

PREVENTION OF COMMUNAL AND TARGETED VIOLENCE (ACCESS TO JUSTICE AND REPARATIONS) BILL, 2011: AN INSIGHT

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Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 has been drafted as a response to the growing concern over the state of minority groups in India. The bill takes note of the changing morphology of communal violence in India which can be discerned by looking at instances of communal violence from 1980 onwards. The bill clearly draws its mandate from the provisions of the Constitution and hence cannot be said to be discriminatory under Articles 14 and 15. This bill intends to enhance state accountability, correct discriminatory use of state power and restore equal access to justice for religious and linguistic minorities and, Scheduled Castes and Scheduled Tribes. Thus, the bill has been hailed as a step towards addressing the inequality and anguish experienced by minorities in India in the past sixty years.

I. INTRODUCTION

The bill was first introduced as the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 which was later renamed as the Communal Violence (Suppression) Bill, 2005, after which it was renamed as the Communal and Sectarian Violence Bill, 2010. The Communal and Sectarian Violence Bill was reframed finally to its present form i.e. “Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011”. It comprises of 138 sections and four schedules; it was drafted by the National Advisory Council and then thoroughly discussed at the National Integration Council.

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Before 1980, communal riots were a two-sided affair in which two communities clashed. The 1980s marked the changed morphology of communal violence in India and witnessed the beginning of one-sided carnages and pogroms.¹ From 1992, the phenomenon of state-sponsored riots, wherein the state acted as an active accomplice rose to prominence.²

The bill clearly draws its mandate from the provisions of the Constitution of India [*hereinafter*, the Constitution]. When a non-dominant group based either on language or religion, or a member of Scheduled Caste or Scheduled Tribe, is attacked on account of their identity, they are likely to face institutional bias and prejudice from State administration, police and criminal justice system.³ This prevents such non-dominant groups from getting the protection of the law and access to justice.⁴ The Constitution thus recognises that minority groups require additional protection against the discrimination they might face. Many provisions of the Constitution reflect this need. For example, Article 14 which reads: “The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”, is based on the doctrine of ‘equality among equals’ and understanding that minorities in the wake of communal violence are not on an equal pedestal vis-as-vis the majority population, instead they become very vulnerable to violence. In addition, Article 21 clearly places responsibility on the state to ensure

¹ Javed Anand, *In Defence of the Proposed Prevention of Communal and Targeted Violence Bill, 2011*, ECO. & POL. WKLY, Aug. 20, 2011 at 19.

² Teesta Setalvad, *Why the Communal and Targeted Violence Bill must be codified into law*, COMMUNALISM COMBAT, (Nov. 2011), <http://www.sabrang.com/cc/archive/2011/nov11/cover1.html> (The communal violence incidents in the past thirty years have seen the state as an active accomplice and sometimes the sponsor of the crime. Some examples are Nellie, Assam 1983 (target Muslims); Delhi 1984 (target Sikhs); Bhagalpur 1989 (target Muslims); Mumbai 1992-93 (target Muslims); Gujarat 2002 (target Muslims); Kandhamal, Orissa 2008 (target Christians)).

³ Explanatory Note, National Advisory Council, Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 http://nac.nic.in/pdf/explanatory_note.pdf (last visited July 6, 2012).

⁴ *Id.*

equal protection of life and liberty to everyone. Article 15(1) provides that “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them”.

Moreover, Article 355 makes the central government duty bound to protect every state against external aggression and internal disturbance in order to ensure that the government of every state functions in accordance with the provisions of the Constitution. In case of communal and targeted violence the situation will constitute an ‘internal disturbance’ and the centre becomes duty bound to take control of the situation. It is this duty for which a National Authority under the bill is envisaged.

II. SCOPE AND OBJECTIVES OF THE BILL

As mentioned earlier, the bill has been hailed as a step towards addressing the inequality and anguish faced by minorities in India in the past sixty years.⁵ When citizens are targeted on account of their identity, for being small in numbers or socially and economically disadvantaged, they also face discrimination by the state institutions and law enforcement agencies. Thus the bill is a positive and rational legislative step towards correcting the discriminatory use of state power or a discriminatory justice delivery system in such scenarios.

This bill seeks to protect all religious and linguistic minorities living in any state of India (except Jammu and Kashmir) as well as Scheduled castes and Scheduled tribes, from targeted and organised communal violence. It provides for extensive preventive and punitive measures to victims and perpetrators of communal violence respectively. The bill also entitles every victim whether from the majority group or from minority group, to a robust scheme of compensation and reparation.⁶

The bill is however criticized on many grounds. For example, it is said that no additional law is required as the existent laws are

⁵ *Id.*

⁶ *Id.*

sufficient and only need proper implementation;⁷ that during any communal strife safety and security is ensured if the inspector in-charge of a police station performs his or her duties diligently and honestly; that it is a minority appeasement measure and is discriminatory to the majority population in India.⁸ As the bill envisages provisions like formation of National Authority which gives powers to the centre to intervene, the bill is also criticized for encroaching upon the federal principle and poaching into the powers of the states provided under Seventh Schedule of the Constitution.⁹

III. DEFINITION CLAUSES

The definition clauses in the bill have generally been accepted but some definitions like that of ‘group’ and ‘communal and targeted violence’ have generated debate among political parties as well as within civil society. The definition of ‘group’ in the bill has been said to be violative of Article 14 of the Constitution and discriminatory towards the majority Hindu population. Clause (e) of the bill defines “group” as a religious or linguistic minority, in any state in the Union of India or Scheduled Castes and Scheduled Tribes within the meaning of Clauses (24) and (25) of Article 366 of the Constitution.¹⁰ The definition of ‘group’ is criticised for two reasons: that on an ideological spectrum it will divide the population on the basis of majority and minority and that the bill is based on the assumption that minority groups will never be the perpetrators of the violence.

The definition of ‘group’ may appear to be disfavouring the majority population of India but it needs to be understood with an open mind and a proper perspective. It is no secret that democracies,

⁷ *Id.* (Ashutosh Varshney argues that with India now riding a strong growth curve, the emerging “politics of aspirations” leaves little space for communal politics).

⁸ *The ugly truth behind communal violence bill, 2011*, <http://www.legallyindia.com/Blogs/Entry/the-ugly-truth-behind-the-communal-violence-bill-2011-please-forward-it-to-as-many-people-as-you-can> (last visited Jan. 12, 2012).

⁹ Ram Jethmalani, *Communal Violence Bill is vicious, will divide society*, INDIA BEHIND THE LENS, (Sept. 25, 2011), <http://www.ibtl.in/news/national/1279/communal-violence-bill-is-vicious—will-divide-society?ram-jethmalani>.

¹⁰ See, Clause 3(e) of the bill, *available at* <http://nac.nic.in/pdf/pctvb.pdf>.

although based on electoral and representative politics tend to privilege the majority. Democracies have to maintain a balance of power and that balance requires that minorities be given a special protection.¹¹ Looking at the history of communal violence in India the existing definition of 'group' finds clear justification. In November 1984 in 72 hours more than 3,000 Sikh who were residents of Delhi were massacred. Other examples like the violence against Muslims in Mumbai in 1992-1993 (Justice B N Srikrishna Report)¹² and the carnage in Gujarat in 2002 may also be cited. The perpetrators of such crimes are yet to be brought to justice, which goes to show that if the justice delivery system works poorly in general, for the minorities it doesn't work at all.

Good governance and legislative steps like the present bill becomes imperative more so when the rule of majority enters democracy. The concept of the majority rule dictates that a numerical majority gains control over the bureaucracy and other institutions of the state and is instrumental in the decision-making process. Having said that, the bill does not make any presumptions regarding who the perpetrators of communal violence are. What the bill envisages is that if an incident occurs the state machinery should function properly and administration should show no bias towards minority groups. Thus, the bill ensures efficient functioning of police and administration vis-a-vis a victim who belongs to a minority group to ensure fair and non-discriminatory practice. The bill refers to 'minority' as both linguistic groups and religious minorities and these are shifting categories at the state level. Every state has a different population composition and non-dominant groups vary from state to state. Though Hindus are a majority population in India, in states like Punjab, Mizoram, and Meghalaya etc. they are a minority and are thus protected under the bill. Therefore, the bill is not discriminatory to the Hindu population as is argued by many right wing supporters.¹³

¹¹ Setalvad, *Supra* note, 2.

¹² Full Srikrishna Report, *Excerpts from the Madon Comm. Report on Bhivandi Riots, 1970*, <http://www.sabrang.com/srikrish/sri%20main.htm> (last visited July 21, 2012).

The bill defines ‘communal and targeted violence’ as an act that ‘destroys the secular fabric of the nation.’¹⁴ Major components of the bill such as the offences enumerated, rights of victims to justice and reparation or the provisions regarding the compensatory scheme revolve round the definition of ‘communal and targeted violence’.¹⁵ Under this definition, it has to be established first that a particular offence was a ‘targeted offence’ in nature, which means that the act was committed intentionally against someone due to the fact that the person is a member of a non-dominant group. This places a heavy burden on the authorities to reach a conclusion as to whether a particular offence is a communal and targeted violence. However, the bill itself lays guidelines for the same. The provision in the bill which defines ‘organised’ and ‘targeted violence’ refers to mass violence that consists of multiple or mass commission of crimes that is widespread or systematic in nature. The provisions of the bill will ensue only if it is proved that the violence was communal and targeted and has destroyed the secular fabric of India. At this point the definition is criticized on the ground that it becomes arguable if a particular incident involved communal or targeted violence and also if a particular incident of violence has affected the secular fabric of India. This places the threshold for invoking the provisions of the bill very high while simultaneously placing it very low. It raises concerns that it may allow a minor incident to be categorized as ‘communal and targeted violence’ while allowing a major incident to be argued as not being so.

IV. OFFENCES UNDER THE BILL

The bill enumerates offences of communal and targeted violence. These provisions are applicable to SCs and STs in addition and not in derogation to the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989. It is worth mentioning that the shortcomings of the Scheduled Castes and the Scheduled Tribes

¹³ Setalvad, *Supra* note, 2.

¹⁴ V. Venkatesan, *A flawed Bill*, FRONTLINE, (June 18-July 01, 2011), <http://www.frontlineonnet.com/fl2813/stories/20110701281304500.htm>.

¹⁵ Yoginder Sikand, *Anti-Communal Violence Bill Criticised by Minority Leaders*, (June 16, 2011), <http://newageislam.com/article/details.aspx?ID=4847>.

(Prevention of Atrocities) Act 1989 are that there are no provisions in place to make public servants accountable for non-compliance with the Act. The bill envisages that the offences enumerated under Schedule I and II of the Indian Penal Code, 1860 shall be deemed to be offences of communal and targeted violence for the purpose of this bill and will be dealt with in this proposed law accordingly. Laudably the long standing demand of civil society and other groups that torture should be included under communal and targeted violence has been complied with.

The bill also marks a watershed as it broadens the definition of 'sexual assault' to include 'any sexual advance to humiliate a member of a 'group''. The extension of the definition of sexual assault for the purpose of this bill does not affect the sexual offences listed under the Indian Penal Code, 1860. The bill also broadens the definition of 'hate speech' which is already punishable under Section 153A of the Indian Penal Code, 1860.

Dereliction of duty has been made an offence in a very detailed provision. The bill is lauded mainly for the reason that dereliction of duty is taken very seriously and acts as an additional law to the Indian Penal Code, 1860. Dereliction of duty is an offence under the law in force but the present bill holds the biased police officers accountable with more severe punishment.

In this bill, for the first time in India, public servants and senior officers are held responsible for "breach of command responsibility". Such a breach will be treated as a much more serious offence than dereliction of duty. A constable or a police inspector alone will not be held responsible for failure to prevent violence.¹⁶ Where there are continued unlawful activities, it will be presumed that the concerned officer has failed to exercise control over persons under his or her command. Such an officer shall be guilty of offence of 'breach of command responsibility'. The proposed bill thus has a tendency to act as a deterrent.

¹⁶ *Id.*

Interestingly, the breach of command responsibility also applies to “any non-state actor or superior or office bearer of any association” which is a very welcome move. The implication of this is that the superiors or the office bearers of political parties or certain associations and organisations that perpetrate or support communal violence and riots in any manner will be booked under the law. The provision of ‘breach of command responsibility’ is an incorporation of Article 28 of the Rome Statute.¹⁷ Under the Rome Statute different forms of superior responsibilities arise which are based on the fact that the superior has a legal duty to act in accordance with law. The superior can be made criminally liable only in case where s/he had authority; had effective command; has failed to exercise the control; had knowledge or should have known that the crimes are being committed; and s/he failed to take action to prevent the act.¹⁸ However, the punishment for command responsibility has been criticised on the ground that the dynamics of communal violence are very complex and the officials involved even after acting with due diligence may fail to control the riots.

Thus, this provision may be used at the cost of implicating officers who tried to control the riot to the best of their capabilities. However, implicating an officer does not per se amount to holding him or her responsible. The doctrine of ‘good faith’ which is well rooted in the Indian jurisprudence is incorporated in the bill under Clause 130 which protects an action done in good faith. Thus, this section will act as a safeguard for the officers who have acted in good faith while performing their duties. Nevertheless, it remains to be seen how the courts in India will interpret the provision of ‘breach of command responsibility’, what interpretations the court will give to the provision in case of cases of attempt, lack of knowledge, and where the subordinate only did a marginal act which did not directly contribute to the crime.

¹⁷ *The ugly truth behind communal violence bill, supra* note 8.

¹⁸ CHANTAL MELONI, COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 147 (2010).

V. PUNISHMENT UNDER THE BILL

Punishment for targeted violence is imprisonment for life. Dereliction of duty is punishable with “imprisonment for two years which may extend to five years and fine”. The punishment for breach of command responsibility is “rigorous imprisonment for life in case of failure to curb organised targeted violence and in any other case with imprisonment for a term of 10 years and fine.” The punishment for sexual assault as provided in the bill is minimum imprisonment of seven years and maximum imprisonment for life and imposition of fine. Punishment for hate propaganda is a prison term of 3 years or fine or both. The punishments prescribed by the bill are much more severe than those provided in other laws applicable in India for offences of the same nature.

However, the modern trend in the field of penology does not necessarily endorse that severe punishment can act as a deterrent and be effective in crime reduction. Also the Indian Supreme Court has in many cases held that the penal strategy in India does not reflect the modern trends and is dismissive of the psycho-social problems of the offenders.¹⁹ In *Inder Shing's* case²⁰ the Supreme Court gave directions to all the State Governments to see that the young accused are not given any degrading work and are given benefit of liberal parole. Generally in cases of communal riots and targeted violence the offenders are young people who are indoctrinated. The deeply entrenched bias towards minorities gets transformed into psycho-social reality for such offenders.

However, concerns have been raised that the offenders may escape conviction because for proving such an offence in a court of law the prosecution is faced with having to discharge a heavier burden.

²¹ We see that in the cases where punishment is death or long term

¹⁹ Shivaji v. State of Maharashtra, 1973 Cr. L.J. 1783 (S.C.).

²⁰ A.I.R. 1978 S.C. 1091.

²¹ K. S. N. MURTHY ET.AL., CRIMINAL LAW INDIAN PENAL CODE, 1860 90-91(1st ed, 2001).

imprisonment the courts are too cautious in accepting and corroborating the evidence.²²

VI. SETTING UP OF NATIONAL AND STATE AUTHORITIES

Chapter IV of the bill lays down the provision for formation of a National Authority for Communal Harmony and Reparation. Clauses 21 to 43 of the bill lay down the provisions for constitution, appointment, qualification, term of office etc. of members of the National Authority. The objective behind setting up the National Authority and the State Authorities is controlling, monitoring and preventing communal and targeted violence. The bill takes care of and elaborately lays down all the necessary requirements for the prevention of violence and all the functions which National Authority is to undertake for the prevention and monitoring of communal and targeted violence. The functions of the State Authority are the same as that of the National Authority.

The purpose and the role of the Authority will be to facilitate the implementation of the new law. The functions of the National Authority will be receiving and investigating complaints of violence and dereliction of duty while also keeping an eye on the build-up of a situation likely to lead to violence.²³ But it will not be within the powers of the National Authority to compel a state government to take action. However, the National Authority can approach the courts for appropriate directions. One of the major functions of the National Authority will be to monitor relief and rehabilitation of victims of violence. The recommendations of the National Authority are not binding but recommendatory. However, the National Authority can pass binding orders to the states but only in respect of seeking information from the state governments. The state level authorities will be staffed on the same pattern as National Authority. Such authorities are created in order to facilitate district-level inputs towards the prevention of violence.

²² *Id.*

²³ Javed, *supra* note 1 at 21.

VII. PRE-TRIAL AND TRIAL PROCEDURES

Pre-trial and trial procedures forms an important chapter of the bill and seeks to lay down the procedure for investigation, taking evidence and trial of the offences envisaged under the bill. This chapter is extensive and the main purpose of the bill is found here. The discriminatory laws or procedures which have denied justice to the victims of communal and targeted violence can be dealt with under this section. Under this chapter victim-informants and witnesses are protected. The chapter also provides for judicial enquiries and trial by designated judges and procedure for appeals etc. Clause 61 of the bill provides for assistance to the displaced victims in initiating legal proceedings. The police officer visits the relief camp and records statements. Here it is important to mention that instead of recording the statement the police officer can be empowered to register the statements recorded as First Information Reports.

Regarding protection of victims there remain concerns as under Clause 64 (1) of the draft it is compulsory for the victim-informant to give his/her statement on oath. The bill thus fails to take into consideration the situation and the vulnerability of the victims or informants in the aftermath of a communal violence. The bill does not place much obligation on the states to protect witnesses. This may prove counterproductive and can put the victims in much vulnerable situation, especially when they depose in the courts against socially and politically powerful. The bill maintains that it tenders protection during trial by keeping the identity of the witnesses confidential. However, Clause 88 of the bill makes it mandatory that the witness be video-graphed and a copy of the same be given to the accused. This increases the vulnerability of the witness beyond measure.

VIII. RELIEF, REPARATION, RESTITUTION AND COMPENSATION

The bill provides for relief, reparation, restitution and compensation for the victims of the communal and targeted violence. Clause 90 of the bill refers to the victims eligible for compensation. Clause 91 makes state governments through district

collectors duty bound to provide relief, reparation and restitution of property and pay compensation to the victims. For example compensation for death shall not be less than 15 lakh and compensation for rape not less than 5 lakh.²⁴

Clause 93 provides for immediate establishment of relief camps for the victims of the violence. The bill also provides for setting up of assessment committees which will be formed to take note of and record any damage and injuries caused. Assessment committees are empowered to assess the compensation as well. All affected persons regardless of whether they belong to a group which is non-dominant in a particular state will be safeguarded. The bill ensures relief, reparation and compensation and makes the same justiciable. Chapter IX deals with miscellaneous provisions. Clause 129 removes any limitation period for the offences enumerated under the bill. The chapter also contains provisions providing for the rule making powers of the Centre, State, National Authority and the State Authorities. Further, Clause 138 provides that the present bill will be in addition to the laws already existent and will not be derogatory to any law in place.

There are four schedules attached to the bill. Schedule I enumerates what constitutes Armed and Security Forces. Schedule II and Schedule III provide description of the offences under the Indian Penal Code and the Criminal Procedure Code applicable for the purpose of this bill. These provisions relate to giving evidence and the duties of public servants. Schedule IV is a very elaborate scheme for fixing the amount of compensation. The schedule enlists the offences and prescribes compensation for the kind of disability or death suffered. The amount of compensation is assessed as per the percentage of disability suffered. This has also been laid down in the schedule.

²⁴ *Provisions of the NAC Drafted Communal Bill, 2011*, INDIA TODAY ONLINE, (Sept. 10, 2011), <http://indiatoday.intoday.in/story/communal-violence-bill-rovision/1/150822.html>.

IX. THE BILL AND FEDERAL STRUCTURE OF INDIAN POLITY

The National Authority envisaged under the bill shall have powers to intervene and issue directions to the state governments to prevent or control any communal and targeted violence. It is being argued by many including some chief ministers of the states that law and order is a state subject and the centre should have no powers to intervene.²⁵ As mentioned above the bill is derived from Article 355 of the Constitution which states that “It shall be the duty of the union to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of this Constitution”. The criticism that the formation of the National Authority under the bill is violative of the federal feature of the Constitution does not carry much weight as during the times of communal violence people generally plead that the law and order situation be handed over to the army. Also by virtue of the provisions of the bill the National Authority cannot force a state government to take action but the powers of the authority are recommendatory. However, the National Authority can approach the courts for necessary directions. Moreover, the National Authority has no powers to issue binding orders against the state governments but it can issue such orders only in case of seeking information. Thus, the National Authority as envisaged under the bill does not violate the federal nature of Indian polity in any way.

X. CONCLUSION

Many opinions have been expressed both in favour and against the proposed bill. The concerns raised are generally about the definition clauses, creation of National Authority etc. The provisions which have been favoured are the provisions relating to the rights of victims during trials and the scheme of compensation and reparation. Responding to the criticism the National Advisory Council has made a number of amendments to the draft. For example, from the definition

²⁵ Communal Violence Bill: Didi's stand puts govt in a spot (Sept. 11, 2011), http://articles.timesofindia.indiatimes.com/2011-09-11/india/30141438_1_communal-violence-bill-regional-parties-draft-bill.

of 'Communal and Targeted violence' it has dropped the reference to "destruction of the secular fabric". NAC has taken care of the federal polity of India by dropping a clause from the bill which empowered the centre to unilaterally intervene in the states in the wake of communal violence.²⁶

Despite certain reservations over a few provisions of the bill, the bill creates opportunities to address the long standing demands of the minorities and civil society in India. It is no secret that there is deeply entrenched institutional bias against the minorities in India and the history of communal violence in India stands testimony to this fact. During communal violence, the law and order agencies which are part of the same society also tend to be driven by the same emotions of hatred, bias and impartiality. The bill provides hope that the law and order machinery may work in favour of minorities with the bill putting a very high responsibility on police officers and the administration. The scheme of compensation and reparation also ensures proper rehabilitation of the victims. By making communal violence in India a thing of past and taking care of the protection and rehabilitation of the victims, this bill can act as a step towards that end.

²⁶ Sudha Ramachandran, *India Divided over Communal Violence Bill*, (June 30, 2011), http://www.atimes.com/atimes/South_Asia/MF30Df02.html (last visited Jan. 14, 2012).