

Draft - Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011

Explanatory Note on Key Provisions
May 20, 2011

Introduction

The Constitution of India, based upon principles of equality and fraternity, contains several guarantees for minorities, Scheduled Castes and Scheduled Tribes. Despite this, the experience in India over the past 64 years is that particular groups of citizens have suffered targeted violence merely because of their group identity; because of hatred, bias and opposition to the secular character of our polity. These acts of violence are treated under Indian law like any other crime; the *targeted* nature of these offences is not explicitly recognized. This Bill seeks firstly to redress this.

Section 3 (c): Communal and targeted violence means and includes any act or series of acts, whether spontaneous or planned, resulting in injury or harm to the person and or property, knowingly directed against any person by virtue of his or her membership of any group, which destroys the secular fabric of the nation....

The focus of the Bill is those particularly vulnerable groups of citizens, who are routinely subjected to violence or threats of violence in different forms because of 'who they are'. These consist largely of religious and linguistic minorities, SCs and STs. Tragically, it is for these very groups that the existing provisions of law fail because of a similar systemic bias in the administrative and criminal justice machinery against these most disadvantaged groups. Thus, their vulnerability stands twice enhanced. These are the groups that this Bill seeks to protect.

Section 3 (e): Group means 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 of India

It is suggested that the Central government may, with the consent of the State of Jammu and Kashmir, seek extension of this Bill to that State, so that its protection may extend also to Kashmiri pandits, a religious minority in that State. Likewise religious *minorities* in any state, of all religions are covered. Additionally, regional minorities, of all religions, like the migrants from UP and Bihar in Maharashtra, would be covered because they are also linguistic minorities.

Accountability of Public Officials (Ref: Sections 3 (h), 13, 18, 19, 120)

Experience has also shown that in cases of communal & targeted violence particular groups of citizens are often denied equal protection before law and access to justice by those whose sworn legal duty it is to serve and protect – namely, public officials, as defined in Section 3 (h) of the Bill.

Thus, accountability of public officials is at the heart of this Bill. This is being secured through reiterating the duties of public officials, and defining offences by public officials as the failure to perform those duties. Offences by public officials shall attract penal

consequences under this Bill. It is important to stress that often the greatest cause for communal and targeted violence against these vulnerable groups occurring, spreading and persisting, is that public officials simply *do not act*. The Bill therefore recognizes the offences of both commission and omission.

Recognizing the creation of a 'hostile environment against a group' (Ref: Sections 3 (f), 18)

The Bill specifically defines a series of acts that amount to creating a intimidating or hostile environment against members of groups, including economic boycott, denial of public services, and forced migration. It defines as the duty of public servants to identify the creation of such a 'hostile environment' and to prevent any communal and targeted violence against such members of groups.

Public Servants & Breach of Command Responsibility (Ref: Sections 14, 16, 121)

Given the hierarchical nature of administrative systems, the reality is that too often it is those higher up in a chain of administrative or political command that are responsible for failure to perform their duties. Yet, it is only the officer on the ground whose dereliction is visible. This Bill seeks to ensure that the power of holding command over the actions of others is indeed upheld as a sacred duty, and that there is culpability for those who are 'effectively in-charge'. This is being ensured through the doctrine of command responsibility. In cases of widespread, mass violence (*defined as 'organized' communal and targeted violence in this Bill. Section 9*) the command responsibility shall reasonably be presumed to extend to the immediate superior officer who *shall* be held guilty of such offence. However, the chain of command responsibility may extend to any level where effective decisions to act or not act are taken.

Non State Actors & Breach of Command Responsibility (Ref: Sections 15, 16, 122)

The offence of breach of command responsibility is also extended to non-state actors and any association.

Monitoring and Accountability: National Authority for Communal Harmony, Justice & Reparation and State Authorities for Communal Harmony, Justice & Reparation (Ref: Chap IV & V, Sections 21-56)

The principle behind this Bill is not to supersede the existing law enforcement machinery, nor to disempower or paralyze the existing administrative and justice mechanisms, but rather to strengthen them and make them work by making them more accountable.

Thus, the primary monitoring and grievance redressal mechanism laid out in this Bill in the form of the National Authority and State Authorities (NA/SA) do not, in any instance, take over any existing powers of any public official or institution. Their only mandate is to ensure *that public functionaries act* to prevent and control communal & targeted violence, and to ensure justice and reparation when violence occurs. The job of the

NA/SA is to watch, advise, nudge, push, remind, and warn those who run the system that there will be consequences if they fail to act as per law.

The NA/SA will thus monitor, inquire into complaints, receive or suo moto seek information, and issue advisories and recommendations only when there is alleged inaction or malafide action by public officials and governments. Through the NA/SA this Bill is seeking to create a mechanism that can make the administrative and criminal justice system work as it should, free from favour or bias or malafide intent. The monitoring mechanism of the National and State Authorities will also provide the 'paper trail' to ensure robust accountability of public officials in a court of law.

Bi-Partisan and representative selection of the Members of the National Authority for Communal Harmony, Justice & Reparation and State Authorities for Communal Harmony, Justice & Reparation
(Ref: Sections 21, 22, 23, 44, 45,46)

The Selection Committee for members (including Chairperson) of the National Authority shall consist of the following:

- Prime Minister, Chairperson
- Leader of the Opposition in the House of the People
- Minister for Home Affairs
- Leader of each recognized national political party in the House of the People*
- When the Selection Committee at any given time has *even* number of members, the Chairperson of the National Authority shall be the additional member of the selection committee

**There are currently 6 recognized national political parties in the Lok Sabha (INC, BJP, BSP, NCP, CPI (M), CPI). This number may change after general elections depending on the vote share of the parties*

The Selection Committee for members (including Chairperson) of the State Authorities shall replicate this at the State level, where Chief Minister shall be the Chairperson, and members shall be - Minister for Home Affairs in the State, Leader of Opposition in the Legislative Assembly, and leaders of all recognized State Parties in the Legislative Assembly.

New Offences of communal and targeted violence, including 'organized' communal & targeted violence (Ref: Sections 7,8,9,10, 11, 12)

The Indian Penal Code (IPC) contains many offences committed during episodes of communal and targeted violence, including murder, rape, loot, arson and others. These have been appended in a schedule to this Bill. However, a great many forms of targeted violence routinely occur, but have failed to find a place in our statute books, including brutal forms of sexual assault beyond the limited IPC definition of rape. These new offences have been defined under this Bill. Additionally, mass violence that is widespread or systematic in nature is also defined specifically as 'organized' communal and targeted violence.

Victims Rights (Ref: Sections 69,86,87)

While there is much that is good in our criminal justice system, the weakest participant in this system is the victim. The State not only investigates and prosecutes, but also adduces evidence and appeals. The victim has limited rights in any of these processes. Indian criminal law is also based on the assumption that the State is always on the side of the victim against the accused, and therefore it is primarily the rights of the accused that need to be protected. The reality of *targeted* violence is that the State may in these cases, be on the side of accused and actively hostile to the victim. This Bill seeks to correct this, by strengthening throughout the criminal justice system the rights of the victim, through a series of new provisions at every step in their struggle for justice – from the simple right to information at all stages, the right to get copies of all their statements, to the right to be heard in a court of law, right to adduce evidence, right to protection, right to appeal, and the right to file a complaint with the NA/SA if and when they are aggrieved by failure of the system to protect and secure for them justice and reparations.

Relief, Reparation, Restitution and Compensation (Ref: Chapter VII & Section 90)

This Bill recognizes that for rights to relief, reparation, restitution and compensation, there are no statutory norms and provisions for ANY Indian citizen under present law. Thus, ALL affected persons (whether or not they belong to a religious or linguistic minority or are SCs or STs) have been given justiciable rights to comprehensive reparations and compensation if they suffer any harm as a result of an incident of communal and targeted violence.

Some state governments have refused to provide even elementary humanitarian services to victims – by refusing to establish relief camps or forcefully disbanding these prematurely. The Bill seeks to prevent this, by casting legal duties on the State to provide rescue, relief, rehabilitation, compensation and restitution, to ensure that victims are restored to a situation better than which prevailed before they were affected by targeted violence.

Compensation (Ref: Section 90, 102)

When there is violence, and citizens lose their lives, livelihoods, and homes, then each devastation must be recognized in the same manner. Each life lost must be compensated for justly and uniformly. Regrettably this has not been the case, and governments have been both arbitrary and selective in awarding compensation to different groups of citizens with different standards of generosity. Compensation must not be a matter of charity or largesse, but a justiciable right with a single uniform standard for every Indian citizen. Thus this Bill provides that compensation shall be paid within 30 days from the date of the incident, and in accordance with a schedule, which shall be revised every 3 years. No compensation for death shall be less than Rs. 15 lakhs. No compensation for rape shall be less than 5 lakhs.

The Federal Principle & the Constitutional Framework (Ref: Section 20)

This Bill is mindful of the federal nature of our polity, and the Constitutional framework. The advisories and recommendations of the National Authority are not binding on any State Government. With respect to the powers of the Central Government in relation to ***organized communal & targeted violence*** i.e in situations of ***mass violence***, the Bill **does not** create any new powers. It only makes a cross-references to such powers as already exist the Constitution of India, and proposes that “the occurrence of ***organized*** communal & targeted violence shall constitute ‘internal disturbance’ within the meaning of Article 355 of the Constitution of India and the Central government may take such steps in accordance with the duties mentioned there under, as the nature and circumstances of the case so requires.”
