The Communal Violence Bill: Countering Impunity, Seeking Accountability

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For more than seven years now, the civil society has supported the idea of a separate law on communal and targeted violence, to deal with crimes committed against religious minorities with political complicity and intent, to make persons accountable for acts of commission and omission perpetrated with an institutional bias, to provide justice to victims and survivors, and to formulate a robust and workable legal regime that will create a long-term deterrence. Though communal violence adversely affects all communities, past experience has repeatedly highlighted that it is the religious minorities who suffer the greatest harm and receive the least protection from law and its institutions due to inherent institutional bias in the performance of constitutionally mandated duties.

The UPA government, in its National Common Minimum Programme issued in May 2004, promised to enact a comprehensive legislation on communal violence. Its election manifesto of 2009, reiterated its “unflinching resolve to combat communalism of all kinds”, and further promised to ensure “the right to compensation and rehabilitation for all victims of communal, ethnic and caste violence on standards and levels that are binding on every government.”

Background to the Bill

The government draft of 2005 – the Communal Violence Bill (Prevention, Control and Rehabilitation of Victims) Bill – was rejected by the civil society, as it sought to make the State more powerful and conversely increased the vulnerability of victim-survivors. In June 2010, the government formed a Working Group on the Communal Violence Bill, under the aegis of the National Advisory Council (NAC) and entrusted it with the task of developing a draft Bill on the issue. The Working Group, consisting of a Drafting Committee and an Advisory Committee, included government representatives as well as members from civil society. The draft that was finalized through this process – Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill (PCTV Bill) was placed before the public in May 2011 for suggestions and feedback.

The 2011 Bill has made attempts to hold public servants accountable for dereliction of duties, and has introduced the concept of ‘command and superior responsibility’ in order to pin accountability on those who plot, plan and mastermind such forms of violence in addition to those who directly commit the offences – though the provisions need to be worded in a more precise manner. For the first time, it has also sought to address extreme forms of socio-economic boycott, forced migration and denial of public services by recognizing the creation of a ‘hostile environment’ against a group. Significantly, the law recognizes that even though religious minorities would be more disadvantaged and vulnerable, all victims are entitled to relief and reparations. Despite these gains, serious concerns persist with provisions in the Bill, some of which are outlined below.

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Major Concerns with the Bill

**Definition of Crimes:** The definition of ‘communal and targeted violence’ requires that the violence has to be such that it ‘destroys the secular fabric’. This increased threshold is a requirement that is pivotal to the application of all other provisions of the Bill. The threshold of the crime has been increased so drastically that hardly any situations of targeted violence against religious minorities, SCs or STs would come within its ambit, for the rest of the law to be applicable. Crimes such as enforced disappearances have not been included within the ambit of the law, even though the government has become a signatory to the international convention in this regard, and thereby, on principle, accepts the standards. The definition of torture in this Bill falls short of that proposed by the Rajya Sabha Select Committee on the Prevention of Torture Bill.

**Reference to ‘Internal Disturbance’:** The Bill refers to communal and targeted violence as an internal disturbance for Art. 355 of the Constitution to be attracted (an entry point for the Central Government to intervene). In contexts of internal disturbance, the State acquires more power, often unbridled and used in an arbitrary manner, which subverts the intent of this law. Punjab in the 1980s, Nagaland, Manipur and Kashmir are some live examples of this. Hence, any reference to internal disturbance would be dangerous in a law of this kind.

**Internal Inconsistency in Making Public Officials Accountable:** On one hand, the Bill lists out a series of dereliction of duties by public servants, which amount to offences. On the other hand, it empowers the government with powers to intercept messages (S. 67) – a regressive and dangerous provision that may backfire on victims’ groups – by empowering the government to prevent messages from being sent to or from such groups. In addition, the Bill has ironically included a ‘good faith’ clause that protects public servants (including members of National and State Authorities) from legal proceedings for acts done in good faith. Though this may be explained as a ‘routine’ drafting exercise, this provision only exacerbates the lack of accountability and transparency, since Commissions of Inquiry have repeatedly observed that public servants act in a mala fide manner in contexts of communal and targeted violence. The provision related to sanction is also difficult to comprehend (see para below). So it appears that what the law attempts to do with one hand is effectively neutralized by the other hand.

**Prior sanction for Prosecution of Public Servants:** S. 197 of the Criminal Procedure Code, which prescribes prior sanction from the government for prosecution of public servants, has long been used for shielding public servants from processes of accountability. As per the provisions of the Bill, the requirement of sanction for more serious crimes listed in Schedule II is retained, while dispensing with sanction for the less serious crimes listed in Schedule III. The rationale for this gradation is hard to decipher, and counters efforts at ensuring accountability. Further, for offences created by this Bill, it is unclear if sanction is required or not required.

**Provisions Related to Procedural Law:** Trials for communal violence often end up in acquittals due to procedural law standards and their use / misuse on the ground. The Fast Track Courts of Kandhamal are an illustrative example of this. Formulated with an over-enthusiasm to assist victim-survivors, many of the procedural provisions in the PCTV Bill would actually backfire on them, and / or violate fair trial guarantees. An example is S. 64(1) that makes it compulsory for the statements of all victim-informants to be recorded before a Magistrate on oath, thereby heightening their vulnerability in
the period immediately after the violence. The Bill also draws upon provisions from draconian laws such as MCOCA, TADA and POTA, such as by increasing the period of detention of the accused (S. 85)

**National and State Authorities on Communal Harmony, Justice and Reparation:** The National and State Authorities have been created, with the specific purpose of identifying and countering institutional bias, and operationalizing changes brought about through this law, particularly in relation to acts of commission and omission by public servants, commanders and superiors. However, concerns persist that these bodies, on one hand, replicate the powers of the National Human Rights Commission (NHRC) and other such commissions, which have failed largely in providing justice and reparations to victim-survivors or in making perpetrators accountable. Hence, it may amount to the creation of a huge beauracratic infrastructure that would do little. On the other hand, the mammoth body ought to be playing a complementary role (by observation and monitoring) rather than directly intervening in what is happening at the ground, as that whittles down responsibility of state officials. To conceive that a few members in the state authorities would have the capability of taking on the might of the State, which may be complicit in the violence, while being situated within it, is far removed from reality.

**Absence of New Legal Standards on Sexual Assault:** The prosecution in cases of sexual assault depends heavily on the question of consent. The Criminal Law Amendment Bill, 2010 – a draft produced by women’s groups and other civil society groups across the country and submitted to the government last year - introduces a comprehensive definition of consent, taking cognizance of ground realities. It explicitly states that no consent can be obtained when the victim is in coercive circumstances, which includes communal and targeted violence, and a threat / fear of such violence. This needs to be included in the PCTV Bill. In addition, newer standards of procedure and evidence need to be formulated in relation to sexual assault in such contexts since women’s access to police stations (for lodging FIR), government hospitals (for medical examinations) and the confidence / ability to pursue legal procedures is substantially reduced during the period of the violence.

**Witness Protection:** The provisions on witness protection in the PCTV Bill are sketchy and inadequate. The provisions place the onus of providing witness protection on the Designated Judge during investigation and trial. The Bill does not mention eligibility of victims / complainants / witnesses for protection in the pre-trial and post-trial phases, and if so, which body / department within the state would be responsible to provide such protection. This could lead to increased vulnerability for victims and witnesses after they testify in court against those who wield social and political clout. The recommendations made by the Law Commission of India in its 198th report appear to have been considerably diluted in the Bill - this needs to be remedied.

**Rights of Victim-Survivors:** A victim has been narrowly defined as one who has suffered various forms of harm (physical, mental, monetary or harm to property) and his / her relatives, legal heirs etc. Hence, the law seeks to protect those who are directly harmed by the violence, excluding thousands of people who may be witnesses to the violence or are members of the same 'group', and who are nevertheless affected by the violence. It is important to include the broader concept of ‘affected person’ rather than the narrowly defined ‘victim’. The Bill spells out State responsibility with regard to various aspects of relief, rehabilitation, restitution, compensation etc, but approaches the rights of affected persons in a paternalistic manner. The Bill, in many ways, objectifies affected persons and their families and has the potential of reducing them to mere statistics that governments grapple with, contrary to recent developments in international jurisprudence on the place of victims in criminal law.
Compensation & Resettlement: While the Bill seeks to set a uniform standard for granting compensation, the ‘income replacement’ model adopted in this Bill is not suitable for contexts of CTV as most of those affected are poor, marginalized and underprivileged people. Their loss of income in actual terms may not be considerable but their capacity to recuperate after the violence is severely affected because of their disadvantaged socio-economic status. So, their loss cannot be reduced to loss of wages alone, nor can compensation be computed solely on that basis. The option provided in the Bill to state governments to resettle families in existing or new locations could whittle down their responsibility to ensure that a conducive, peaceful and secure environment is created in their places of habitual residence for the return of affected persons and their families.

Failure to refer to international standards related to Internally Displaced Persons (IDPs): Victim-survivors of communal and targeted violence become internally displaced persons (IDPs) and are entitled to protection on a wide range of issues from the State, as prescribed by the international standards related to IDPs – the Guiding Principles on Internal Displacement. The Principles are guidelines to governments and international humanitarian agencies in protecting and promoting rights of IDPs through a human rights approach, in all phases such as protection from displacement, assistance during displacement and guarantees for return, settlement or reintegration with safety and dignity. It is rather strange that the PCTV Bill makes no reference to the Guiding Principles at all.

Key Points for Policy and Action

- Delete the requirement of destroying the ‘secular fabric’ from the definition of communal and targeted violence, lower the threshold, and formulate definitions in a specific manner, leaving little room for ambiguity and interpretations;
- Delete reference to ‘internal disturbance’ in providing an entry point for the central government in this law;
- Delete provisions that attribute power to the governments – such as to intercept messages and those that shield public servants – such as through the ‘good faith’ clause;
- Dispense with the requirement of governmental sanction for prosecution of public servants for all offences under this law; alternatively provide for a time-bound issuance of sanction, with reasons in writing for rejecting sanction and with an assumption of grant of sanction beyond the prescribed time period;
- Delineate a role for National Authority that does not entrench upon the roles and responsibilities of public servants on the ground. Provide it functions of observation and monitoring, based on wide and broad-based sources of information, giving it the power of intervention only when state agents do not act.
- Make cross-references to the Criminal Law Amendment Bill 2010 on sexual assault, and adopt the standards recommended in that Bill on issues of consent, evidentiary and procedural standards;
- Provide for witness protection at all stages commencing from the time of lodging a complaint to post-trial phases;
- draw upon recommendations of the Law Commission of India in its 198th report in this regard; balance witness protection measures with aspects of fair trial guarantees including rights of the accused;
- Provide for rights of ‘affected persons’ rather than narrowly defined ‘victims’; treat affected persons as human beings with entitlements and agency;
• Acknowledge rights of internally displaced persons who face forced displacement due to communal and targeted violence; provide for a justiciable framework of entitlements to protect their right to reparations in conformity with international standards for internally displaced persons, including the UN Guiding Principles on Internal Displacement.

The UPA government is clearly in a hurry to introduce the Bill in its present form in the monsoon session of the Parliament. The Communal Violence Bill is an opportunity for the central government to prove its commitment to secular values. However, it needs to address the serious concerns raised and various feedback and suggestions given by the civil society to the NAC, before the Bill is cleared by the cabinet and introduced in the Parliament. Its failure to do so would have a disempowering effect on persons and communities that are vulnerable to communal and targeted violence in particular, and a betrayal of the faith of civil society in general.