

1 Law and the Aesthetics of Atrocity

It is when we think of the world the aesthetic of indifference might bring into being that we recognize the urgency of remembering the stories we have not written.¹

For several weeks in the early months of 2002, a pogrom singularly targeting Muslims was executed in the western Indian state of Gujarat. The violence resulted in deaths numbering in the thousands, egregious forms of sexual harm against women, massive displacements and loss of property, hearth and home.² ‘Gujarat 2002’, as the pogrom has come to be popularly called, is independent India’s most litigated and mediatised³ event of anti-minority mass atrocity.⁴ In the two decades since 2002, there has been much contestation over memory and forgetting related to the pogrom, played out in multiple sites such as litigation, films, literature, art, reportage, the economy and, of course, electoral politics. Of these sites, this book engages with judgments and films, by far the most ‘publicly available commemorative symbols, rituals, and technologies’⁵ of collective memory of the pogrom.

The pogrom’s legal and cinematic representations continue to provoke debates regarding state impunity, minority rights, liberalism, justice and the very meaning of India as a secular, constitutional democracy. Central to these post-pogrom debates is a concern with collective memory: the ways in which the pogrom and its aftermath are remembered through ‘shared meanings’⁶ in public discourse, how these memories are invoked through ‘circuit[s] of culture’ like law and films,⁷ by whom and to achieve what end.⁸

This book reads judgments and films—two key narratives of India’s secular legal imagination⁹—as a posteriori sites of collective memory where the contestations about the Gujarat pogrom have been most pronounced. The first of these two narratives is written into the texts of four judgments of the Best Bakery case—a landmark criminal trial related to the massacre of a Muslim family in the city of Vadodara on 1 March 2002. The second narrative

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is framed in the images and sounds of three Bollywood films about the pogrom, namely *Dev* (2004), *Parzania* (2007) and *Kai Po Che* (2013).

These two narratives have had a shared temporal journey—the three films span a period of nine years (2004–13), coinciding closely with the years through which the trial in the Best Bakery case ran (2003–12) (Figure 1.1). Both the trial and the films have been the cause of several controversies that were widely reported in the media, notably on issues of witness intimidation, faulty police investigation and censorship. These controversies have given the trial and the films a cultural and political traction that has made both the narratives and the event live on in collective memory since 2002. This book focuses on the decade-long post-pogrom period because it offers a concentrated insight into the consolidation of Hindu right-wing nationalism, or Hindutva,¹⁰ and neoliberalism in the wake of the pogrom.¹¹ I refer to this consolidation as the ‘New India’. Attending to this consolidation will throw light on how the relationship between secular law and religious violence is understood and articulated in postcolonial India by the judiciary and in cinema.

The judicial narrative reconstructs the pogrom as a matter of ‘fact’ to get to the ‘truth’, convict the wrongdoers and deliver justice. The cinematic

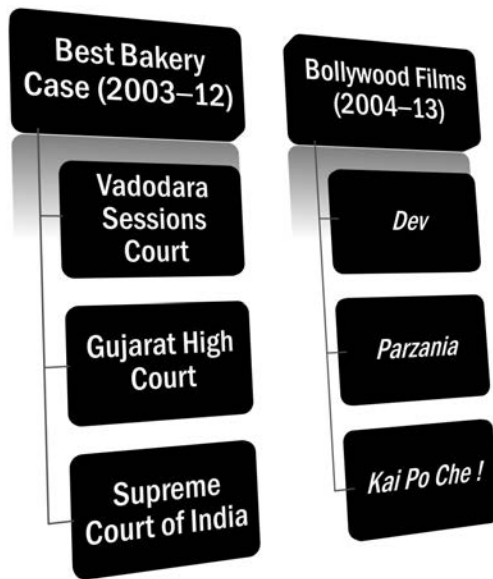


Figure 1.1 Judgments and films: A shared narrative of collective memory
 Source: Prepared by author.

narrative uses the scaffolding of facts to offer fictionalised accounts of ordinary human depravity and compassion in the face of mass violence. When read together (rather than in opposition), the shared narrative of the judgments and the films engender ways of remembering the pogrom in which a faith in secular law offers a resolution to the crisis of religious violence. In both the legal and cinematic imaginations, the pogrom is reconstructed as a conflict between secular law and religious violence, in which secular law ultimately emerges victorious.

The book argues that the shared narrative of law and cinema participates in the ordering of collective memory, which produces ways of remembering that acknowledge the horror of the pogrom and simultaneously rationalise it as aberrant. Such ordering is made possible through the workings of a particular kind of rationality that masks secular law's complicities with religious violence. I call this a 'state-making and state-preserving' rationality that demonstrates how 'popular sovereignty takes the paradoxical form of inclusion [of Muslims] and unspeakable violence [against them]'.¹² In the public's collective memory, then, this rationality, as recorded in the shared narrative of law and cinema, considers Muslims as citizens and condemns the pogrom while always already exonerating secular law from having played any role in fomenting the actual violence—thus keeping intact the violent (legal) order against India's Muslim citizens.

To pursue this argument, I develop a 'jurisprudential-aesthetic' (J-A) approach to the reading of the judgments and the films. The J-A approach enables me to pay particular attention to the intertextual form of the judgments and films—to look for 'the *way* something is said in contrast to [merely] *what* is said'.¹³ I do this by foregrounding the aesthetic dimensions in the texts of the judgments and the jurisprudential dimensions in the texts of the films.¹⁴ Despite working in different genres, judgments and films are both public sites and records of storytelling that share a 'commitment to narrative as a central organizing principle'.¹⁵ The development and deployment of the J-A approach helps to understand law not only as an autonomous body of rational knowledge with its own self-referential norms, rules and principles but also as one that shapes and is shaped by aesthetics—passions, emotions, sentiments and the senses.¹⁶

When the judgments of the Best Bakery case and the three films are read using the J-A approach, we can see two things: first, how the legal and the cinematic work together to produce collective memory; and second, how the shared narrative of the judgments and the films order the collective memories

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of the pogrom. This ordering engenders ways of remembering that condemn the violence while rationalising it as aberrational—a temporary crisis that can be overcome by restoring faith in secular law. My J-A reading will make visible a particular rationality at work in ordering collective memories of the pogrom—a state-making and state-preserving one. This rationality reconstructs the pogrom as an event in which secular law is understood to be rescuing the postcolonial nation-state from the destructive effects of religious violence.

This state-making and state-preserving rationality embeds the ideas of legalism, secularism and developmentalism in a national constitutional imagination, which is endorsed consistently by the Supreme Court of India.¹⁷ These attributes—interpreted into the Constitution of India—work as markers of Indian modernity, considered by many to be in opposition to the so-called nativist ideology of *Hindutva*.¹⁸ And yet, as this book will demonstrate, this triad of legalism, secularism and developmentalism operates discursively to both condemn and normalise violence against Muslims by advancing seemingly secular critiques of the pogrom, as represented in both the judgments and the films.¹⁹

In this double-play of normalisation and condemnation, anti-Muslim violence is rationalised—by references to the 1947 Partition of the subcontinent—as an a priori condition of the postcolonial Indian nation-state's coming into being.²⁰ In the constitutional imagination, India as a secular, rule-of-law abiding democracy exists because of the Partition—in contradistinction to the theocratic Pakistan.²¹ For the Hindu Right, India and its Hindu citizens carry a distinct identity because of a traumatic history of violence (against Hindus by Muslims) that has to be constantly avenged through the 'weaponisation' of Partition memory to keep the Indian nation safe from Muslim outsiders.²² Both these imaginations, as my J-A reading will show, are animated by the aforementioned triad. Embedded in the narrative subtexts of the judgments and films is a *Hindutva* discourse that aims to fashion India into a Hindu *rashtra*, or nation—the holy land of Hindus.²³ This triad thus becomes germane to the idea of the New India, which is marked by the symbiotic rise of neoliberalism and *Hindutva*.

In the rest of this chapter, I will offer a short account of Gujarat 2002—the event and its contexts—and explain how the relationship between law and cinema has worked to produce collective memories of the pogrom. I will then introduce the orientation and scope of the book. The purpose of this section

is to provide an outline of the bodies of literature that I am drawing from and the scholarly field that I am contributing to, and to introduce the terms that form the conceptual base of the book.

Gujarat 2002: A ‘Small’ Retelling

Legal and aesthetic records of Gujarat 2002 have played an important role in shaping collective memories of the pogrom. This is the case especially for those like me who experienced it from a safe distance, consuming the unfolding of the violence on television screens or in newspapers, and then through films. The pogrom’s contested narratives are best captured by a set of iconic photographs—like Qutubuddin Ansari begging for mercy with folded hands, or a saffron bandana-clad Ashok Mochi brandishing an iron rod with outstretched arms²⁴—and landmark criminal trials of highly localised massacres, like the Best Bakery and Gulberg Society cases.²⁵ These images have not only produced a surfeit of reportage but also offered templates for popular culture and aesthetic reconstructions in film,²⁶ literature²⁷ and art.²⁸

In my retelling of the Gujarat pogrom—both in this section and in the rest of the book—I do not claim to reveal the ‘neutral truth’ about the event.²⁹ I attend to a practice of reading that does not consider meaning to be bound entirely to ‘real’ authorial intent (of the judges or the filmmakers) and instead acknowledges that ‘every text is embedded in an interrelated network of other texts whose boundaries are porous’.³⁰ My account maintains fidelity to the texts I will read,³¹ rather than trying to establish interpretive superiority.³² In a tradition of critical legal scholarship,³³ my account critiques what I disagree with, but without rejection,³⁴ recognises the partiality of my own views³⁵ and prioritises the question of suffering, without sentimentalising it.³⁶ The version of the events of the pogrom and the narrative that I hold on to through this book is aimed at foregrounding the ‘small voices’³⁷ which struggle to keep alive a certain memory of the pogrom even as they are constantly being ‘drowned in the noise of statist [and corporatist] commands’³⁸ that propagate a dominant memory.

It is now two decades since Gujarat experienced one of independent India’s most violent mass atrocities against its Muslim minority population.³⁹ Postcolonial India has experienced many incidents of anti-minority mass religious violence since the Partition in 1947,⁴⁰ including the ones that have come before and after Gujarat 2002: notably, the ongoing persecution of

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Muslims by the occupying Indian army in Kashmir;⁴¹ the 1983 massacre of Bengali Muslim immigrants from Bangladesh in Nellie, Assam;⁴² the anti-Sikh violence of 1984 in Delhi;⁴³ the anti-Muslim violence of 1992 in Bombay;⁴⁴ the anti-Christian violence in Kandhamal, Orissa (now Odisha), in 2008;⁴⁵ the anti-Muslim violence in Muzzaffarnagar, Uttar Pradesh, in 2013;⁴⁶ and most recently, the anti-Muslim violence in northeast Delhi, in 2020.⁴⁷ All of these events, among many others that are lower in scale and intensity, have been part of a larger script that animates the violence of postcolonial state-making.⁴⁸

The Gujarat pogrom takes ahead the history of anti-minority mass violence in India⁴⁹ and offers a new template for normalising the Hindu nationalist project of both symbolically and materially reconfiguring India as the holy land for Hindus.⁵⁰ The Gujarat pogrom was distinct in certain specific ways in comparison to previous events of anti-Muslim mass violence.⁵¹ The success with which Muslims were targeted was marked by the sophisticated planning and execution of the pogrom, the macabre forms of brutality and the unprecedented extent of state involvement, police inaction and judicial complicity.⁵²

Although official estimates state that the violence lasted for three days, many Gujaratis who lived through it say that it lasted for as long as three months.⁵³ The killings, rapes, arson and destruction continued unabated, yet despite a complete breakdown of law and order and grave instances of police inaction, a constitutional state of emergency was not declared by the president of India. It can be argued that such a decision reveals how the federal government—which at that time was the National Democratic Alliance, led by the Hindu nationalist Bharatiya Janata Party (BJP)—condoned the event.⁵⁴ This failure to impose president's rule rendered the violence as not deserving of federal attention in political and public consciousness, even though it could be considered to be a situation where there was a complete breakdown of the constitutional machinery.⁵⁵

Starting on 28 February 2002, groups of militant Hindus—with active support from Hindu right-wing outfits like the Rashtriya Swayamsevak Sangh (RSS), the Vishwa Hindu Parishad and the Bajrang Dal—singularly targeted Muslims across rural and urban Gujarat: killing close to 2,000 people (which included some Hindu, Christian and Parsi casualties as well), 'disappearing' an estimated 2,500 people and driving tens of thousands from their homes.⁵⁶ Sexual violence was used to murder Muslim women, including

pregnant women, in order to humiliate the Muslim community.⁵⁷ Homes and property owned by Muslims were pillaged and burnt. Several mosques were desecrated and razed to the ground, and roads paved over them overnight.⁵⁸ The violence targeted Muslims irrespective of their class status and residential locations.⁵⁹

That Muslims could be attacked in such a systematic manner without much resistance from the community was not only because of the state administration's complicity and police inaction. The sophisticated organisation was also made possible because an attack on Muslims had been planned over a long period of time. This planning included the advance accumulation of arms by Hindu militant groups⁶⁰ and the legislative planning of the city of Ahmedabad over many years, which resulted in the creation of Muslim ghettos whose captive populations were easy to attack.⁶¹ The violence, thus, was not akin to a 'riot'—a spontaneous conflagration—but the result of long-term and systematic planning aided through state support that characterises a 'pogrom'.⁶²

Even over a decade after 2002, many Muslims continued to be displaced,⁶³ and many victim-survivors still await compensation for damages.⁶⁴ The criminal justice processes trying some of the perpetrators have been under threat of being compromised by political interference,⁶⁵ intimidation of witnesses and judges,⁶⁶ and faulty investigations by the police and special investigation agencies.⁶⁷ By the Gujarat government's own admission made to the Supreme Court of India, of a total of 4,252 cases that victim-survivors registered with the police, nearly half were summarily closed by the police and thus never progressed to the trial stage.⁶⁸ For the few cases that did get to trial, some in the first instance resulted in full acquittal of all accused due to lack of evidence, reflecting the police's tardy investigation.

State impunity in India, especially for mass anti-minority violence, is strengthened by the active cooperation of the criminal justice system, and local political and patronage networks.⁶⁹ If lower conviction rates in the post-pogrom trials are one way to measure state impunity, then Gujarat has been particularly notable. As of 2012, in comparison to the national conviction rate of 18.5 per cent for cases related to riots, the conviction rate in cases related to the pogrom in Gujarat was 1.2 per cent.⁷⁰ Despite the failures in investigation and prosecution related to criminal trials arising out of the pogrom, the judiciary continues to be considered an able and willing neutral arbiter of justice that is not complicit with the deep structures of Hindutva's

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anti-Muslim prejudice. This has been called the ‘impunity effect’: ‘how a majoritarian regime conducts farcical legal proceedings that allow it to acknowledge, yet benefit from, state-backed violence against minorities’.⁷¹

The normalisation of state impunity in the wake of Gujarat 2002 has not, however, gone unchallenged. Despite the failures of the state to effectively carry out prosecutions, activists, journalists, artists, academics and lawyers have spearheaded campaigns to seek justice for and with the victims and survivors of the pogrom. In these campaigns, they have expressed faith in secular law in the form of both the Constitution of India and international law as important tools for holding the state accountable.⁷² From the initial characterisation of the event as a ‘genocide’ rather than a ‘riot’ in order to mobilise international attention by comparing it to the Holocaust,⁷³ to the campaign that led to the drafting of national legislation drawing on provisions in the Rome Statute of the International Criminal Court to include command responsibility in Indian criminal law,⁷⁴ secular and international legal standards have been the benchmark used to demonstrate both the Indian state’s unwillingness to prosecute and the way its governance is being shaped by Hindutva ideology. The Hindu Right has, alongside, projected that it trusts the secular legal mechanisms of the country. Under the secular criminal justice system, leaders of the Hindu Right have been both convicted⁷⁵ and acquitted of wrongdoing for Gujarat 2002.⁷⁶ Since 2002, the Hindu Right has time and again cited these convictions and the acquittals as the triumph of secular law.⁷⁷ Secular law, thus, has been deployed in both the pro- and anti-Hindu Right narratives. While the parliamentary and ideological Left and the Liberals see the Constitution as a tool to resist the spread of Hindutva, the Hindu Right cite the Constitution to vindicate its commitment to secularism and consider Hindutva ideology to be in alignment with the secular constitution.⁷⁸

After the 2002 pogrom, Gujarat, under the chief ministership of Narendra Modi (since 2014, the prime minister of India) of the BJP, has been celebrated as one of India’s most developed states with unparalleled urban and industrial infrastructure, and has become a preferred destination for corporate investment by multinationals. Immediately after the pogrom, a group of influential Gujarati industrialists came together to form the Resurgent Group of Gujarat that organised an investors’ conference in 2003 called Vibrant Gujarat. The aim was to simultaneously defend Gujarat as a business-friendly state and present Narendra Modi as a strong-willed business-friendly leader against the criticism that was directed at him by the Confederation of Indian

Industry for his role as chief minister during the pogrom. This inaugurated what has been called the ‘Gujarat model of “development”: violent Hindu nationalism underwritten by serious corporate money’, resulting in a renewed relationship between Modi and Indian big business that propelled his prime ministerial ambitions and the current power and influence that the BJP wields drawing on the support of major industrialists and crony capitalism.⁷⁹ Due to the projections of rapid growth rates and the ease of doing business, the Gujarat Model has been showcased by political parties and industrialists as a template for development in the New India. These projections have been questioned by scholars who have argued that Gujarat’s growth is built on the structural marginalisation of Muslims, Dalits and Adivasis. The Gujarat Model has been analysed as playing a role in consolidating the state’s Hindu majoritarianism and has also been deployed to whitewash the memories of 2002.⁸⁰

Modi’s secular critics allege that he—along with other politicians in the Gujarat BJP—oversaw the planning and execution of the 2002 violence. It has been argued that the pogrom was meant to be a definitive step towards furthering the Hindu Right’s vision of establishing India as a Hindu *rashtra*.⁸¹ Hindutva’s neo-fascist vision, fused with a Zionist sensibility, wants to establish India as the holy land for Hindus alone through both Hindu supremacist violence against religious minorities and secular ‘constitutional accommodation’.⁸² Muslims and Christians who are in the territory of India are not considered original inhabitants because their holy lands are elsewhere. According to Hindutva ideology, those who follow Islam and Christianity must assimilate, if they wish to stay in India, or their forced removal or killings will stand justified.⁸³ In the making of such an ideology against Abrahamic monotheism, Hindutva, ironically, advances an idea of Hinduism as ‘political monotheism’ tied to a single all-powerful Aryan god in the mythological figure of Ram.⁸⁴ In so doing, Hinduism is accorded a pseudo-historical status of a homogeneous and ancient religious order that is indigenous to an undivided territory called Bharatvarsha—the Constitution choosing its shortened version Bharat—which is both the fatherland and holy land of authentic Hindus.⁸⁵

Gujarat has been called the ‘Hindutva laboratory’ that executed the pogrom as an experiment to teach Muslims in India ‘a lesson’.⁸⁶ Modi and many of his ministers in Gujarat have been named in independent fact-finding reports,⁸⁷ survivor testimonies,⁸⁸ revelations by public servants about

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state complicity,⁸⁹ undercover investigations by journalists⁹⁰ and activist memoirs.⁹¹ Statements by the Supreme Court of India have condemned the state government for ordering the police to step back and let the mobs rein free.⁹² Many Hindu right-wing leaders (including Modi) have been recorded on camera instigating the mobs with their inflammatory anti-Muslim speeches and justifying the pogrom by citing the Godhra train-burning incident of 27 February 2002 that killed 58 *kar sevaks* (Hindu pilgrims) as a legitimate cause for this *pratikriya* (retributive action) by hurt, victimised and angry Hindus.⁹³

The incident of the burning of compartment S-6 of the Sabarmati Express, carrying *kar sevaks* returning from Ayodhya,⁹⁴ allegedly by a Muslim mob at Godhra train station in Gujarat, has come to stand as the temporal and ideological justification for the pogrom, or as its ‘precipitating event’.⁹⁵ In line with an explanation that Modi had provided as the then chief minister (CM)—‘every “action” has an equal and opposite “reaction”⁹⁶—almost all references to the Gujarat pogrom until today continue to replay this cause-and-effect logic of ‘who cast the first stone’:⁹⁷ the violent Muslims burnt the innocent Hindus in the train, so now the tolerant Hindus are no longer able to remain silent.⁹⁸ They are avenging the deaths of their Hindu brothers and sisters by killing the intolerant and ungrateful Muslims.⁹⁹ In Teesta Setalvad’s characterisation: ‘Every act of violence of the majority Hindu is an act of retaliation of the perennially and permanently barbaric Mussalman.’¹⁰⁰ Collective memory of the pogrom has, thus, been mobilised through the marking of Godhra as a singular ‘flashpoint’¹⁰¹ moment that performs a ‘moral inversion’¹⁰² where India’s majority Hindus become victims of its minority Muslims. Such a logic masks the deep and dispersed structures of Hindutva which enabled the planning of the pogrom well before the train caught fire.¹⁰³ It also masks the historical and economic antecedents of Hindutva in Gujarat that did not erupt only as a spontaneous and reactionary response to Godhra.¹⁰⁴

The pogrom took place during Modi’s time in office, and arguably, the violence consolidated the Hindu vote in Modi’s favour, which led to him winning four consecutive state elections in Gujarat as CM since 2002.¹⁰⁵ In 2014, Modi was elected as the prime minister of India through a media-managed election campaign that wedded soft Hindutva with robust neoliberal developmentalism.¹⁰⁶ His election saw a clear majority emerge for a single party for the first time in independent India since 1984.¹⁰⁷