the issue that he was not only “judge and jury” but also dependent on Modi. The SRR’s response was to name his right-hand man, Ramesh Patel, in his stead. Second, in August 2010 the trial court had rejected an application by some of the accused to summon A Khetan as a defence witness. Their counsels argued that the Court would learn a lot from his interview – during his sting operation – of the two men of the Kalubhai petrol pump who, allegedly, had sold the petrol that had been used to set ablaze the train.⁵⁰ In his article on the subject⁵¹ Ashish Khetan argues that (a) two of the nine BJP men who testified that they had seen Muslims setting the train ablaze had admitted during the sting operation that they were actually at home on that day, (b) the two petrol pump attendants mentioned above had initially declared to the police that they had not sold any petrol but one of them, Ranjit Singh, had been caught “admitting on camera that he and Pratap [the other witness] had been bribed Rs 50,000 by police officer Noel Parmar to do that”, that is to change their testimony.

Another disturbing contribution to this case that needs to be factored in is the story of Husain Mulla, a truck conductor. On 14 July 2002, the police arrested him “and upon threat of death, forced him to sign a number of confessional statements, among them that he had pulled the chain of the Sabarmati Express and that he saw two Muslim men set fire to the bogey (S6)”. Subjected to torture, Mulla escaped (Subrahmaniam 2005).

In December 2011, one of the 11 Muslims who had been sentenced to death petitioned the Gujarat High Court, demanding that additional evidence from Khetan’s sting operation be brought on record. The court issued a notice to the SRR in that regard, asking it to reply by January 2012.

The second trial that reached completion after the SRR had been appointed concerned the Sardarpura case. On 10 November 2011, the special court sentenced 31 persons to life imprisonment, and acquitted 42 others. The judgment rejected the accusation by the defence lawyers that witnesses had been tutored by Teesta Setalvad. In fact, it comforted her – at a time when she was under so much pressure – by saying: “In the present case, the injured witnesses were in such a state of mind that without the active support of someone they might/not/have come before the court to give evidence” (*Indian Express* 2011b).

This verdict has been described as unprecedented⁵² and welcome by the NGOs supporting the victims in spite of the fact that it did not consider, contrary to their firm belief, that the Sardarpura violence was due to some conspiracy (Dabhi 2011).

This conspiracy question has become central after the leaking to the press of the srr December 2010 report and, therefore, of Sanjiv Bhatt's deposition before the team. In April 2011, Bhatt repeatedly used the term "conspiracy" in the affidavit. He said, for instance, that the srr should concentrate on ascertaining the existence of a "larger conspiracy or official orchestration behind the Gujarat Riots of 2002".⁵³ The meeting he said he took part in at Narendra Modi's residence on 27 February 2002 was naturally the key element in this conspiracy.

An important dimension of Bhatt's affidavit regarded his assessment of the srr's work. Indeed, he registered his "painful duty to bring to the notice of this Hon'ble Court that the srr does not appear to be living up to the enormous trust reposed in it by the Supreme Court of India, to conduct an impartial and thorough probe into the allegations of a larger conspiracy and administrative complicity behind the Gujarat Riots of 2002 and hence the present Affidavit".⁵⁴

Bhatt had one specific grievance to communicate to the Supreme Court about the srr:

... the srr has chosen to intimidate certain witnesses and coerce them in to refraining from stating the true facts and thereby has created an impression that the srr is becoming party to the ongoing cover-up operation in Gujarat. My apprehensions were substantiated when one of the witnesses I had named, Shri K D Panth/Assistant Intelligence Officer with the State Intelligence Bureau in 2002/informed me that he had been called before the Special Investigative Team on 5 April 2011 and was virtually treated like an accused and was threatened with arrest and other dire consequences (ibid).

In May 2011, at last, the Nanavati-Mehta Commission summoned Bhatt for the hearing he had been waiting for a long time. Narendra Modi immediately counter-attacked, saying that he had indeed held a "law and order meeting" at his residence on the evening of 27 February, but that Sanjiv Bhatt did not attend. Allegedly only Swarna Kanta Verma (as Acting Chief Secretary), Ashok Narayan (Acs, Home), K Chakravarthi (DGP), P C Pande (Police Commissioner of Ahmedabad), K Nityanandam (Home secretary), P K Mishra and Anil Mukim, (both personal secretaries to the chief minister) attended. Upon questioning, the other participants in the meeting upheld Narendra Modi's claims or said they no longer remembered who had taken part in the meeting. Bhatt's chauffeur, on the other hand, declared that he clearly remembered having driven his boss to the chief minister's residence that evening⁵⁵ and a former BBC journalist who had interviewed Bhatt on the same day filed an affidavit before the Supreme Court through the amicus curiae Raju Ramachandran. He said: "On 27 February 2002 at about 9 pm I met IPS Sanjeev Bhatt at his official residence. During our meeting he told me that he needs to go to a special meeting at the chief minister's residence and after that cutting short our meeting he left his official residence at about 9.30 pm".⁵⁶

Bhatt, who had already been transferred first to the post of a principal of the Sabarmati jail and then to that of principal of

SRP Training School at Junagadh, was suspended in August 2011 because of a long unauthorised absence. In September he filed a Special Criminal Application in the High Court of Gujarat to challenge the withdrawing of a report he had drafted in 2003. While he was, at that time, in charge of Sabarmati Central prison, he had come across "very important documentary evidence regarding the role of certain highly placed State functionaries/politicians and senior police officers of the State of Gujarat in the killing of Shri Haren Pandya".⁵⁷ Bhatt added that the then minister of state for home, Amit Shah, ordered him to destroy the report and that Narendra Modi and Shah "were highly disturbed and agitated by the act of the petitioner when he decided not to destroy his report".

On 30 September 2011, Bhatt was arrested on a complaint by KD Panth that he had coerced him to sign a false affidavit supporting Bhatt's claim that he was present at the 27 February meeting at Modi's residence – according to Bhatt's driver, he was. An Ahmedabad sessions court released Bhatt on bail on 17 October 2011. Then, the following month, the Government of Gujarat withdrew a revision petition in an alleged case of post-custodial death against Bhatt. In 1990, during an agitation in Jamnagar where Bhatt was then posted as Additional Superintendent of Police, some protesters had been arrested. After being released, one of them died in the hospital. The magistrate court initiated criminal procedures against several policemen including Bhatt. The Government of Gujarat filed a revision petition in the sessions court in 1996. This is the petition that Modi's government has withdrawn exposing Bhatt to prosecution (Jain 2011).

Parallel to the fight of Sanjiv Bhatt, the legal battle continues between the Supreme Court and the state machinery of Gujarat. After receiving the srr report in May 2010, the Court submitted it in October 2010 to the amicus curiae, Prashant Bhushan. He was about to complete his report when the state of Gujarat accused him of bias – which led him to resign. His successor, Raju Ramachandran submitted a 10-page report which led the Supreme Court to direct the srr to investigate further. Then in May, possibly to put up with the limitations of the srr, the Court allowed the amicus curiae to bypass the srr and to meet witnesses, including police officers. In July, Ramachandran submitted his report and in September, in its judgment regarding the petition by Zakia Jafri and the cjp, the Court, while it decided to cease monitoring the case, directed the trial court to decide whether the 63 persons mentioned in the petition – including Modi – have to be probed. This judgment has been celebrated by the BJP as a clean chit, whereas it meant that "trial court is now to 'begin'" (Kripalani 2011).

Conclusions

Most countries – particularly democratic ones – that have experienced violence on the scale of what occurred in Gujarat in 2002 have later set up varieties of "Justice and Reconciliation Commissions", justice being supposed to pave the way for reconciliation. In India no procedure of this sort has been engaged. But an effective judiciary could have equally effectively prepared the ground for reconciliation of some sort – provided a consensus had emerged regarding the need for reconciliation.⁵⁸

Ten years after the events, the number of trials carried through to completion can be counted on one and a half hands and when the process is over, the total number may not exceed that of the fingers on both hands. At the minimum, justice has been slow⁵⁹ and the future will only tell whether the judiciary has retained its sense of fairness and mere prestige.

How Can We Explain This State of Things?

First, the politicisation of the state machinery, including the police and the judiciary, has reached unprecedented proportions at the state level. Certainly, some institutions have shown some resilience. The State Human Rights Commission, which supported the NHRC's actions, is the most remarkable one. Among the unofficial groups the role of the NGOs also needs to be emphasised. But on the state side, the dominant impression is that of a different India where an authoritarian government controlling the media (Shah 2011) is presiding over the communalisation of the main institutions and resorts to a politics of fear. In a state that is celebrated as comparatively less corrupt and less criminalised, a record number of leaders of the ruling party (including former members of the government⁶⁰) and senior policemen are in jail or on bail, accused of serious charges such as rioting or fake encounters. Gujarat is also one of the states where targeted killings have been on the rise.⁶¹

Second, the preceding narrative suggests first of all that India is indulging in a sort of federalism that had never in the past manifested itself in this form. While the Gujarat police and judicial system remain controlled by an executive that exhibits a xenophobic ideology, the centre, whether it is the government in Delhi or the Supreme Court, is unable to overcome the resistance put up at the regional level. But is it really trying to? Political will in the noble sense of the term is obviously lacking. Why did the centre not turn the inquiry over to the CBI, the most credible police institution today? Could it be because it did not want to confront Modi head on to avoid turning him into a "hero-victimised-by-the-minority-vote-bank-party" in the Hindus' eyes and thus alienate the majority electorate? Could it be to prevent Modi from leaving his Gujarati stomping grounds to break on to the national political stage? Or to keep a trump card to pull on him should he become the Nehru/Gandhis' main rival? Each of these factors – and the Congress' poor service record in handling the aftermath of the anti-Sikh pogrom in 1984 – is likely to have played a part.

But why has the Supreme Court not shown greater firmness in reopening investigations when the Gujarat judicial apparatus

proved to be so defective? Why give the state's police officers such a major role in conducting investigations? Why allow the Gujarat authorities so much influence in appointing them? Out of naiveté, the kinder ones will say, because the anti-Muslim bias has become so commonplace, even among lawyers, the more cynical will answer that this has been probably out of respect for the federal structure of the country. But this sentiment is eroding, as evident from the way the SRT has been entrusted with some fake encounters' inquiries and the CBI's recommendation to have the related trials out of Gujarat. The administration of an Indian state has probably never given so little confidence at the centre.

In the coming weeks and months, the decisions of the SRT and the Supreme Court will be of great importance. Siddharth Varadarajan (2010) suggested that "If the SRT concludes, for example, that the chief minister failed to take timely action to stop the violence and failed to discipline or punish police officers who refused to protect the life and property of those under attack – offences which arguably figure only as dereliction of duty on the IPC and which attract relatively light punishment – the apex court would have the opportunity to pass judgment by bringing Indian legal practice in line with customary international norms".

This suggestion is in tune with the conclusions of the amicus curiae Raju Ramachandran which have been reported in the media. According to what has leaked of his report to the Supreme Court, there would be "no clinching evidence" to contest the presence of Sanjiv Bhatt at the 27 February meeting at Narendra Modi's place which seemed "logical", given the responsibilities of Bhatt. On the basis of his assessment of this episode and the presence of members of Modi's government in police control rooms, the amicus curiae allegedly recommends that "Modi and other concerned high functionaries be prosecuted under Indian Penal Code Sections 153A (promoting enmity between different classes or communities on ground of religion), 153B (making assertions or imputations prejudicial to national integration), 505 (statements conducive to public mischief) and 166 (public servant disobeying a direction of the law with the intent to cause injury)" (Bidwai 2011). While these recommendations would not be proportionate to the actual crimes, their implementation would show that the Indian judiciary is not prepared to waste a major occasion to reassert its role as the custodian of the rule of law. Beyond the case of Modi, the way the Gujarat High Court will deal with the appeal of those who have been given the death penalty in the Godhra case will be interesting to watch. And no one should underestimate the power of watching.

NOTES

- 1 These figures were supplied in 2002 by Additional Director General of Police R B Sreekumar to Chief Election Commissioner J M Lyngdoh, who deduced from them that 154 of the 182 assembly constituencies in the state had been affected (Khetan 2011b: 40).
- 2 Mass graves were found years after the events, but grounds where others are believed to lie have still not been inspected, in all likelihood so as not to raise the human death toll. Many bodies were also thrown into wells. Such was the case in Naroda Patiya, a peripheral neighbourhood of Ahmedabad. Teesta Setalvad states, on the basis

of documents collected from the state through various legal petitions, that over 228 persons missing were dumped illegally in criminal acts.

- 3 In this article I do not pay attention to the compensation and rehabilitation of the victims by the state, which constitute an issue in itself – except to say that it is still pending. In 2002 the Gujarat government decided to give Rs 2 lakh per Hindu victim and Rs 1 lakh per Muslim victim. This decision was challenged and had to be reversed. In 2008 the centre announced a compensation package of Rs 3.5 lakh for the next of kin of each of the 1,169 identified victims and Rs 1.25 lakh each of the 2,548 injured.

Besides, Rs 262 crore were allocated to compensate loss and damage of property ("Rs 3.3 bn compensation offered, but Gujarat riots victims sceptical", TwoCircles.net, 23 May 2008 (http://twocircles.net/2008_may22/rs3_3_bn_compensation_offered_gujarat_riots_victims_sceptical.html), accessed on 26 November 2011.

- 4 "CBI authentication of Tehelka tapes pursuant to the NHRC Order dated 5 March 2008", (<http://www.cjponline.org/gujaratTrials/statecomp/pdf>), accessed on 25 November 2011.
- 5 For more information on the role of the Bajrang Dal and Babu Bajrangji in Gujarat, see Codron (2009).

- 6 "Gujarat 2002: The Truth in the Words of the Men Who Did It", *Tehelka* special issue, 3 November 2007, pp 12-14. In addition to Zaphadiya, Bajrangti told Khetan that he called Jaideep Patel (a senior VHP leader) "11 or 12 times" while attacking Muslims.
- 7 A former cadre in the Indian Administrative Service, Mander campaigns for a major Nyayagraha (grip of justice) movement on the model of Gandhi's satyagraha.
- 8 For instance, Gagan Sethi (nd) believed it was wiser to focus on a small number of highly symbolic cases. He thus stated, "Even if for five cases in the state we get a conviction we will have done hugely better than any of the previous riots across the country. To me, it is important that the rule of law is upheld. The reality of our legal system is that it is not possible to look at the 2,000 or 4,000 cases. So it is important that for a few well-known cases you see there is a conviction so it restores a certain faith that you can't do what you like (...). Justice is a crucial component of peace. Seeing that the law is enforced keeps a society in order and gives a sense of security" ("Peace by piece. A document on Janvikas's efforts for peace", Ahmedabad, nd, p 30).
- 9 "In the Supreme Court of India Special Leave Petition No 1088 of 2008, *Smt Zakia Ahsan Jafri and Citizens for Justice and Peace* petitioners versus state of Gujarat and others respondents. Affidavit of Sanjiv Rajendra Bhatt, IPS, 14 April 2011, Ahmedabad." This document is accessible on the website of NDTV at the following address (http://drop.ndtv.com/common/pdf/Sanjiv_Bhatt.pdf?from=NDTV - accessed on 25 November 2011).
- 10 *Andar ki baat hai, Police Hamari Saath Hai* - it is no secret that the police is with us (slogans shouted on the streets in Gujarat in February/March 2002, Communalism Combat Genocide 2002, March/April 2002).
- 11 A petition by Citizens for Justice and Peace challenging his appointment in the Supreme Court ensured that he was sent to the Indo Tibetan Border Security Force and was not part of the investigative wing of the CBI.
- 12 During the pogrom, Babu Bajrangti reportedly communicated through his mobile phone with Inspector of Police Mysorewala who dissuaded him from coming to certain zones ("Gujarat 2002: The Truth in the Words of the Men Who Did It", *Tehelka* special issue, 3 November 2007, p 41).
- 13 The details in this section are taken from the report submitted by the SIT to the Supreme Court in 2010 (see infra).
- 14 In a recent letter to the Nanavati-Mehta Commission (see below), the former Director General of Police of Gujarat, R B Sreekumar - who works closely with Citizens for Justice and Peace - has listed the 11 districts and seven big cities where police officers had prevented mass violence from happening in 2002 (<http://www.milligazette.com/news/2675-sreekumar-writes-to-the-nanavati-mehta-commission>), accessed on 26 December 2011.
- 15 <http://www.sabrang.com/srikrish/sri%20main.htm>.
- 16 As principal session judge for the Ahmedabad City Court, in 1987 he had awarded capital punishment to five Muslims accused of violence during the 1985 communal riot, including a prominent lawyer, M I Laliwala. The Supreme Court acquitted them all on appeal in 1990 (*Times of India*, 2 March 2011) (http://articles.timesofindia.indiatimes.com/2011-03-02/ahmedabad/28646779_1_death-penalty-death-sentence-adam-ajmeri).
- 17 "K G Shah Is Our Man. Nanavati Is Only After Money", Advocate General Arvind Pandya claims the accused have nothing to fear from the Nanavati-Shah Commission", *Tehelka*, 8 June 2007, http://www.Tehelka.com/story_main35.asp?filename=Ne031107KG.asp). Interestingly, an RTI application has shown that once the Nanavati-led Commission's expenditures were disaggregated, it appeared that Arvind Pandya has been the public prosecutor who has received the highest fees (Rs 14.23 lakh). Forced to resign after *Tehelka's* revelations, Pandya was replaced by T S Nanavati who appeared to be the third best paid prosecutor with Rs 5.52 lakh (See Nanavati Commission spent Rs 6.32 crore since 2002, IBN - Live, 2 November 2011 (<http://ibnlive.in.com/news/nanavati-commission-spent-rs-632-cr-since-2002/198336-3.html>), accessed on 25 November 2011).
- 18 "No Police Lapse in Gujarat Riots: Justice Nanavati", 18 May 2003 (<http://www.rediff.com/news/2003/may/18guj.htm>).
- 19 Godhra Inquiry Commission in March 2002, *News Track*, 14 May 2007 (<http://www.newstrackindia.com/newsdetails/158>).
- 20 Manas Dasgupta, "Modi Needs To Be Cross-Examined to Arrive at Truth, Says Manch", *The Hindu*, 20 September 2009.
- 21 http://www.dnaindia.com/india/report_excerpts-from-the-justice-u-c-banerjee-committee-report_1016092, accessed on 28 December 2011.
- 22 http://www.dnaindia.com/india/repor-gujarat-high-court-stays-action-on-uc-banerjee-report_1016665, accessed on 28 December 2011.
- 23 <http://www.indianexpress.com/news/godhra-sc-refuses-to-stay-gujarat-hc-order/7841/>, accessed on 28 December 2011.
- 24 <http://ibnlive.in.com/news/nanavati-commission-contradicts-banerjee-panel-report/74347-3.html>, accessed on 28 December 2011.
- 25 Babu Bajrangti told A Khetan that after the pogrom he has escaped under Modi's protection: "Narendra Modi kept me at ...the Gujarat Bhanu at Mount Abu for four-and-a-half months... After that, (I did) whatever Narendrabhai told me to..." Bajrangti returned when Modi told him to come back in order to defuse the tension that was mounting. But he continued to protect him: "Narendrabhai got me out of jail...He kept on changing judges...He set it up so as to ensure my release, otherwise I wouldn't have been out yet... The first judge was one Dholakiaji. He said Babu Bajrangti should be hanged - not once but four-five times, and he flung the file aside... Then came another who stopped just short of saying I should be hanged...Then there was a third one... By then, four-and-a-half months had elapsed in jail; then Narendrabhai sent me a message ...saying he would find a way out... Next he posted a judge named Akshay Mehta... He never looked at a file or anything ... He just said (bail was) granted ... And we were all out... We were free" ("Gujarat 2002: The Truth in the Words of the Men Who Did It", *Tehelka* special issue, 3 November 2007: 51).
- 26 See entry 2, List II, VIIth Schedule of the Constitution of India.
- 27 See *State of Uttar Pradesh vs Johri Mal* (2004) 4 SCC 7.
- 28 The night before the pogrom started, Sangh parivar leaders had formed panels of advocates (see "Gujarat 2002: The Truth in the Words of the Men Who Did It", *Tehelka* special issue, 3 November 2007: 24). Deepak Shah, a senior BJP leader of Baroda told Khetan that the knew that: "...the police will conduct an inquiry ...So (we had to think of) what we would do to protect our people" (ibid: 26). He names five lawyers among those who were involved: Sanjay Joshi, Neeraj Jain, Rajendra Trivedi, Pankaj Chabar and Tushar Vyas.
- 29 Cited in Janyala Sreenivas, "Justice? When P in VHP Stands for Prosecution", *Indian Express*, 19 September 2003.
- 30 "Gujarat Riots: 8 Get Life Term", 30 October 2007 (http://www.tehelka.com/story_main35.asp?filename=Ne031107Live_updates.asp), accessed on 28 December 2011.
- 31 Raghuvir Pandya's anti-Muslim bias led the SIT to point out in its report to the Supreme Court in 2010, that "the Supreme Court of India has passed serious strictures on the role played by Pandya in this trial which deserves to be brought to the notice of the Bar Association for suitable action as deemed fit" (cited in Ashish Khetan 2011b).
- 32 Amnesty International press release on 26 February 2004 titled "Gujarat: Denial of Justice for Victims" (Index AI: ASA 20/03/2004).
- 33 Quoted in the Amnesty International report, India: Justice, the Victim, Index AI: ASA 20/002/2005 (viewed on <http://web.amnesty.org> 31 January 2007).
- 34 Quoted in Rowena Robinson (2005), *Tremors of Violence*, op cit, p 26.
- 35 The judgment against Zahira, paradoxically, not only incriminated Shrivastava, but also the state of Gujarat's functionaries (Supreme Court on Zahira contempt of court punishment 8.3.2006, <http://gujarat-riots.com> (Accessed on 25 November 2011), accessed on 28 December 2011).
- 36 On the travails of rights defenders and groups who stood by victim survivors and thereafter had to face hostile witnesses see <http://www.gujarat-justice.org>, accessed on 28 December 2011.
- 37 See <http://www.onlinevolunteers.org/gujarat/reports/rural/rural-gujarat.pdf>, accessed on 25 November 2011.
- 38 Shiv Visvanathan, who lives in Ahmedabad, made a most suggestive comment in this regard: "When the Supreme Court established the Special Investigation Team, the victim and survivor, almost dormant with despair, felt that finally something different was happening" (Visvanathan 2010: 3).
- 39 The SIT could do nothing more than hear witnesses' testimony - it was not authorised to order searches, for instance.
- 40 Rediff.com, "The Gulbarg Case Judge used to Browbeat Witnesses", 25 March 2010, <http://news.rediff.com/interview/2010/mar/25/gulbarg-society-case-prosecutor-speaks-out.htm>, accessed on 25 November 2011.
- 41 In the late-2000s, in Gujarat, "239 muslims and one Sikh were booked under POTA on charges of waging war against the country, conspiring to kill BJP leaders, and participating in the ISI's plans of destabilisation" (op cit). See also, Leena Misra (2003: 5). While the UPA government had repealed the POTA in 2004, very few of the POTA accused were freed on bail in Gujarat.
- 42 Bajrangti told Khetan: "They have left patiya, they don't have the guts to stay here, defying us...the rest have gone to Karnataka" ("Gujarat 2002: The Truth in the Words of the Men Who Did It", *Tehelka* special issue, 3 November 2007: 13).
- 43 In Naroda, like in so many other places, dalits were instigated to attack their Muslim neighbours. A BJP leader from Baroda, Deepak Shah, testifies that this is the usual pattern: They "are the warring communities...the Kharvas, the Baakris ...They always come forward at such times ...They are meat-eating people...They have the tools and they usually lead from the front...So they were channelled... There were Kahars ...A lot of Rabaris were there this time ...Bhadris, Parmars and Marathi-speaking people, who have a lot of passion" ("Gujarat 2002: The Truth in the Words of the Men Who Did It", *Tehelka* special issue, 3 November 2007: 26).
- 44 Besides Modi, the SIT also questioned Pravin Togadia in 2010. Immediately after, he filed a complaint against Zakia Jafri and her son for "attempting to create communal hatred and endangering the peace of Gujarat" (*The Hindu*, 16 May 2010).
- 45 See <http://www.cjponline.org/zakia/timeline.htm>, accessed on 28 December 2011.

- 46 He also claimed that he had no idea his party had joined the "bandh" of 28 February that was behind the violence: "In the night only I came to know that bandh call had been given by the VHP. However, on 28 February 2002, I came to know from newspaper reports that the bandh had been supported by BJP" (see the transcription of the exchange in *Teelka*, 12 February 2011, pp 42-47).
- 47 The POTA was repealed by the Manmohan Singh government after the BJP was defeated in the 2004 elections but the effect of this decision was not automatically retroactive.
- 48 Cited in D P Bhattacharya, "Godhra Train Fire: Lawyers Slam Navavati Report", *India Today*, 25 February 2011. See also, "Navavati Panel, Gujarat HC Divided on Godhra Killings", <http://ibnlive.in.com/videos/85390/navavati-panel-gujarat-hc-divided-on-godhra-killings.html>, accessed on 28 December 2011.
- 49 Cited in Ashish Khetan, "Twice Burnt, Still Simmering", *Teelka*, 3 November 2007, p 94. This article offers an exhaustive and disturbing account of the Godhra investigation.
- 50 Rediff.com, "Gujarat HC Notice to SIT on Admitting Godhra Sting op as Evidence", <http://www.rediff.com/news/report/gujarat-hc-notice-to-sit-on-admitting-godhra-sting-op-as-evidence/20111229.htm>
- 51 See, for instance, Ashish Khetan (2011c).
- 52 This feeling was especially strong among the Muslims whose trust in the judiciary has been rekindled. Radiance, for instance, wrote: "It is for the first time in the history of communal riots in India that 31 persons have been convicted for mob violence and mass murder. Otherwise, invariably, in almost all communal massacres the criminals were let off. The monitoring by the Supreme Court, the generally better atmosphere in the country and the feeling that the wheels of justice must move full circle raise the hope that, inshallah in other cases also justice would be done" ("Sardarpura Verdict First Step to Justice", *Radiance Weekly*, 26 November 2011 (<http://www.radianceweekly.com/282/7911/ruining-innocent-live-guilt-of-investigating-agencies/2011-11-20/editorial>).
- 53 "In the Supreme Court of India. Special leave petition no 1088 of 2008, Smt Zakia Hsan Jafri and Citizens for Justice and Peace...petitioners versus state of Gujarat and others respondents. Affidavit of Sanjiv Rajendra Bhatt, IPS, 14 April 2011, Ahmedabad" <http://www.ndtv.com/article/india/gujarat-police-officer-sanjiv-bhatts-affidavit-100775> et <http://www.scribd.com/doc/53608219/Sanjiv-BhattAffidavit>, accessed on 28 December 2011.
- 54 Ibid, Bhatt added: "I submit that on 25 March 2011, when I again tried to bring up the issue of a larger conspiracy or official orchestration behind the Gujarat Riots 2002, as also the ongoing attempts at cover-up, I faced unconcealed hostility from the members of SIT. This was even more obvious when I gave names of witnesses who could corroborate the fact of my having attended the said meeting with the chief minister on 27 February 2002" (ibid).
- 55 <http://www.ndtv.com/article/india/gujarat-police-officers-driver-backs-his-claim-says-he-went-to-modis-house-on-feb-27-2002-100883>, accessed on 28 December 2011.
- 56 "Ex-BBC Journo Supports Sanjeev Bhatt's Claim", 28 May 2011, http://twocircles.net/2011may28/exbbc_journo_supports_sanjeevbhatt%E2%80%99s_claim.html, accessed on 30 May 2011.
- 57 "In the High Court of Gujarat at Ahmedabad (District-Jamnagar), Special Criminal Application N° 2101 of 2011, *Sanjiv Rajendra Bhatt, IPS vs State of Gujarat and Others*", <http://cponline.org/SBArrest/>, accessed on 25 November 2011.
- 58 This is one of the disturbing questions asked by Harsh Mander (2007).
- 59 Justice delayed is not only justice denied to the survivors but also to all those who were to be acquitted or on bail.
- 60 In addition to former minister of state Kodnani who is on bail, one may mention former minister of state for home, Amit Shah – a close associate of Modi – who has been arrested in 2009 because of his role in three allegedly fake encounters regarding Sohrabuddin Shaikh, his wife Kausarbi and their friend Tulsiram Prajapati. As early as 2005 Kuldeep Sharma, the Additional Director-General of Police CID had recommended a CBI inquiry regarding persistent allegations regarding the bribes Shah had received from a certain Ketan Parekh to help keep him out of jail. Sharma was eased out of the CID (Vyas 2010).
- 61 The killing of Haren Pandya, who was shot dead on March 26, 2003 is a case in point – and its aftermath are also revealing of the malfunctioning of the state machinery. Immediately, his assassination had been attributed to Muslim terrorists by the police. But in November 2011, the Gujarat High Court acquitted the 12 accused. Pandya's father and sisters consider that his was a "political murder" (see "Modi a Killer", interview of Vithalbhai Pandya by Yoginder Sikand in *Teelka*, 6 November 2007 – <http://www.teelka.com>, accessed on 25 November 2011). His widow has asked for a new investigation after Sanjiv Bhatt filed an affidavit in this respect (see above).

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