# The Ehsan Jafri Case
## Modi's Banquo Ghost

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The report by the International Human Rights and Conflict Resolution Clinic of Stanford Law School, *When Justice Becomes the Victim – The Quest for Justice After the 2002 Violence in Gujarat*, indicts the lower echelons of the Indian judiciary and makes a case for reforms in the criminal judicial system.

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Narendra Damodardas Modi's destination may have been very different if the Indian criminal justice system had met the standards of more robust democratic legal systems that make strict adherence to due process and timely delivery of justice an article of faith and everyday practice.

Nothing exemplifies this more than the handling of the case of the murder of Ehsan Jafri, former Member of Parliament (MP) who was hacked to death alongwith many others in the Gulberg society in the Chamanpura suburb of Ahmedabad. The case is brilliantly etched out in the report by the International Human Rights and Conflict Resolution Clinic of Stanford Law School, *When Justice Becomes the Victim – The Quest for Justice After the 2002 Violence in Gujarat* (2014).

The report should not be read as one more on the killings in Gujarat, rather it should be read as an indictment of the Indian lower judiciary (with honourable exceptions) at the point that it comes into contact with the citizen, most often, in the lower courts. The issue of shoddy or motivated police investigations, the lack of independence or the very competency of the prosecutors in many cases, the issue of official immunity, the nefarious role of the Intelligence Bureau (IB) all come into play. The failure to prosecute IB officials, the issue of reparation, witness protection and the fate of the Communal Violence Bill, all tell their own tale.

### Justice System on Trial

Most media stories on the Stanford report dwell on only one of its findings related to the abysmally low conviction rate in the riot cases of Gujarat 2002 compared to the national rate of convictions in riot related cases. In the Jafri case it is not the accused that are on trial but the Indian criminal justice system. The relevant portions of the Stanford report need full reiteration.

In May 2011, the Supreme Court (SC), cognisant of the questions that were raised about the work of the Special Investigation Team (SIT) directed Raju Ramachandran, a respected lawyer acting as amicus curiae, to revisit

> the evidence gathered by the SIT during its [investigations] (sic) into allegations made by Ms Zakia Jafri, Mr Ehsan Jafri's wife. Ms Jafri's case is arguably the most controversial to have been brought following the 2002 riots, since it alleges the State's political leadership's direct complicity in the violence. In its preliminary investigation the SIT concluded that there was not enough prosecutable evidence to establish possible criminal charges against Mr Modi and other high ranking officials in the violence. After conducting his review of the SIT's investigation, however, Mr Ramachandran came to precisely the opposite conclusion, arguing that the prima facie allegations against Mr Modi and others could constitute gross criminal misconduct.

It is instructive to see how the attempts by Zakia Jafri to get justice were systematically thwarted. The Stanford report observes that from the very beginning

> the legal question has always been whether the claims she makes about a wider conspiracy to plan and execute the post-Godhra riots

were sufficiently well documented by evidence to merit a trial.

However, the police refused to register an first information report (FIR) based on her written complaint and insisted that she first speak to an investigator. According to the Stanford report,

> Ms Jafri demanded that her written report be treated as a witness statement, and that she did not trust the police to take down a proper FIR based on her oral testimony.

In February 2007, Jafri and the Centre for Justice and Peace (CJP) jointly petitioned the Gujarat High Court (HC) urging it to direct the police to register an FIR. Two successive HC judges refused to hear the matter and a third judge dismissed the petition in November 2007. The petitioners appealed to the SC against the dismissal and in April 2009, the SC invited the SIT to "look into [the] matter and take steps as required in law and give its report to this court within three months". Prashant Bhushan, a noted human rights lawyer was appointed as amicus curiae. "The SIT interviewed 163 witnesses, including, in March 2010, Mr Modi himself. Over a year later, in May 2010, the SIT submitted its 'enquiry report' to the Supreme Court".

The Stanford report says that in October 2010, an accusation of bias was levied against Bhushan by the Gujarat government which led to his withdrawal from the case and Ramachandran took over as amicus curiae. The report states that

> [i]n January 2011, Mr Ramachandran submitted his then confidential analysis to the Supreme Court, where he urged a more serious investigation into the matter. The court agreed, and asked the SIT to reinvestigate some of the issues flagged as particularly problematic by Mr Ramachandran's early analysis. In light of growing criticism of the SIT, the Supreme Court also broadened Mr Ramachandran's authority, allowing him not only to review the SIT's documentation, but also to conduct his own independent investigation and interview witnesses.

Jafri's claims were rejected by the SIT in its closure report and were labelled

> baseless, or not sufficiently egregious to constitute criminal misconduct. The SIT also impugned the reputations of many of the petitioners' witnesses, as well as Ms Jafri herself. To arrive at its conclusion, the SIT dismissed allegations that Mr Modi had allegedly suggested that Gujarat state security services should 'let the Hindus vent their anger' from the Godhra tragedy at a meeting of high-level politicians on the evening of 27 February 2002. Evidence of Mr Modi having allegedly uttered these words came from several sources, but most directly from Mr Sanjiv Bhatt, former deputy commissioner of police, who claimed to have been present at the meeting on 27 February, and to have heard Mr Modi speak those words.

However, this source and others were not considered "sufficiently robust to withstand judicial scrutiny" by the SIT and it "consequently discredited any evidence of an alleged conspiracy between Mr Modi or any of the other defendants".

### Demand for Open Court

In July 2011, Ramachandran submitted his final report on the SIT's investigation in which he

> disagreed with the SIT's opinion that the petitioners' evidence was insufficient to make out a *prima facie* criminal charge against Mr Modi and his alleged co-conspirators. He agreed with the SIT that much of the evidence presented by the petitioners was flawed or circumstantial, but he also insisted that evidentiary questions should be decided in open court, rather than by the SIT – a three-person panel that self-describedly preferred to operate 'in a highly confidential manner.' Mr Ramachandran recommended that the SIT complete its report, but that the petitioners also be given the opportunity to challenge the SIT's conclusion.

Agreeing with his recommendation, on 12 September 2011, the SC remanded the Jafri case to a magistrate's court in Ahmedabad to determine if the matter should go to trial. It also clarified that this court would not be bound by the recommendations of the SIT's closure report and its power to decide whether to proceed with the case or not would not be affected by the SIT's report. In February 2012, the SIT submitted its closure report to the magistrate's court that led to debates on whether Modi had been given a "clean chit". According to the Stanford report, "the SIT's closure report was not the 'clean chit' that some have suggested, at least not in the sense of a judicial determination based on evidence presented in court." In April 2013, Jafri and the CJP filed a protest petition challenging the SIT's closure report raising the same question as to whether there was sufficient evidence to take cognisance of the offence and initiate proceedings for prosecution against the accused. In December 2013, this petition was dismissed by Judge B J Ganatra, Metropolitan Magistrate, Ahmedabad and the closure report filed by the SIT was accepted. On 18 March this year an appeal was filed against this decision before the Gujarat HC and "as a result, charges have not been filed against any of the 60 individuals named in Ms Jafri's Protest Petition, nor is there currently a criminal investigation into Ms Jafri's allegations".

The Stanford report makes another important recommendation relating to

the need to "Eliminate the Need for Obtaining Prior 'Sanction' from State or Federal Government for Prosecution of Public Servants".

It has been lost in the little media coverage on the report.

### Colonial Official Immunity

India's laws on sovereign and official immunity are out of step with international developments. Such near-blanket immunity clearly violates prevailing international legal standards – such as the state's obligation to punish human rights violators and the principle of providing remedies for victims. In fact, the Government of India has been severely criticised by international legal organs that specialise on these issues and who have observed that the form of immunity allowed in India is anomalous in the international community. It is a holdover from colonial rule: India's system of sovereign and official immunity preserves the power the (British) monarch retained over suits against self and agents – a type of immunity which has long since been abandoned in the UK, and throughout most of the world.

Regardless of the international standards, basic principles of justice call for eliminating the current system of immunity. It is well understood, in principle, that there is no right where there is no effective remedy, because "[a] declaration of fundamental rights in a Constitution may be of not much avail if there is no adequate machinery for their enforcement".[1]

The current system creates a climate of impunity in which human rights violations occur on a widespread basis. Victims of those abuses effectively have no reliable recourse for obtaining compensation to relieve their injuries or for seeking justice in terms of seeing the guilty prosecuted or punished.

In terms of sovereign immunity, Article 300(1) of the Constitution provides:

> Suits and proceedings – (1) The Government of India may sue or be sued by the name of the Union of India and the government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

In *Kasturi Lal vs State of Uttar Pradesh*, the SC explained that Article 300(1) does not shield the government from suits involving acts committed outside the scope of sovereign power.[2] However, the ultimate test for whether acts are covered by the Article 300(1) is a determination of whether "a suit [could] have been filed against a corresponding Province if the Constitution had not been passed".[3] In the Kasturi Lal case, the SC applied this rule to cases involving alleged violations of fundamental rights – even though fundamental rights were not granted in the period preceding the Constitution and thus not the basis of suits.

In *Nilabati Behera vs State of Orissa,*[4] the Court explained that the Kasturi Lal ruling did not apply to cases brought under Article 32 on the basis of a claim of constitutional rights violation. However, insofar as the court attempted to distinguish Kasturi Lal, it also made clear that the Kasturi Lal ruling applied to all suits in tort, even if the plaintiff's alleged claim concerned serious violations of human rights. The Nilabati Behera did announce a principle that compensation could be awarded in constitutional rights cases. This is not an adequate substitute for suits in tort and damage judgments.

In terms of official immunity, the Constitution does not directly grant immunity as in the case of sovereign immunity, but allows Parliament to provide effective immunity through legislative enactments. Admittedly, Article 34 of the Constitution provides immunity for acts of officials in areas under martial law.[5] Still, the main aspects of official immunity are contained in various provisions in an array of legislative acts. Due to these provisions and the silence of the Constitution on anything to the contrary, Parliament and the executive have effectively prevented officials from being sued.

The law of greatest application in this regard is the Code of Criminal Procedure (CrPC). Section 197 of the CrPC states that no court can take cognisance of an offence alleged to have been committed by a public servant or member of the Armed Forces while "acting or purporting to act in the discharge of his official duty" without first obtaining authorisation of the central or state government. Section 45(1) of the CrPC protects members of the Armed Forces from arrest for "anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government". In a more specific context, Section 132(1), CrPC states:

> No prosecution against any person for any act purporting to be done under section 129, section 130 or section 131 (use of armed forces and civil forces to disperse assembly) shall be instituted in any criminal court except with the sanction of the central government (or)...the state government.

Various national security laws also contain grants of official immunity for "anything done or purporting to be done" in exercise of the powers under the respective acts.

The crux of reforms in the criminal justice system reforms is more independent and well-trained judges to deal with the backlog of cases in the courts. Insulation of decision-making in the prosecutorial system from the investigative machinery is essential. Police accountability does not mean donor-driven solutions of endless training seminars but the elimination of all vestiges of official immunity. And lastly and most importantly, bringing all intelligence agencies under parliamentary control is imperative. Until then the ghosts of Gujarat and elsewhere shall stalk the land.

NOTES

1 The Constitution of India, D K Singh, p A-32.
2 *Kasturi Lal vs State of UP*, AIR 1965 SC 1039.
3 *Kasturi Lal vs State of UP*, AIR 1965 SC 1039.
4 AIR 1993 SC 1960.
5 In full, Article 34 states: "Restriction on rights conferred by this Part while martial law is in force in any area – Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area."