**Commissions of Inquiry**

Inquiry commissions became an intrinsic part of the political system and are often appointed to ascertain facts related to a matter of "public importance". In India, it was in 1952 that the Commission of Inquiry Act was passed by the Parliament facilitating the appointment of commissions broadly under two categories: a) those appointed to collect information for the government to take necessary steps like the Press Commission, Pay Commission, Banking Commission and b) Commissions against public servants, ministers for their misconduct or misuse of power lowering the standard of public administration. In this respect, judicial commissions in India are statutory bodies

appointed under the Commissions of Inquiry Act of 1952 by the Parliament to inquire on a matter of public importance. 1 While, these are important facts reflective of the constitutional provisions in the appointment of judicial commissions, it is important to probe a little deeper

to bring out the larger issues concerning judicial commissions.

A reasonable starting point to understand the post-riot commissions could be to situate them within the larger debates on commissions of inquiry. This chapter does this by sighting reasons for the appointment of commissions of inquiry, what were the important concerns when the Commissions of Inquiry Bill was introduced for the first time in the Parliament, how some of these concerns have emerged time and again and whether they were resolved? How were these issues dealt with in other countries like England (from where we borrowed our system) and Canada? These questions, ultimately lead to an important issue of how the neutrality and fairness of a commission of inquiry is determined?

This chapter would also draw a comparison between Judicial Inquiry Commissions and the Truth Commissions, which are appointed to address the more substantive issues of

1 *Commissions of Inquiry Act, 1952,* Delhi: Universal Law Publishing Co. Pvt. Ltd.

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reconciliation and healing among the groups involved in a long standing conflict. An understanding of the nature and functioning of Truth Commissions along with the different challenges these commissions face is especially important from the point of view of this study on post-riots judicial inquiry commissions. Also, justice has been an important aspect of Truth Commissions and it has now re-surfaced in th terms of reference of judicial commissions on communal riots in the last decade. But, it would be significant to understand the different routes to justice as an end that is aimed for, when it comes to these two different types of commissions. Truth Commissions, this chapter would argue has emerged as an alternate tool in helping society come to terms with the legacy of its past. Given this understanding of Truth Commissions, the question being posed here is how significant is the experience of Truth Commissions and their challenges for commissions of inquiry on communal riots. Are there important and alternate ways of looking at the victim-perpetrator relationship in Truth Commissions which can be accommodated within the system of judicial inquiry commissions on communal riots?

In the initial paragraphs of this section one of the key areas of scrutiny remains the reasons for the appointment of inquiry commissions. Why is it important and necessary to have commissions of inquiry and what will their appointment and deliberations add of unique value, to the matter under inquiry? Historically, what were the reasons attributed for their appointment? The key argument emerging from this section is that the formulation of a fair and neutral inquiry has been a persistent challenge right from their conception till date and this is not only because of political maneuvering, as has often been argued, but essentially because of a cluster of factors that would be discussed throughout this chapter.

A historical understanding of commissions of inquiry both in India and England, from where we borrowed the system of appointing judicial commissions, suggests that the need for inquiry commissions arose from a desire for impartial and fair investigation into a matter of public importance. It was this urge for a fair and impartial inquiry that resulted in modifying a two century old practice of investigating matters of public importance through Select

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Parliamentary Committees appointed by the English Parliament.2 The fact that the executive commissions were not above partisan views because of their political loyalties and the neutrality of such a system increasingly coming under scrutiny was the reason for devising a system of appointing Royal Commissions by enacting the Tribunals of Inquiry Act in 1921

by the British Parliament. 3 It was envisioned that once a Royal Commission was appointed

through this act, it would be completely independent on all other matters except for the finance, which the government was obliged to provide it with.4 Therefore, 'independent functioning' to have a fair and impartial inquiry was sought as the strength of such commissions. Similar reasons were sighted in India when the Commissions of Inquiry bill was introduced for the first time in the Parliament as Bill No. 39 on 28 May 1952 by the Minister of Home Affairs and State Dr. Katju.5 The Bill was passed with some changes and

the Act came into force from 1st October 1952.6

The core idea behind the appointment of an inquiry commission not *ju§t* in India, but in other . parts of the world as well was not to bring solutions to a problem, but rather to maintain high standards of public administration. Often, after an incident, it becomes important to bring out the true facts related to it and this is the purpose for the appointment of inquiry commissions. The general understanding being that in providing these 'true' facts, commissions restore the public confidence in the agencies of the State. This is of particular significance to post-riot commissions, when because of the loss of life, property and dignity of victims, the trust of the public in agencies of the State gets severely tarnished. Governments then appoint commissions to restore this lost trust. By following a set of formal rules and procedures, they try and pin responsibility on particular individuals or groups for their actions. In the case of commissions of inquiry there is an expectation to come out with a set of findings which would enable the other agencies of government to take further action on the subject.

2 *The Report of the Royal Commission on Tribunals of Inquiry in the United Kingdom,* Under the Chairmanship of Salmon L. J., London: H.M.S.O, 1966, p. 10.

3 ibid

4 Harold F. Gosnell, "British Royal Commissions of Inquiry," *Political Science Quarterly,* Vol. 49, No. 1, March 1934, pp. 84-118.

*5 Parliamentary Debates,* Volume I, Part II, No. 11, 28th May 1952, p. 702 and 703.

6 N. Dharmadan, "Judicial Review and Commissions oflnquiry," *Kera/a Law Times,* Vol.2, 2000, p.27.

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The second broad reason for the appointment of inquiry commissions is to educate the government on important aspects of public administration. Inquiry commissions were envisaged with the view that at the end of the day they would add something valuable to the already existing set of information and initiate new policies.7 For instance, the work of major commissions of inquiry such as the Shah Commission, Justice Gupta Commission, Justice Bhargava Commission and others did not deal with specific crimes. The terms of reference

were much wider and more generic. They were to enable the Government to restructure administration and governance. Elaborating this feature, the Supreme Court cited in P.V. Jaganath Rao v. State of Orissa held ''the object of the enquiry to be made by the commission

appointed under Section 3 of the Act was to make appropriate legislative or administrative measures to maintain the purity and integrity of political administration in the State."8

The third central reason is linked to the problem of rumors after an incident has taken place. Governments appoint commissions to quell unwanted, unfounded and unjustified rumors. The Mathew Commission appointed to inquire into L.N. Mishra murder case is an example

of a commission to support this point.9 Commissions in India and elsewhere have been

appointed to inquire into financial misappropriations by a particular department or ministry and these have usually been appointed to suppress the speculative theories on the subject under inquiry. The "Mundhra Commission" constituted in 1958, consisting of a single member, the former Chief Justice of the Bombay High Court, Mr. M.C.Chagla inquiring into the alleged improper use of funds in Life Insurance Corporation resulted in the resignation of the then Finance Minister and was one such commission that was appointed in a situation of widespread controversy on the misuse of funds.10 In other words, commissions are often appointed when rumors or problems related to a particular matter have reached a scale that the government is obliged to seek "external, considered advice."11

7 Mike Rowe and Laura McAllister, "The Roles of Commissions of Inquiry in Policy Process," *Public Policy and Administration,* Vol. 21, 2006, pp. 99-115.

8 AIR 1969 SC 215

9 B. N. Tandon, *PMO's Diary-I: Prelude to the Emergency,* New Delhi: Konark Publishers Pvt. Ltd., 2003, p.181.

10 *24'h Report on The Commissions of Inquiry Act, I 952,* Government of India: Ministry of Law, December

1962, p.3

11 Janet Chan and David Dixon, "The Politics of Police Reform: Ten years of Royal Commission into New South Wales Police Service," *Criminology and Criminal Justice,* Vol. 7, 2007, pp. 443-468.

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Commissions in a number of ways also serve in elaborating the "idea of the state".12 This view has increasingly now come to be recognized essentially because, commissions now, more often than before, are used as mediums of "State spectacles" where they emerge as agencies through which the legitimacy of the State is maintained particularly in periods of stress. The public inquiries that are often conducted are a part of this process whereby through participation, commissions are seen to provide a certain legitimacy to the "idea of the State" itself. In other words, commissions have increasingly become a source for government to show to the citizens that it stands for the public good. The publication of the report of the commissions and a discussion on that same is a dialogue that occurs between the State and the civil society on the matter under inquiry. In this respect the report becomes an authoritative statement which leads to questions on political action and inaction. 13

Therefore, commissions play the role of the intermediary between the state and the society where for instance after an incident of communal rioting, both the victims and the alleged perpetrators are allowed to speak freely of their interests. From the purpose of this work, the role of an inquiry commission as a mediator becomes particularly important. After the occurrence of communal riots or massacres, the appointment of a commission soon acquires this role. It is through the commission that people narrate the incidents of violence and in certain cases even identify the perpetrators and provide the relevant evidence. Also, commissions are platforms where various contrasting views are expressed and debated and finally these views get transformed as recommendations and findings for the government to find a solution on a particular matter. This kind of a function that a commission performs has

been termed as the "engagement of the State in the administration of the Society."14

12 Adam Ashforth, "Reckoning schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," *Journal of Historical Sociology,* Vol. 3, No.I, March 1990, pp. 1-22. Speaking of the British context, Ashforth, gives this understanding of the purpose or relevance of Inquiry Commissions in Britain. For similar argument in the Indian context, see, Thomas Blom Hansen, in his book, *Wages of Violence: Naming and Identity in Post-Colonial Mumbai,* Princeton University Press, 2001, pp. 125

13 George J. Bedard, "Constructing Knowledge: Realist and Radical Leaming Within a Canadian, Royal

Commission," *Education Policy,* Vol. 13, 1999, pp. 152-165

14 Op. cit. 12

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This role of the commission becomes clearer when the role of the civil society in pressurizing the government to establish a judicial inquiry on a particular issue is taken into account. The government owing to popular demand appoints a commission of inquiry which then takes the role of a body, where people could come and express their views and detailed accounts on what they know of the subject under inquiry. The translation of this popular demand into the appointment of a commission therefore is a way in which the State tries to negotiate with the civil society and the citizens. With the growing concerns being expressed openly on 'matters of public importance, there is a shift from where the commissions were seen as merely agencies of fact-finding and truth seeking bodies to a more mediatory role acquired by commissions. This shift would be further visible when this work would move from the analyses of the Jaganmohan Reddy and Madon Commissions to that of the Nanavati and Srikrishna Commissions in the subsequent chapters.

What role the commission acquires and the purpose that i(would serve, become more visible once it starts functioning and the way it interacts with the government, the civil society and also the participants in the inquiry. For instance the Inquiry commission on the Bhagalpur riot which was appointed to quell the various theories on the riots resulted in further controversy with two different reports coming from the same commission and this particular commission could not play the mediatory role between the people and the government. 15 There were a number of differences among the members of the commission which they could not resolve to play this crucial role of both restoring the confidence of the people in agencies of the State and as a body that mediates between the State and the civil society.

While the reasons cited for the introduction and need for a judicial commission was strongly rooted in having a mechanism for providing answers to some of the unresolved questions related to any matter that needed an immediate clarification from the government, there was skepticism to the functioning of such a system in an independent and neutral manner. The debate in the Parliament on the Commissions of Inquiry Bill suggested some of the core concerns related to the implementation and long term functioning of inquiry commissions.

15 Asghar Ali Engineer, "Bhagalpur Riot Inquiry Commission Report," *Economic and Political Weekly,* Vol. 30, No. 28, 15 July 1995, pp. 1729-1741.

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One of the concerns was regarding the misuse of commissions of inquiry by governments to initiate inquiries not on "matters of public importance" but to settle personal scores against an individual or political party. The question of ensuring the implementation of the recommendations of inquiry commission was raised when the Bill was tabled in the

Parliament and the issue, as would be seen in this chapter and the next chapter on case studies, remains an important subject of discussion even today. 16 A detailed study of the four commissions of inquiry would suggest that each of these concerns remain important and have resurfaced time and again in the debates on inquiry commissions.

The argument being made here is that historically an important challenge in the appointment of inquiry commissions and their functioning has been ensuring that they are free, fair and function on the basis of a neutral system of public inquiry. This challenge has resurfaced time and again before commissions of inquiry in different countries and the next section of the chapter is a reflection on whether they were successfully addressed in other countries .before moving on to the different steps in the functioning of inquiry commissions and how each step is imperative to understand the neutral and fair character of a commission.

The inquiry commissions in India are closer to that of the Royal Commissions in Britain and Canada. Judicial inquiry commissions or Royal Commissions are very procedural in character following a certain set of strict and formal procedures through which they intend to arrive at the correct sequence of events or facts and based on these they provide recommendations. Therefore the inquiry often takes the form of a courtroom, where those concerned with the events or who are aware of them, file an affidavit through which their grievances can be given voice. There is a particular process to be followed in the case of these kinds of commissions. The focus of judicial commissions is on the correct facts and providing a free and neutral inquiry. Neutrality acquires a central position in the judicial/Royal inquiries appointed by the State. In this context it would be more relevant to

16 *Lok Sabha Debates,* 29 July 1952, *Commissions of Inquiry Bill.* Also see, *Council of States Debates,* 6 August 1952 on Commissions of Inquiry Bill, 1952.

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discuss the challenges to the functioning of Royal Commissions in both Britain and Canada and how they have tried addressing some of the challenges. What has been the experience of these countries in conducting a fair and neutral inquiry and, more importantly, has neutrality been as formidable a challenge for the Royal Commissions in these two countries as has been the Indian experience? This discussion would begin with the Royal Commissions in England because it is from them that in India the Commissions of Inquiry Act was imbibed with some vital differences. These are more in the nature of technical differences which relate to the powers of the Chairman for summoning the witnesses and also the modalities of the appointment itself, but overall, the idea behind formulating the judicial commissions was in

line with the British Royal Commissions. 17

When it comes to public commissions in England there are two opposing views - One, which believes that commissions are mechanisms which do serve the purpose of providing the correct facts and restore public confidence, and the other opposing view of some others who have increasingly come to view inquiry commissions as discretionary, arbitrary and inconsistent responses by government ministers, in consultation with their colleagues and

civil servants, which are set up to investigate on specific matters defined in their terms of reference. 18 In England, inquiries in certain cases have been avoided for fear of risking politically compromising public disclosures into important matters like the blowing up of the Flight PanAm 103 carrying 209 passengers over Lockerbie, Scotland in 1988. There were

allegations of the involvement of US military and drug agencies, the CIA and unspecified amounts of heroin and currency carried on the flight. 19 Such experiences have made the second view on commissions prevail over the first, linking it to the larger debate on how effective is the system of inquiry commissions. When most commissions' recommendations are not followed and implemented, then what relevance do commissions have? Commissions largely came to be viewed as mechanisms for governments to delay policy decisions and buy

17 Op. cit 10, p. 7. A. N. Sinha, *The Commissions of Inquiry Act,* 1952, Calcutta: Eastern Law House, 1978, p.

6. and 7

18 Frank Burton and Pat Carlen, *Official discourse: On Discour;e Analysis, Government Publications, Ideology and the State,* London: Routledge and Kegan Paul Limited, 1979, p. 1.

19 Phil Scraton, "From deceit to disclosure: the politics of official inquiries in United kingdom," in George P. Giligan and John Pratt (ed.), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge,* London: Willan Publishing, 2004, p.46

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time to allow the controversy around the subject of inquiry to subside.20 While, the problem in Britain still persists, one of the ways to keep a check on governments from not implementing the recommendations was devised by the members and the Chair of the commissions. They went beyond the scope of an inquiry commission and started checking from time to time whether their recommendations were being implemented or not. This, for

instance, was done by Michael Bichard, who held the Inquiry on Child Protection in Britain.21 Sir Bichard assigned himself the role of checking on the progress made on his recommendations six months after the submission of the report.22

The members of the commissions and their Chairs have also come under scrutiny and maintaining the standard of the Royal Commissions by appointment of members with high integrity and experience on the subject under inquiry has been an important factor in determining the fair and neutral character of these commissions. To overcome the problem of commission appointments being sought for their lucrative character, in Britaio, the members of the commissions, including the Chair are unpaid and given only a small allowance to

cover their traveling expenses. Therefore, Royal Commissions do not become platforms for people to seek monetary benefits.23

Also, what was consistently seen in Britain was that whenever governments chose not to implement the recommendations of a commission, the issues dealt by the commission always resurfaced, for instance the commissions on the reform of House of Lords. The re-emergence of such issues in periodic intervals always made people go back to the recommendations of the particular commission appointed on the subject bringing the pressure back on the government to implement the recommendations. It would be interesting to explore this dimension in the context of commissions of inquiry in India, particularly in the case of the Srikrishna Commission inquiring into the riots in Mumbai. The resurfacing of issues and their "longevity" along with the mechanism of going back to the recommendations of the

20 "Increasing the Effectiveness of Royal Commissions: A Comment," *Public Administration,* Vol. 61, Winter 1983, pp. 436-443

21 Michael Bichard, *Bichard Inquiry - A Report,* London: The Stationary Office, 2004.

22 Op. cit. 7

23 A. Todd, *Parliamentary Government in British Colonies,* London: S. Low, Marston, 1892, Vol. II, pp. 93 and 103

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commission was seen as a suggestion that Royal Commissions were relevant in the country.24 Whether commissions in Britain have initiated policy decisions and how far have they been useful instruments of accountability can be answered by looking at specific commissions which is beyond the scope of this study. Instead, the larger argument being made is that questions related to relevance and usefulness of inquiry commissions are not just unique to India, but have time and again emerged in other countries as well and though permanent solutions to such problems have not emerged. even in Britain, the relevance of commissions are debated not just within the parameters of the political influence exercied on them, but their relevance are viewed in the long term analysis of issues under inquiry.

With regard to the Commissions of Inquiry in Canada, there are two different issues that are of importance to the Commissions of Inquiry in India. One is with regard to mandate of commissions and the second is in relation to the proceedings and how they influence the larger findings and recommendations. In Canada, among other things, whl!t mandate a commission has been given has had a specific impact on the overall findings and recommendations. For instance, whether the terms are specific or are they broad and vague,

and what impact a particular mandate would have on the issue under inquiry has occupied center space in discussions on Inquiry Commissions in Canada.25 There are cases where a commission functioning with specific terms of reference has worked better on certain issues and there are others where the opposite has been true. The important factor is not so much the terms of reference on which the executive has a hold, but the way a commission interprets the mandate that has been given to it. In the Canadian context, it has been observed that those

commissions (irrespective of the terms of reference) which are able to maneuver them in a

manner beneficial for the issue or event under inquiry, are better equipped in serving the purpose of their appointment.26 Therefore, whether commissions stick to the space provided to them, or do they manoeuvre that space to the benefit of the issue under inquiry or alternately, do they go beyond to establish the correct facts, all these have important bearings

24 Op. cit 7

25 J. E. Hodgetts, "Royal Commissions of Inquiry in Canada," *Public Administration Review.* Vol.9, No. 1, (Winter), 1949, pp. 22-29.

26 ibid

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on the final findings and recommendations and consequently on the fair and neutral character of the commission.

The Canadian experience suggests that the procedure adopted by a commission can have a detrimental role in the way the commission's report shapes. Within the procedures, there are two factors that need to be highlighted. The first is related with the general procedures that a commission ought to follow to initiate a fair inquiry, like, a public inquiry instead of in camera proceedings, taking evidence on oath or in the form of informal conversations. The second problem is a more interesting and de]?atable one and of specific importance to commissions in India. This relates to problems that emerge before the commissions while recording evidence. Should any and all parties be heard? Should witnesses be guided in testifying? Is a fact-finding commission interested in opinions? What has been observed in the Canadian situation is that proceedings increasingly become court like where there is a high reliance on counsels and what they produce before the commissions in the form of affidavits and evidences. Moreover, because of paucity of time, often Chairmen of commissions are given the key arguments in writing for their reference and therefore the

commission gets deprived of a view in its entirety.27 Again, how all this impacts the findings

of a commission depends on the way the proceedings have taken place, which parties have been heard and left out.

While, public confidence and restoration of trust in the agencies of the government were the most important reasons for the appointment of judicial inquiry commissions not just in India but in other countries as well, some commissions working under similar set of regulations are perceived as fair and neutral, while others are not. This element needs further inquiry, as to why some commissions are seen as being more fair and in the process, able to enjoy the confidence of the people while others are not able to do so? Another more important and a difficult question to answer is, why some commissions are seen as more effective than others? In this context, the question to be asked is whether we need to go beyond situating inquiry commissions within the fold of political influences and rather locate their problems in

27 V. C. Fowke, "Royal Commissions and Canadian Agricultural Policy," *The Canadian Journal of Economics and Political Science I* Revue Canadienne d'Economique et de Science Politique, Vol. 14, No. 2 May 1948, pp. 163-175

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other aspects of the commission, for instance the proceedings of the commission. This work argues that it is important not just to analyze whether a commission is free from political influences but also to study the procedural problems which commissions confront and how commissions deal with such problems which ultimately have a larger role to play in determining the final shape of their inquiry. It therefore, becomes significant to analyze each of the characteristics of inquiry commissions, right from the stage of appointment to that of report submission, and establish their linkages with the conducting a free and fair inquiry.

While the 'why' of the appointments is a case in point, the corollary to it is, *'who'* in the process gets appointed and under *'what'* circumstances is a commission appointed. The first key question for examination in this section would be to explore whether the appointments made by the government subscribes to both the letter and spirit of the procedures of appointment. Overall, this section brings out the impact of 'who' and 'how' of the procedures of appointment on the issue of neutrality and fairness and the autonomous character of the inquiry commissions.

There are two important things, which need to be highlighted with regard to the appointment of commissions and their members. As governments have the power to appoint and dismiss commissions, it provides ample scope for arbitrary use of such power and vague reasons for the appointment of commissions, which have resulted in loss of confidence in them and their impartial character. Why are commissions appointed - are they appointed because of civil society pressures or because of a government initiative - are important questions in formulating perceptions about a commission of inquiry. These questions are particularly important in the context of communal violence because it involves loss of life and property for a section of the population, who closely watch appointment of commissions and their confidence becomes vital for a commission to be seen as fair and neutral.

Overall, as would be argued through various examples in this chapter and the subsequent chapters on the case studies, is that the governments in India have not catered to the 'spirit'

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of the appointment of inquiry commissions and increasingly they have come to be initiated for purposes other than those envisaged while evolving a system of judicial commissions. Here, what is the matter for which an inquiry commission is being appointed becomes a vital issue. Whether the appointment is being done in keeping with the tradition of the *letter and spirit* of the commission of inquiry act or is the commission being appointed for trivial and vague reasons.

While, what is a matter of 'public importance' for which inquiry commissions are appointed can be interpreted in different ways by governments, what has tarnished the relevance of commissions is their appointment to score points against each other for making political gains. For example, the Tamil Nadu government appointed the Sivasubramanian Commission of Inquiry on 14 August 1992 to probe charges against the Dravida Munnetra Kazhagam (DMK) leader, M. Karunanidhi but did not give convincing explanations for its appointment. The demand for such an inquiry was also not visible from other political parties or from pressure groups outside the government. Therefore, the commission's birth was

widely viewed as part of intense rivalry between the Anna Dravida Munetra Kazhagam (AIADMK) and the DMK.28 One of the reasons for the constitution of Tehelka Commission of Inquiry was to inquire into the aspects relating to the allegations that were made on the controversial defense deals and illicit gains from them. The commission was appointed, among other things, to probe into the credentials of those who had made the charges against the defense ministry.

The fact that the Chairman of a commission enjoys the same perks and salary as that of a Judge of a Supreme Court and that there is a lot of public money involved in the inquiry process, governments are expected to be careful in appointing judicial commissions. It is difficult for any judicial commission to enjoy the confidence of the people if the reasons for their appointment as said above is not rooted in the letter and spirit of the commission of inquiry act and such an inquiry even if it does exemplary work, would be viewed with suspicion and its fairness and neutrality would always remain a question mark.

28 A.G. Noorani, "Panel for Vendetta: the Sivasubramanian Commission," *Frontline,* Vo. 9, No. 18, 11 September 1992, pp. 19-20.

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Also, the mandate as interpreted by the commission during the course of its inquiry acquires significance. A number of commissions for instance were appointed to inquire into the assassination of important political leaders. While, commissions have a better record of finding out the circumstances of the assassination, there have been problems when a commission was thrust with responsibilities of finding out who was involved in the assassination. The Verma Commission appointed to inquire into the assassination of Rajiv Gandhi, suggested that it cannot take up the responsibility of fmding out who was responsible for the act as that was the job of an investigative agency. The commission would rather inquire into the position of security around that time which was related to the assassination. This suggestion from the Verma Commission was perhaps a result of the experience of the Thakkar Commission which was appointed to inquire into the assassination of Prime Minister Indira Gandhi. The commission ran into problems as its findings were not acceptable to the government which in the first place had appointed it. The findings of the commission were controversial, suggesting problems inside the government machinery

which ultimately resulted in the assassination of Indira Gandhi, stirring debate on whether a commission should be entrusted with the responsibility of this nature.29 But, Justice Verma's warnings and suggestion against appointing commissions for such investigative purposes were not taken into consideration by future governments which appointed a separate

commission, the Jain Commission, to find out who was behind the assassination of Rajiv Gandhi.

Similar problems were faced by the judicial commission appointed to inquire into the death of Netaji Subhash Chandra Bose. This commission was appointed in 1999 while the incident which involved the alleged death of Bose had taken place in 1945. The question remains about what a commission can unravel so many decades after the incident had taken place and

also this cannot be seen as a matter of "public importance", when it was appointed.30 This

further goes to suggest that in recent years, governments have not appointed judicial commissions that have essentially been in accordance with keeping the integrity of the

29 "Hailed and Failed," *Indian Express,* 19 May 1999.

30 ibid

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institution which has perhaps been a reason for judges refusing to take the responsibility of heading commissions.

In this context, the second most important factor is the appointment of the members and the chairman of a commission. Why a particular member is chosen to Chair an inquiry commission is a vital question. The ideal situation is when the government appoints someone to chair the commission and there is a consensus where all sections are satisfied with the appointment. While, this situation is ideal, it is difficult for everyone to be satisfied with the appointment, therefore, an overall consensus is something to be desired for when the members of a commission are appointed. Particularly, if there is a sharp criticism coming from civil society groups or those affected by the events under inquiry, then it is difficult for such a commission to function and achieve the desired results as in this situation there would always be aspersions against the recommendations and findings of such a commission. Who should get appointed to these commissions, whether the person should be an expert or not, whether he should be a retired or a sitting judge, these issues have always been a source of debate. There is no way of knowing whether the person is impartial while his appointment is being made except for an understanding of his general reputation during his tenure as ajudge or a civil servant. But, it is important that the appointment is made in a manner which reflects the integrity of the institution. While some seem to suggest that sitting judges are better equipped to function in a fair and neutral manner, there are others who have opposed this, arguing that they could also be partial for promotional benefits to superior courts and any

personal criticism against the sitting judge during the course of the inquiry erodes the confidence and respect for the judiciary. 31

The integrity of the judge presiding as the chairman of a commission has come into question especially when they are rewarded with appointments and coveted positions, transfers and post-retirement benefits. The appointment of Justice K, Venkataswami, serving as the Chairman of Tehelka Inquiry Commission, as the Chairman of another statutory body even

31 Bhupesh Gupta, Editorial, *Calcutta Weekly,* January 1972

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before he submitted his report, is a case in example.32 Whether Justice Venkataswami was given that appointment as a reward for making a report conducive to the government is open to interpretation but that it raises doubts about the integrity of the member or the Chair of a commission is what makes the appointment problematic.

The appointment for rewards and questioning the integrity of judges heading inquiry commission further runs into problem when it is a sitting judge as against a retired judge. Both in Britain and in Australia one of the ways of maximizing the preservation of authority

and prestige of the serving judges is through appointment of retired judges to head the Royal Commissions. 33 In India also, the judiciary has voiced a number of times that the norm should be to appoint retired judges to head such inquiries rather than the sitting judges. In 2002, the Supreme Court in fact gave a judgment to the effect that a sitting judge should be made the Chairman of a commission of inquiry only on rarest of rare occasions.34 But, again, the experience particularly in the recent years has been that r.etired judges have taken many years to come out with their reports making an inquiry an exorbitantly expensive affair. The Liberhan Commission is a case in point which took 17 years with 48 extensions and Rupees 8 crores to eventually come out with a report which perhaps could have been avoided if a sitting judge was appointed to head the commission.35

Though the general practice is for the government to consult the Chief Justice of the Supreme Court if the Chairman is to be appointed by the Centre, or the Chief Justice of the High Court if he is to be appointed by the State government, but over the years Chairman and other members of inquiry commissions have been handpicked without appropriate reasons given

for their selection. Justice K.K Mathew of the Supreme Court was hand picked to serve on the commission appointed to inquire into the L. N. Mishra murder in 1975.36 Similarly,

32 Madhav Godbole, *Public Accountability and Transparency: The Imperative of Good Governance,*

Hyderabad: Orient Longman, 2003, p.343.

33 Geoffrey Lindell, "British Tribunals of Inquiry: Legislative and Judicial Control of the Inquisitorial Process-Relevance to Australian Royal Commissions," *Commonwealth of Australia,* Research Paper No. *5*

2002-03, p. 7

34 SCJ, *T. Fenn Walter and Others Vs Union of India and Others,* Civil Appeal No. 3993, 12 July, 2002.

*35* M.J.Akbar, "Does Justice matter after 17 years?" *Times of India, 5* July 2009.

36 A.G.Noorani, "Panel for Vendetta: The Sivasubramanian Commission," *Frontline,* Vol. 9, No. 18, 11 September 1992, pp. 19-20

16

V.P. Singh revealed in the Rajya Sabha on 14 December 1987, during the debate on the Thakkar Natarjan Commission report, of how these two judges were selected to constitute the commission. He said that a meeting was called by Rajiv Gandhi at which Finance Minister V.P.Singh, and law minister Mr. Buta Singh were present and from the long list of names

brought by the law minister, these two judges were preferred as the others were considered 'hostile to the government' .37 Appointing the members to an inquiry on the criteria of their political preferences has over the years tarnished the integrity of the commissions and their value diminishes as agencies to restore the lost faith in the government over the matter under

investigation.

The performance of the commission and the final recommendations along with proceedings are given shape by the Chairman of a commission. Therefore, his functioning in a neutral

manner is essential for producing a balanced report which safeguards the rights and provides justice for the citizens of a country. The efficiency of a Chairman in producing a bala.n. ce. d report becomes evident from the way in which he conducts the proceedings, chooses his

witnesses, innovatively uses the powers conferred on a commission, analyses the evidence before him and then produces a report.

Within the appointment, a single member commission and a multi member commission sometimes has a bearing on the overall investigation and the findings as well. While there is no ideal model in this case, there have been cases where constituting a multi member commission has proved as an asset while there are other cases where a multi member commission has had an adverse impact on the overall credential of the commission itself. One example of the latter is the Bhagalpur Riot Commission which was appointed with Justice Ram Nandan Prasad as the Chairman and Ramchandra Prasad Sinha and S. Shamsul Hasan as members to inquire into the riots that occurred in Bhagalpur in October 1989. The members and the Chairman could not reach a consensus on the findings and therefore submitted two different reports on the inquiry. The members' report consisted of 128 pages where they blamed both the communal elements and the administration as responsible for

37 *Rajya Sabha Debates on Thakkar-Natarjan Commission Report,* Vol. CXLIV, No.27, 14 December 1987, pp.135-150.

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creating a riot like situation and for not being able to take enough action to control the rioters. This was in complete contradiction with the Chairman's report who did not find the police or the State administration to have a communal bias.38 The intention behind having a multi member commission was essentially to ensure that it acts as a mechanism to check any

partisan approach to the entire subject under investigation but this has not always guaranteed an effective functioning of the commission. The 'how' and 'who' of the appointment has vital implications on the fair and neutral character of a commission. The public trust important to the functioning of a commission begins from here and a commission which does not have the support from all the sections involved in the inquiry cannot be seen as fair and neutral as it would eventually lead to the exclusion of important aspects.

The second related issue is the governments' prerogative to appoint, dismantle, extend the term of commissions and provide them with the necessary infrastructure. How far do all these things have an impact on the independence and autonomy of commissions? It would be important here to reflect on the experience of the Election and the Finance Commissions. Has the Election Commission been able to preserve its autonomy because of constitutionally conferred powers and has it functioned in a free and fair manner at all times over the years?

The inquiry commission's dependence on governments for infrastructure and finances sometimes makes it difficult for them to function in an environment conducive to produce a report that is in line with the integrity of the institution. There have been instances when state governments have not provided the necessary infrastructure required to a particular commissions of inquiry. The commission of inquiry on the riots in Bhagalpur faced problems in the initial stages because of non dispersal of funds from the government to the commission. The commission after a year of functioning had received only Rupees 1,30,000

as the amount for first three months of functioning. As a result of non payment the staff of the commission remained without a salary for about five months.39 There is so much of variation in the way commissions are prioritized in terms of the extensions given and funds transferred that some commissions are left with almost negligible funds while others have

38 "Recalling Bhagalpur: Aftermath of 1989 Riots," *Economic and Political Weekly,* Vol. 31, No. 18, 4 May 1996, pp. 1055-1059

39 "Forgotten Commission of Inquiry," *Economic and Political Weekly,*Vol. 25, No. 34, p.1864.

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them in excess. For instance, the Liberhan Commission inquiring into the sequence of events leading to the demolition of Bahri Masjid which was appointed in December 1992 received 48 extensions. It took the commission seventeen years to come out with a report on the demolition of the Bahri Masjid and Rupees 8 crores were expended on the functioning of the

commission, the majority of the money used for the salary and perks of the staff.40 The

Liberhan Commission has come to acquire the dubious status of the longest serving Commission as well as the costliest one. The government's treatment of the commission, after the appointment, during the course of the inquiry has particular significance for the overall impact that its report would have on the issue under inquiry.

The government's power to dismantle a commission of inquiry has been argued as a central feature in undermining the autonomous character of commissions. This provision has been used and misused by governments on number of occasions. Also, as per the provisions of the Inquiry Commissions Act, the government can fix the tenure of the members of the commission. Justice J.S.Verma while giving judgment on the Churhat lottery case suggested that this power of the government vis-a-vis inquiry commissions reduces their ability to function independently. He suggested, "After appointment, the tenure of members of the commission should not be dependent on the will of the government, to secure their

independence. A body not so independent is not likely to enjoy the requisite public confidence and may not attract men of quality and self-respect.',4 1 It is interesting to note that

even permanent bodies like the Election Commission have undergone phases when their autonomous character has come under a scanner. One of the reasons stated for the functioning of the Election Commission in a fair manner is attributed to the fact that once appointed the Chief Election Commissioner shall not be removed from his office, except like

in manner and on the like grounds as ajudge of the Supreme Court.42

40 "Liberhan panel gets 48th extension for 3 months till June 30," *The Hindu,* 31 March 2009.

41 *The State of Madhya Pradesh v Ajay Singh and Others,* 1 SOC 302 at 323, 1993

42 Article 324: Clause *5,* Constitution of India. N. L. Madan, 'The Chief Election Commission of India: Structural and Organizational Issues' in M. P. Singh and S. K. Chaube (eds.), *Indian Constitution: A Review,*

New Delhi: Har Anand Publications, 1997, pp. 98-118

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The Election Commission was a single member body till 15 October, 1989 after which it turned into a three-member body till 1, January 1990.43 The Election Commission again became a one member body for a short period of time before it was permanently converted

into a three-member body again, from 1 October, 1993. The tensions between the Central government and the Chief Election Commissioners resulted in this move but over the years this step has proved to be a more democratic functioning of the Election Commission. The members appointed as Chief Election Commissioner and the two Election Commissioners have had to deal with aspersions caste on them for taking decisions that is favorable to a certain political party. The autonomy provided to the Election Commission in managing elections, the constitutionally derived powers that enhance the institution as an autonomous body, the conduct of the Chief Election Commissioners in ensuring the integrity of the institution, the democratization process itself and the relationship between the Election Commission and the different wings of the government, all this collaboratively work to ensure that this public institution functions in a free and fair manner. \_

Over the years the Election Commission's autonomy has been preserved only when all the other branches like the executive, judiciary and legislature has functioned in a manner vis-a­ vis the Election Commission to preserve the autonomy and integrity of the institution.44 For

example, when the BJP was advised by the commission during the 2009 general election to withdraw its ticket to Varun Gandhi, who was contesting from Pilibhit after the controversy related to his inflammatory speeches, the institution's integrity would have been preserved had the political party decided to respect the same. Instead, the BJP went ahead with its decision to field Varun Gandhi as its party candidate from Pilibhit which went to undermine

the authority of the commission.45

Even if any one factor does not work towards this endeavor, it raises questions and aspersions on the conduct of the Election Commission and reduces its autonomy to function in a neutral and fair manner. The controversies gripping the Election Commission under the

43 S. S. Dhanoa and V S Seigell served as additional election Commissioners from October 1989 to January 1990 along with R V S Peri Sastri as the Chief Election Commissioner.

44 B. Venkatesh Kumar, "Criminalization of Politics and Election Commission," *Economic and Political*

*Weekly,* Vol. 36, No. 24, 16 June 2001, pp. 2119-2121

45 V. Venkatesan, "The Lawless and the Law," *Frontline,* Vol. 26, Issue 8, 11-24 April 2009

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Chief Election Commissioner (CEC), N. Gopalaswamy reflects this argument. The tussle between the CEC and one of the Election Commissioners, Navin Chawla has given space to various kinds of accusations being caste on the Election Commission.46 The argument being made is that even if constitutionally a number of powers are provided to an institution to

preserve its autonomy, over the years the autonomous character and the free and fair functioning of the same have been ensured through a cluster of factors mentioned above. Therefore, the argument that more powers to inquiry commissions can by themselves make this public institution autonomous need to be assessed on the basis of the experience of the Election Commission.

The experience of Election Commission in India has shown that making any body more autonomous and powerful is not sufficient in determining its fair and neutral character. Central to neutrality and fairness of an institution is how it has evolved over a period of time and how other agencies of the state like the legislature, executive and judiciary have responded to it. While, the powers of the Election Commission certainly provides a better scope for functioning in an environment where minimum political interference can be expected, this is not the only factor in the effective functioning of this institution. The important thing to explore would be why within a limited scope, some commissions of inquiry are seen as better equipped and more effective.

While writings on inquiry commissions give considerable importance to the appointment of commissions and their members, there is not enough work done on analyzing the procedures adopted by the commissions which ultimately determine the shape of the report. There are three or four important aspects in the procedure that a commission adopts and these have a detrimental role in the final findings and recommendations of the same. The first in this is the procedure adopted by commissions for the inquiry. For instance, whether the proceedings are going to be in public where anyone including the press can come and participate or are they

46 Sriram Panchu, "Free and Fair Election Commissioners?" *Economic and Political Weekly,*Vol. XLIV, No. 9, February 28, 2009, pp. 10-12 and "Election Commission in Tatters," *Economic and Political Weekly,* Vol. XLIV, No. 9, 28 February 2009, pp. 5-6.

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going to be conducted in private? Which mode of inquiry the commission adopts? The second aspect within the procedure is the set of witnesses that a commission examines. How do these witnesses come and give their evidence before the commission? Is the procedure of recording evidence particularly in cases of large scale violence during communal riots possible for commissions without the intermediaries? The third is the protection of the witnesses who appear before the commission and the final aspect relates to the way commissions interpret the different versions of the same set of events related to the matter under inquiry. While these four aspects would be dealt in detail in each of the case studies of this work, it is important to dwell on these by providing examples from the experiences of different commissions in India.

Commissions can select the mode of inquiry that they would follow. Commissions except under exceptional circumstances have preferred to conduct their inquiry in public.47 The most

important reason for conducting the proceedings in public in most cases has been to avoid any speculation that could enter with regard to the fairness of the inquiry. Even when the Inquiry Commission act was being formulated way back in 1952, one of the major issue of debate in the parliamentary proceedings was, what method and mode would a commission of inquiry acquire to investigate the issues before it, whether the proceedings would be conducted in camera or in public and the general suggestion was that any inquiry would be

relevant and its transparency maintained only if the proceedings are conducted in public.48

Therefore, public inquiries are important tools for not just ensuring that the investigation is fair to all the parties involved but more importantly to create an environment where all parties are assured and confident of a fair inquiry.49 This confidence as would be discussed in detail in the chapters on case studies becomes highly imperative for any inquiry commission to be viewed as fair and neutral. For instance, there were serious objections raised when the Thakkar-Natarajan Commission on the Fairfax case decided to conduct its inquiry in camera and not in public.50 While, it is difficult to make a judgment on the final findings of the commission, what becomes important to understand is that any inquiry conducted in private

47 *The Commissions of Inquiry Central Rules,* Section 5, Sub Section 1, 1972

48 *Lok Sabha Debates,* Volume I, Part II, No. 11, 28th May 1952, p. 702 and 703.

49 P. Jaganmohan Reddy, "Not Hearings in Secret; Justice must be seen to be Done," *The Statesman,* 29 May 1987.

50 "Command Performance," *Economic and Political Weekly,*Vol. 22, No. 51, Dec. 19, 1987, p. 2181.

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has grave difficulties in gaining the confidence of the people concerned with the inquiry. Also, when such commissions face severe criticism along with the judges or sometimes even retired civil servants who head them, it tarnishes the image of the institution as fair and neutral. The Thakkar-Natarajan's experience brought forth other difficulties in appointing judges as Chairman of inquiry commissions as there was a perception that it was essentially a

''thankless job".51

What comes as evidence before a commission has a deterministic role in the final recommendations and findings. In certain circumstances while there has been a lot of enthusiasm before a commission was appointed on an issue, the same does not get reflected in the evidence that comes before the commission. The Venkatagiri Commission report on police excesses while curbing students' disturbance in a Kanpur village, discussed this aspect. The commission was of the view that because of public apathy in giving evidence during the proceedings, the task of the commission became doubly difficult. There were

individual notices sent to the political leaders, the press and the general public to come forward and provide any evidence concerned with the incidents under inquiry.52 But, the commission did not get the deserved response which proved as a handicap for its functioning.

While, the general view seems to be that commission's can only base their report on what is brought before them as evidence, the role played by civil society groups over the last few years has changed this understanding to a large extent. There are independent groups formed particularly after communal riots that are dedicated to the cause of the victims and one of the areas where such groups have acquired an important role is to motivate the victims to speak and file their affidavit before a State appointed judicial commission. The Nanavati Commission on anti-Sikh riots and the Srikrishna Commission on Mumbai riots were aided by intermediary groups representing the victims in providing them with the necessary evidence. While the usual procedure is to call for evidence in the form of affidavits to be filed before the commission once it is appointed, there are some commission who even acquire a more proactive role at this stage. They go a step further by not just waiting for the

51 Attar Chand, *Rajiv Gandhi: the mind and ideology,* New Delhi: Gyan Publishing House, 1991, p. 153

52 "Police Excesses and Public Inquiry: Venkatagiri Commissions' Findings," *The Hindu,* 16 October 1970.

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evidence to come before them but go out in search for the evidence by interviewing people concerned with the subject under inquiry. This does not mean that the other commissions are not fair in following the conventional mode of inquiry but instead those who go out in search of evidence are just more proactive and therefore in the end their reports might seem to be better and fairer. For instance, The Royal Commission appointed in 1994 to investigate rumors of corruption within the Police Services in New South Wales and to recommend further reforms of the system, went a step further in collecting new evidence. The Wood's Commission apart from the usual process of collecting evidence took a more proactive investigative role where cameras were installed in the work space of some of the officers to observe their activities in the following months and when credible evidence was collected on their involvement in bribery cases, they were confronted with the evidence by the

commission and under pressure a number of them accepted their crime.53

This work argues, that within procedures, it is not only important to examine the mode of inquiry but also the set of evidences that a commission works with in arriving at the final findings and recommendations. Which set of evidences come before the commission, which are the other set of evidences that never reach the commission and how crucial is their exclusion? These are important questions which need to be answered while examining the procedural aspects of a commission. This factor is often ignored while making assertions on the fair and neutral character of a commission and their ability to make the state agencies accountable and also in dealing with issues of justice. Also, in the form of evidences there are different versions of the same set of events which are articulated before the commission. Now, based on the arguments which version does the commission view as the authentic version and what reasons are given by the commission for the same.

The other challenge before the commissions has been how to persuade the witnesses to depose, production of documents and to punish recalcitrant witnesses. Witness protection has been an important challenge before judicial commissions. There have been instances, particularly after a communal riot that commissions found it difficult to ensure witness

53 Janet Chan and David Dixon, "The Politics of Police Reform: Ten years of Royal Commission into New South Wales Police Service," *Criminology and Criminal Justice,* Vol. 7, 2007, pp. 443-468.

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participation and record their statements. How different post-riot commissions have dealt with this problem? Whether commissions within their given mandate have been able to deal with this situation or do they go beyond their mandate to address the problem of non participation of witnesses? Has there been any scope for witness protection with regard to inquiry commissions in India?

Sometimes, it is not just public apathy as was pointed out by the Venkatagiri Commission that stops witnesses to come forward and give evidence but there are more pressing problems like fear and lack of protection that makes it difficult for genuine witnesses to file their statement before an inquiry commission. The Aligarh Riots Commission headed by Justice Shashi Kant Varma appointed on 20 October 1978 was wound up on 31 July 1980. The commission was expected to examine 200 witnesses, but from January to April 1980, the

commission was able to examine just eight witnesses and the state government of Uttar Pradesh suggested that it had no choice but to wind up the inquiry. 54 In a post-riot judicial inquiry, how far are the witnesses willing to come forward and provide information before an official inquiry depends on the level of confidence that they have in the apparatus of the state to protect them. This is particularly true of riots where one community has been targeted systematically. For fear of further retaliation, key witnesses refrain from giving information

on the incidents. This is not only true of official commissions but also of court cases related to riots where victims have turned hostile.55 The cases related to riots in Gujarat in 2002 and the complexity involved in witness protection is just one example to elaborate this point.*56*

Commissions of inquiry work within the legal parameters of evidences, witnesses and different versions which emerge before them. Therefore, what they arrive at as findings and recommendations can always be contested on the basis of certain other evidences and versions which might have never reached the commission. It becomes important to observe, how the commission interprets these different versions of an event which emerge before it. Also important is whether there is an equal opportunity provided to all groups to present their

54 *Rajya Sabha question and answer session,* July 1980.

*55* "Best Bakery Case: Witness admits giving false testimony," *The Hindu,* 3 November 2004.

56 "Gujarat witnesses intimidated, harassed," *The Hindu,* 24 September, 2004. Also see, "Gujarat SIT begins setting up Witness Protection Cell," *Indian Express,* IO June 2009 and Riaz Ahmed, "Gujarat Violence: Meaning and Implications," *Economic and Political Weekly,* Vol. 37, No. 20, 18-24 May 2002, pp.1870-1873

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versions before the commission. How far does a commission work to maintain the trust of all sections during the proceedings? These are factors which are equally vital in determining the final findings and recommendations of a commission based on which assertions of fairness and neutrality are made on particular commissions. More importantly, while listening to the witnesses and the material that comes before the commission in the form of evidence at this stage of the inquiry makes truth a 'contestable space', where the outcome is something that cannot be predicted before. This unpredictable character that an inquiry commission brings to the subject or incident under inquiry makes the entire exercise more than just a mundane form of fact-finding. The Shah Commission which was constituted to inquire into the exigencies committed during the time of emergency received so much evidence and details of different kinds on the emergency that the inquiry proceedings were followed with great

intent and they were more or less like a court hearing on a controversial issue.57

The debate on the report of the commission begins from the tabling of the final findings in the Parliament/Legislative Assembly depending on who appoints the commission. While the recommendations and the findings of a commission are not binding on governments, it is mandatory for them to table the report within six months of their submission. There have been attempts by governments to repeal this clause but the Courts have repeatedly pointed

out the importance of this clause in initiating debates on important issues under inquiry.58

The initiation of such debates, according to the Courts is an important sign of the existence of a healthy democracy and inquiry commissions are instruments to sustain this important character. This clause which was later on included in the 1971 Amendment of the Commissions of Inquiry Act after being recommended by the Law Commission in its 24th Report, provides a right to the citizens of being informed on the matter under inquiry. This clause of ensuring the debate on the commissions' report within six months of its submission

57 Thomas Blom Hansen, "Governance and myths of State in Mumbai," in C.J. Fuller and Veronique Benei (ed.), *The Everyday State and Society in Modern India,* New Delhi: Social Science Press, 2000, pp. 31-67

58 B. Sharma, "Problems Arising Under Commissions of Inquiry Act," *Journal of the Indian Law Institute,*

Vol.26, Numbers l and 2, Jan-June 1984, pp. 160-172.

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was essentially to ensure that the findings become public and people are informed on what the commission has to say on a matter of ''public importance."

When the Rajiv Gandhi government on 15 May 1986 by an ordinance promulgated the non­ tabling of the recommendations of an Inquiry Commission in the Parliament, it was an act that did not recognize this powerful reason for compulsorily tabling the report. *59* There were

a number of motives that were cited behind this act, the immediate being, to avoid the tabling of Thakkar Commission's Report on the assassination oflndira Gandhi. The legal argument given was that the government was in the best position to decide what is in the public interest and in the "interest of the sovereignty and integrity of India and security of the State and

friendly relations with foreign States or any other issue involving public interest", waive the application of Section 3 of the Commission of Inquiry Act.60 More than the real motive behind the government's actions, it is important to understand that the government conveyed the message that it failed to understand and respect the spirit behind the-tabling of the report

of an inquiry commission in the floor of the house.61 In 1990, the Parliament repealed the amendment to the Act thereby necessitating the tabling of the report. There have been instances as seen during the publication of Thakkar Commission Report where governments have cited various reasons for amending this provision. One such occasion was before the tabling of the report of the Srikrishna Commission on the riots and blasts in Mumbai in 1992- 93, which would be discussed in detail in the chapter on the case studies.

The second important issue related to the report of a commission is the response to the report by governments in the form of ATR which provides an overview of what is to be expected as far as the implementation of the recommendations and findings are concerned. If the commission has performed its task in an efficient and neutral manner, but the government rejects its recommendations then there are questions on the relevance of such a commission. This certainly impacts the overall effectiveness of a commission. The fact that the overall report of a commission is recommendatory in character has been exploited most often for not

59 N. K. Saksena, *Indian Towards Dawn in Law and Order (1985-1994),* Bareilly: Rohilkhand publications, 1994, p.17-20

60 "No Right to Know," *The Tribune,* 17 May 1986

61 Op. cit 2. This clause was introduced to the Commissions of Inquiry Act only in 1972 as a result of the suggestions made by the Twenty Fourth Report of the Law Commission.

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implementing or taking the findings seriously. Commenting on the relevance of the Judicial Inquiry Commission, Bal Thackeray said, "Commissions are a waste of time since they end up being irrelevant. They make no difference between recommendations and judgments. There is no need for them." Specific to the Srikrishna findings, a fortnight before the release of the report Bal Thackeray shrugged away any possible prosecution with: "I don't care.

Anyway he cannot hang me."62 Speaking on the nature of judicial inquiry commissions

during the Lok Sabha debate on the Nanavati Commission Report on August 10, 2005, Mr. Kapil Sibal, stated, ''No commission under the Commission of Inquiries Act has the power to arrest individuals. If the commission does not have the power to arrest under the Commissions of Inquiries Act, no investigation can take place and since no investigation can take place, the truth never comes out. So, it becomes a fertile ground for attacks and counter­

attacks between the political parties"63

But, the recommendations of inquiry commissions can have wide repercussions. The findings of commissions can bring forward facts pointing in the direction of public servants or political figures that can even ruin their careers or reputation. The report of the inquiry commission can lead to judicial proceedings or to civil actions. To situate the relevance or non relevance of inquiry commissions within the confines of government's implementation of the same is perhaps a narrow understanding of the overall impact that inquiry commission have on the subject under inquiry. The fact that time and again a particular issue is brought back to the forefront citing the recommendations or the findings of the commission requires further understanding of the nuances of the functioning and relevance of judicial commissions. Also, because of the experiences of a few commissions, the entire set of judicial commissions cannot be given a blanket verdict.

This work would argue through the case studies that each inquiry commission while following similar procedures, a particular mandate and appointed in a certain way, brings forward a certain uniqueness based on the handling of issues before it. The commissions when studied closely and separately provides the different relationship that each of them

62 Saira Menezes, "The Testimonies Nail The Sena... ," *Outlook,* 24 August, 1994.

63 *Lok Sabha Debates on the Failure of the Government to take action against persons indicted by the Nanavati Commission of Inquiry on anti-Sikh riots,* August 10, 2005, p.725.

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share with the agencies of the government, the civil society and the participants in the inquiry. The study of separate commissions is also a reflection of the existing political situation in the country and the State which appoints the commission. Two commissions even when they conduct an inquiry in public are not completely the same because of the way in which they might select their witnesses, the evidence ,and finally the manner in which they interpret what comes before them. More importantly, there are also differences in the government's approach towards judicial commissions that bear an impact on the functioning ofjudicial commissions.

All these factors in a combined manner make certain commissions better equipped and more effective in dealing with the events under inquiry. The argument that emerges from the above paragraphs is that for a commission to be seen as fair and neutral, it has to be appointed keeping in mind both the letter and spirit of its appointment, the public trust and general consensus should be there on the appointed members, the way its proceedings shape, ho \_the commission interprets the limited scope and terms of reference within which it functions and finally the response of the government to the report of the commission. The case studies in the next two chapters would reflect in detail each of these issues in the functioning of inquiry commissions. More importantly, the case studies would provide an understanding of how the system of inquiry commissions has evolved over a period of time.

Among the four commissions, the Jaganmohan Reddy Commission and the D.P.Madon Commission represent a different scenario in the study of commissions of inquiry appointed to inquire into communal riots. Both these commissions were seen as fairly independent and provided with the necessary resources to conduct their inquiry. Working under similar circumstances, both commissions are faced with different problems in their inquiry and the findings and recommendations of these two commissions are shaped by the way they interpret the terms of reference and the evidence before them. The Nanavati Commission on anti-Sikh riots and the Srikrishna Commission on Mumbai riots represent a phase where among other things they had both the benefit of similar investigations from civil society organizations and pressures of confronting a scrutinizing media. Important issues related to appointment and dismissal of commissions is addressed through the study of Srikrishna

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Commission. Both the Nanavati Commission and the Reddy Commission highlight on the issue of evidences before the commission and how the final findings and recommendations are reflective of the absence and presence of certain important voices or views in the form of witnesses.

While a neutral and fair inquiry is the minimum that commissions are expected to deliver, this work would like to argue that with the changing nature of communal riots since the 1980s, where more cases of brutal violence, mass killings and explicit role of the agencies of the State in fomenting violence has come to light, inquiry commissions are increasingly expected to deliver more than their constitutional character allows them. In the case of judicial commissions appointed to inquire into communal riots, they are being seen as forums for victims to come and give a detailed account of what they went through during the violence. This has been especially true of the minority communities. Commissions and their inquiries are no longer mundane but have acquired a far greater interest and to some extent this has also been because of the role played by the civil society organizations and media in the last few years. The fact that justice for the victims has featured in the mandate of inquiry commissions suggests an acknowledgement and acceptance of wrongs that were committed against certain groups during communal riots. But, the important question to be asked is whether the scope of judicial commissions provides them to go beyond a procedural understanding of justice through compensation to a more substantive understanding of justice through reconciliation and healing. It is here that the role of Truth Commissions have acquired an important place. In situations of conflict leading to large scale violence, Truth Commissions have been able to achieve what judicial proceedings have failed. This chapter in the next section would, therefore, provide an overview of Truth Commissions and float the understanding of an alternate way of addressing a post violent situation and whether the

challenges faced by Truth Commissions would bear any relevance for post-riot judicial

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This study understands that the circumstances and motive for the appointment of Truth Commissions is very different from those of Inquiry Commissions. Truth Commissions have been appointed to deal or cope with past and prolonged violence which are of such vast proportions that the methods of criminal justice system alone are seen as futile in handling such situations. Over the last few years Truth Commissions have sprouted in large numbers in the African continent to deal with past crimes of apartheid and political genocide committed by dictators. Truth Commissions are viewed as helping societies to transform

from barbaric to a minimally decent society.64

There is also a debate on whether Truth Commissions are only meant for transformation into minimally decent society or are they meant to do something more substantial which is reconciliation and healing, both for the victims and perpetrators of a long drawn conflict. From the purpose of this study it is not important to go into the details of this debate on what the Truth Commissions are aimed to achieve.65 What is significant to understand is that Truth Commissions in the long run are expected to address more substantial issues of reconciliation

which would eventually lead to restorative justice. This form of justice goes beyond a process of justice through punishment for the perpetrators. They allow victims to tell their story in a less formal and sterile environment. The objective in the case of Truth Commissions is to provide official acknowledgement which can eventually restore the victims' dignity. The stress here is on dignity, self-respect, forgiveness and finally a vision that all this would eventually bring about the reconciliation. In this case the perpetrator is allowed to speak of the crime committed and the victim and perpetrator are able to understand each other better. As opposed to judicial inquiry commissions in India, Truth Commissions are not just expected to bring forward the correct facts but are institutions

64 Rajeev Bhargava, "The Moral justification of Truth Commissions," in Charles Villa-Vicencio and Willhelm Verwoerd (ed.), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa,* London: Zed Books Ltd., 2000, pp. 60-67. Bhargava makes the distinction between barbaric and minimally decent societies and how Truth Commissions help transform barbaric societies to minimally decent one.

65 Tony Planner's editorial of the *International Review of the Red Cross,* Vol. 85, Number 862, June 2006, pp.

221-224.

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which facilitate a dialogue between the victims and the perpetrators which opens channels for acknowledgement of the wrong committed, seeking and giving forgiveness and eventually reconciliation.

Procedurally, as is clear from a discussion on inquiry commissions m India, judicial commissions are not meant to address some of these issues between victims and perpetrators of communal riots. Since, post-riot commissions are establishment within the larger framework of Commissions of Inquiry Act, they are not specialized institutions like Truth Commissions which are appointed to cope with prolonged violence between communities. On occasions when communal riots are viewed as acquiring a matter of "public importance" then governments appoint judicial inquiries to investigate them.

There are certain common threads between the Judicial Commissions and the Truth Commissions. An important point where they merge and from where this study argues that lessons can be drawn for Indian commissions of inquiry is that both want to arrive at the truth on events where injustices have been committed, so that these true facts can be a beginning for providing justice to the victims and an acknowledgement that wrong has been committed. It is important to mention, often as is understood, Truth Commissions are created not with the presumption that there will be no trials but they are seen as a step towards knowing the truth and that ultimately justice would prevail. This understanding of Truth Commissions is necessary to situate the problems they come across and their relevance in the case of inquiry commissions on communal riots in India.

The experience of the Truth Commissions suggest that they are not just mechanisms to forgive the perpetrators and provide them amnesty which often takes place in the course of the hearings. But, collective forgiveness to the perpetrators by the victims is just part of the entire process. The important question often asked is why should the victims forgive when the crime committed is beyond repair? The victim forgives only when there is an assurance of restoration of lost dignity, when there is an assurance that similar crimes would not be committed in the future. Forgiveness by no means suggests that the perpetrator or perpetrators cannot be tried in a court of law and punished. In fact, a number of Truth

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Commissions have recommended that prosecution take place and some have even shared their archives with the prosecuting authorities.66 Therefore, both Truth Commissions and Judicial Commissions work for restoration of the confidence of the victims but their means for the restoration and what they address in the process is certainly very different. The fact that both want to bring forward the truth about past crimes (in the case of Truth Commissions) and about matters of public importance (in the case of Judicial Inquiry

Commissions) and both are appointed to restore the lost confidence of people, are important merging points for suggesting that the experience of the Truth Commissions could provide important parallels for post-riot inquiries.

In the case of Truth Commissions, two issues are relevant for this study. The first is the difficulty of arriving at the ''truth", which again goes back to the earlier discussion on who is involved in the narration of the events and who is excluded from this narration? Considering that, Truth Commissions are also official, temporary and fact-finding bodies, there are doubts resurfacing about the relevance of their recommendations and findings. But, the argument made for them is rooted in the necessity and the right of the victim to know the truth about the abuses committed against them. The right to truth, both in its individual and collective forms, is seen as an inalienable right while arguing for the appointment of Truth Commissions. This logic can also work very well to argue not only for the appointment of inquiry commissions but also to understand their relevance. The second important lesson to be learnt from Truth Commissions and studies on Truth Commissions is the linkages between civil society and these commissions. This is an important aspect which needs to be explored in the context of commissions of inquiry in India. What role do agencies of civil society play in wielding pressure on governments for appointment of such commissions? Further, what is the impact of independent inquiries by civil society organizations on similar incidents of abuses and violence? In the case of Truth Commissions it is observed that civil society has played an important role in not just the appointment but also in the proceedings of Truth Commissions. (Example: appointment of Truth Commission in Nepal). It would be interesting to explore this aspect while dealing with the four case studies and analyze how

66 Priscilla B. Hayner, "Truth Commissions: a schematic overview," *International Review of the Red Cross,*

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changing role of civil society organizations has transformed the nature of mqurry commissions in India.

While, this chapter broadly gives an overview of why commissions are appointed, their purpose and why is it important to have them irrespective of the visible challenges in having a neutral and fair system of inquiry, the case studies of this work would provide details of deliberations in the proceedings of the commissions under study that are uniquely valuable to understand commissions as instruments of state accountability and justice after communal violence. This chapter states the key challenges in the functioning of judicial inquiry commissions, how these challenges were tackled in other countries and why some commissions are seen as better equipped or rather fair and neutral than the others. More importantly, this chapter asks a vital question: whether judicial commissions on communal riots in their current form are equipped to handle the new challenges which have emerged because of the changing character of the communal riots itself? It has floated the understanding for further debate that judicial commissions which now only deal with procedural understanding of rights and justice can draw important lessons from the experiences of Truth Commissions. These issues would be raked in detail while analyzing the case studies and the response of the state to the findings and recommendations of these commissions.