CRITIQUE OF THE COMMUNAL VIOLENCE 
(PREVENTION, CONTROL AND 
REHABILITATION OF VICTIMS) BILL, 2005

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The UPA Government has done it again! The Communal Violence Bill is astonishingly poor, having been drafted in ignorance of the two draft bills proposed by civil society groups after extensive consultations with NGOs. The focus is on increasing police power instead of empowering civil society to initiate and control prosecutions when communal crimes occur. Given that government is the principal wrongdoer in many instances the thrust of the legislation is misplaced.

**FATAL FLAWS**

1. The Act is that it cannot come into force in the state unless the State Governments issue notifications to that effect. Once notified, the Act cannot be invoked even when communal crimes take place unless the state or the central government decides to declare an area “communally disturbed.” Therefore, if the State Government refuses to issue a notification bringing the proposed statute into force or if the State Government refuses to declare an area communally disturbed, the Act will not apply. All opposition governments could ignore this statute completely. Moreover, a state government may issue a notification bringing the statute into force in the state and yet render it sterile by not issuing notifications declaring certain areas to be “communally disturbed areas.”

2. The Act fundamentally misunderstands what the term “communal riot” has come to signify in the Indian context, which is precisely why it cannot adequately provide for the prevention or alleviation of communal riots. Communal riots in India are not mutual violence between two communities analogous to a miniature civil war. They are the attack of one community by another with substantial collusion of the Government at the local, district and State levels. If one understands a communal riot to be a mutual clash, then the natural response is to increase the discretion and power of the State Government in order to control and mediate the conflict. However, if one understands communal riots to occur with the complicity of the State Government, then the augmentation of State power simply puts more weapons into
the hands of communal forces, creating the possibility for increasingly violent attacks and increasingly unjust State response. This Act does exactly that, and as a result must be wholly rejected.

3. Law is often created in ignorance of existing power relations in a society, particularly between the sexes. Communal violence in the prevention, commission and rehabilitation stages is always framed in the power relation, and is specially cruel in its use of the woman’s body as a battlefield. Women are particularly targeted and intimidated by the hate speech that precedes a riot, they are subject to most brutal violence during the riot, and they face the greatest difficulty in the rehabilitation stages. This bill relegates their suffering to an afterthought, and even then is woefully inadequate in fulfilling its insufficient objectives.

4. In terms of flaw 1, Section 1 (4) is the culprit for the first flaw, which is as under:

“The provisions of this Act, except Chapters II to VI (both inclusive) shall come into force in the States on such date as the Central Government may, by notification in the Office Gazette, appoint... and the provisions of Chapters II to VI (both inclusive), shall come into force in a State as the State Government may by notification, appoint...”

5. The principal issue is the Parliament’s legislative competence to make a law in respect of communal crimes, which according to some, is covered by Entry 1 (Public Order) of List II of the Seventh Schedule of the Constitution framed under Article 46. Only the State Governments, it is contended, have the legislative competence to make laws in respect of communal crimes.

6. However, the “Public Order” question is confined to disorders of a lesser gravity than communal crimes and is necessarily restricted disorders whose impact is felt only at the state level. Article 245 (I) restricts the legislative power of state legislatures to laws having application within the territorial limits of the state.

7. Communal crimes have grown enormously in their nature and geographical spread. Apart from riots that have taken place on an ever increasing scale, often bordering on genocide; the spread of hate in educational institutions throughout the country, the social and economic boycotts, ghettoization, stigmatization and victimization, all
indicate that communal crimes have reached such a stage that they undermine the secular fabric of the Indian state.

8. A similar argument was used by the Central Government to justify the enactment of what was called “anti-terrorism legislation” – TADA and POTA. It may be recalled that even the possession of a weapon in a notified area, as in Sanjay Dutt’s case, could attract charges under these statutes. Communal crimes are arguably as grave as “terrorist crimes” in today’s situation. The same logic could therefore apply to the effect that the control of communal crimes falls within the legislative competence of the Central Government. If this is correct, the concurrence of the State Government for the enactment of legislation and the punishment of communal crimes is not necessary.

9. In Kartar Singh vs. State of Punjab - 1994 3 SCC 569 – the Supreme Court held:

“Having regard to the limitation placed by Article 245 (I) on the legislative power of the legislature of the State in the matter of enactment of laws having application within the territorial limits of the State only, the ambit of the field of legislation with respect to ‘public order’ under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the State. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the States under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to Defence of India and in any event under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List” (Para 66).

10. There is a feeble attempt in Chapter XI to assert the primacy of the Central Government where a situation exists corresponding to section 3 abovementioned, i.e., where communal violence is taking place on such a large scale that there is an imminent threat to the secular fabric, unity, integrity or internal security of India. Then and only then, is the Central Government empowered to direct the State Government to take measures. If the State Government does not take such measures the Central Government may issue a notification declaring any area within the State as a communally disturbed area. Even then the Central Government cannot deploy armed forces without the request of the State Government! Section 55 (3) is critical:
“3) Where the Central Government is of opinion that the directions issued under sub section (2) are not followed, it may take such action as is necessary including:-

b) the deployment of armed forces, to prevent and control communal violence, on a request having been received from the State Government to do so.”

**Communally Disturbed Area: Too Narrowly Defined**

10. The proposed Act can only be invoked in the most extreme circumstances where there is criminal violence resulting in death or destruction of property and danger to the unity of India. There is a myriad of serious communal crimes which may not result in death, such as rape, and which are not considered to endanger to the unity of the country. All these crimes fall outside the ambit of the Bill. Even if such circumstances do exist the section only prescribes that the government ‘may’ act. On the face of it, the duty to act is not mandatory.

11. The offending part of the Bill is Chapter II, the relevant parts of which are set out below:

“3.(I) Whenever the State Government is of the opinion that one or more scheduled offences are being committed in any area by any person or group of persons-

a) in such manner and on such a scale which involves the use of criminal force or violence against any group, caste or community resulting in death or destruction of property and;

b) such use of criminal force or violence is committed with a view to create disharmony or feelings of enmity, hatred or ill-will between different groups, castes or communities; and

c) unless immediate steps are taken there will be danger to the secular fabric, integrity, unity or internal security of India.

It may, by notification:-

1) declare such area to be a communally disturbed area
(3) Where any area has been notified as communally disturbed area under sub-section (l), it shall be lawful for the State Government to take all measures, which may be necessary to deal with the situation in such area…

(2) If the State Government is of opinion that assistance of the Central Government is required for controlling the communal violence, it may request the Central Government to deploy armed forces of the Union to control the communal violence.

**Sexual Violence: Totally Absent from the Bill**

12. The bill contains no special provision for the prosecution or rehabilitation of offenders and victims of Sexual Violence. The bill fails to be cognizant of the radically different nature of sexual assault during peacetime and during communal riots. The particularly brutal sexual violence committed en mass during communal riots testifies to the genocidal intent of the crime, and thus should be treated appropriately by any legislation seeking to address communal violence.

13. The bill must further recognize the specific types of sexual violence seen during communal violence, including genital or mammary mutilation, insertion of objects into the women’s body, cutting out of the uterus etc., that are not covered under the existing IPC provisions for rape (Section 375). These offenses must be held in equal standing with the other types of sexual violence already covered by the IPC.

14. Finally, there is no special provision for women in the Rehabilitation section of the Bill, despite pervasive evidence of their continuous and abject suffering as a result of communal violence. There are no special provisions that allow survivors of sexual violence to more easily record FIRs, avail of counseling or medical treatment among other things. There are no specific standards of proof laid out by the Bill that take into account the unique obstacles women face in the aftermath of communal violence.

**Communal Crimes: Narrowly Defined**

15. Section 2(l) read with the Schedule indicates that crimes covered by this Bill are offences as set out in the Indian Penal Code, the Arms Act 1959, The Explosives Act, 1884, The Prevention of Damage to Public...
Property Act 1984, The Places of Worship (Special Provisions) Act, 1991 and The Religious Institutions (Prevention of Misuse) Act, 1988. The Bill does not propose to include any of the communal crimes so frequently noticed in riot after riot. Gender violence including the insertion of objects in the genitals, social and economic boycotts, forcible evictions, restraint on access to public spaces, residential segregation, deprivation of access to food and medicines, enforced disappearances, interference with the right to education, using religious weapons and ceremonies to intimidate, interference with police work, advocating the destruction of a religious structure, are woefully absent in the Bill. All that the Bill provides for in Chapter IV, is for enhanced punishment for the commission of already defined offences under other statutes.

16. A special section on communal crimes against women and children is sorely needed to cover sexual violence, penetrative assault, sexual slavery, enforced prostitution, forced pregnancies, enforced sterilization and other forms of sexual violence. The rules of evidence need to be modified so that the victim is not further victimized during the trial.

Sections Either Unnecessary or of Doubtful Use

17. Chapter III deals with the prevention of communal violence. Chapter V deals with investigation of offences. Chapter VI deals with the setting up of Special Courts. Apart from minor changes these provisions already exist in the Criminal Procedure Code and, in any case, it is doubtful whether it is necessary at all to include these provisions in this special Act. Chapter III, for example, relates to the prevention of communal violence and appears to empower the district magistrate to prevent the breach of peace by, inter alia, curbing processions, exterminating persons, regulating the use of loudspeakers, seizing arms, detaining persons and conducting searches. This is largely a cosmetic section because the police, in any case, have the powers to do all these things under the Criminal Procedure Code and various other criminal statutes in force today.

18. A chapter on preventive action to be taken by the authorities along the lines of the SC/ST Atrocities Act is certainly needed. Immediately on receiving information the officials should visit the area, establish a police outpost, begin patrolling with special police forces and form vigilance committees.
Victims Rights: Relief, Rehabilitation and Compensation

19. There is, of course, the wishy-washy Chapters VII and VIII requiring government to plan and coordinate relief and rehabilitation measures through the setting up of State and District Communal Disturbance Relief and Rehabilitation Councils but these chapters fall far short of enunciating victim’s rights enforceable in court. Chapter X of the Bill deals with compensation to be paid to the victims but restricts the compensation to the amount of fine payable under the Code, which is generally very small. In the Communal Crimes Bill, 2007 submitted by the Human Rights Law Network (HRLN) and ANHAD to the government, the suggested sections made it mandatory for government to set up relief camps, pay subsistence allowance, pay substantial compensation and provide reasonable rehabilitation including alternative sites and housing and to reconstruct the destroyed places of worship at government’s expense. All these victim’s rights are missing in the present Bill.

20. When the state does not protect the lives and properties of the minorities during communal carnages, should the victim not have a right to compensation and alternative livelihoods at the cost of the state? An answer to this was expected in the statute. Is a relief camp to lie at the discretion of government and NGOs with shabby provisions being made on a temporary basis, or is it a right of the victim to be provided immediate relief according to well-established norms?

21. Once again, had government cared to look at the Atrocities Act, it would have noticed the provisions relating to the collective fine where the community harboring the aggressors could be substantially fined and the money used for the payment of compensation.

22. There is no provision in the Bill relating to the duties of authorities after the riots take place. A section is necessary requiring the authorities to provide immediate relief and protection from further acts of violence, to prepare a list of victims and their losses, and to provide for legal aid, allowances, and facilities during legal proceedings. Likewise, provisions are required to enable the arrest and detention of people engaging in hate speech and to enable the court to shift the investigation to the CBI in cases of involvement of the local police in the communal crime.
23. The Supreme Court has recently held that social statutes must be accompanied by a financial memorandum. This is to ensure that government puts its money where its mouth is. The Government of India is accustomed to enacting grand legislation without allocating resources for its implementation. In this regard the Financial Memorandum of the Bill makes for interesting reading:

“As involvement of expenditure depends mainly on the occurrence of communal violence, it is difficult to make an estimate of the expenditure, both recurring and non – recurring, from the Consolidated Fund of India.”

It is thus clear that the Government of India intends to make no financial provision whatsoever for the relief and rehabilitation of the victims of communal crimes.

**Witness Protection**

24. The witness protection provision - Section 32 - has been drafted without application of mind as to the Law Commission’s recommendations. The usual pathetic provisions reappear, covering only the holding of proceedings at protected places and the shielding of the identity of the witnesses. The main aspects of modern day witness protection, which include the shielding of the witness from the accused, compensation of the witness for the trauma suffered during the crime and trial, creation of new identities and a new life for the witness, are all missing. Genuine witness protection includes a substantial financial commitment of the state to care for the witness and her family in secrecy, often for the rest of their lives.

**Immunity for Public Servants**

25. Section 17, which grants immunity to the police and the army, is particularly insensitive. Although the section provides for the punishment of public servants who break the law, two things must be noticed. Under the Indian Penal Code the punishment for such offences committed by public servants is more severe than the maximum sentence of one year with the alternative of a fine presecribed in the Bill. Secondly, Section 17(2) retains the requirement of sanction by State Government for prosecution of public servants. The provision is as under:
“(2) Notwithstanding anything contained in the Code, no court shall take cognizance of an offence under this section except with the previous section of the State Government.”

26. Various Commissions of Enquiries including the Justice Ranganath Mishra Commission (Delhi riots), the Justice Raghuvir Dayal Commission (Ahmednagar riots), the Justice Jagmohan Reddy Commission (Ahmedabad riots), the Justice D.P. Madan Commission (Bhiwandi riots), the Justice Joseph Vithyathil Commission (Tellicheri riots), the Justice, J. Narain, S.K. Ghosh and S.Q. Rizvi Commission (Jamshedpur riots), the Justice R.C.P. Sinha and S.S. Hasan Commission (Bhagalpore riots), and the Justice Srikrishna Commission (Bombay riots), have found the police and civil authorities passive or partisan and conniving with communal elements.

27. A chapter is necessary to punish police persons, paramilitary forces and members of the armed forces for their involvement in communal crimes particularly when FIRs are not registered or registered improperly, when security is not provided to minorities under attack, when destruction of property is not prevented and when inadequate forces are deployed. Where the officers stand firm - and there were many such fine examples of bravery even in Gujarat - the rioters are quickly diffused and dispersed. No communal riot can take place without the support of the police and the security forces. They must be severely punished for not doing their duty.

28. The abject failure of the criminal justice system because of the insidious role of the police and the public prosecutors, who often side with the accused, needs special legislative attention. After the last racial riots in Britain, the McPhearson Committee recommended that complaints be registered at places other than police stations and suggested ways of overcoming ‘institutionalised racism’. Sections are required for the punishment of policemen who fail to record complaints and conduct investigations properly. Complaints ought to be able to be registered electronically.

29. Recognising the role of the police in communal riots, it is critical that the immunity granted under sections 195, 196 and 197 of the Criminal Procedure Code be omitted in any statute on communal crimes. No junior officer should be allowed to take the defence that he was ordered by his superior to commit the crime. Nor should any commanding officer be allowed to take the defence that he was
unaware of the crimes that were committed on his beat.

30. Similarly, public prosecutors who side with the accused persons and enable them to be released on bail or are instrumental in their acquittal ought to also come under legislative scrutiny. A section is necessary to make it mandatory for the trial judge who finds the performance of the prosecutor unsatisfactory to remove him from the case.

31. Politicians must come in for special mention in the legislation. Any minister interfering with police work by shielding the accused, misdirecting the police investigation or by preventing relief from reaching the victims should be treated as a common criminal. His ministerial status should afford him no protection in law.

32. All in all a policeman’s Bill oriented to increasing police power with no care for the victim.
The UPA government has done it again! The Communal Violence Bill is an astonishingly poor draft that has ignored the two drafts suggested by civil society groups after extensive consultations with NGOs. The focus is on increasing police power and not on empowering civil society to initiate and control prosecutions when communal crimes occur. Given that government is the principal wrongdoer in many instances the thrust of the legislation is misplaced.

The **Human Rights Law Network (HRLN)** is a collective of lawyers and social activists dedicated to the use of legal system to advance human rights.

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