The Communal and Targeted Violence Bill

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The Indian Penal Code and the various police acts give the executive and the police ample powers to deal with communal violence. Failure to implement these laws is one of the major problems confronting the prevention of communal violence. However, there are a number of connected issues which the present laws are powerless to deal with – like responsibility pertaining to the public servant in control of armed or security forces who fails to exercise control over his/her subordinates, witness protection, reparations, and a regular machinery to pay compensation. The National Advisory Council's draft anti-communal violence bill takes these shortcomings into account. However, it too suffers from certain lacunae which need to be addressed.

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Laws are not the answer to communal prejudice and ideology though they play a significant role in dealing with communal violence. Commissions of inquiry set up after every major conflagration have consistently come down heavily on the State authorities as also certain parties and organisations for their role in this violence.[1] However, it is in very rare cases that the perpetrators have been convicted. By and large the police and the administrative and political class have been left untouched by the law.

In 2004, the Congress while seeking electoral victory had promised to bring a law to deal with communal violence. In 2005, a bill was drafted. This was castigated by civil society because it provided for the act to be applicable only if an area was declared as "disturbed", which leaves too much discretion to politicians. The bill was abandoned.

The present United Progressive Alliance (UPA) government set up the National Advisory Council (NAC) which includes members of civil society.

The NAC drafted the anti-communal violence bill in 2010 and had it whetted by the Additional Solicitor General (ASG).[2] After that it was placed online for public feedback. Civil society held various consultations and innumerable suggestions were made. The Sangh parivar said the bill was anti-Hindu. In June 2011 the NAC made 49 amendments to the earlier draft and submitted it to the ASG where it is now pending.

Need for a Separate Law

Do we need a separate law to deal with communal violence? Isn't non-implementation of the existing law the problem?

Any act of violence is punishable under the Indian Penal Code (IPC) and the ordinary law of the land ought to be sufficient to penalise violence. Apart from individual acts of violence even a conspiracy to commit an offence is punishable. The executive and the police also have ample powers under the IPC as well as the various police acts to prevent mobs from gathering. Under Sections 153A and 153B of the IPC, hate speech against a particular linguistic or religious group is also actionable. Even if a public servant refuses to perform his duties he/she can be charged under the ordinary law, apart from having to face departmental proceedings.

At least a section of communal or targeted violence can be dealt with under the existing criminal law. Failure to implement the law rather than its absence is one of the major problems confronting the prevention of communal violence. It begins with turning a blind eye to communal and targeted hate speech, refusal to register first information reports (FIRS) or registering them without naming the culprits even when some of the perpetrators are identified, refusal to take adequate action to disperse mobs, and includes prolonged and weak trials.

However, there are large areas where the laws are absent or inadequate especially in dealing with targeted and communal violence. Mass violence is a qualitatively different category from stray individual violence. It is the pre-existing prejudice against a community which gets whipped up into hysteria. The violence may be episodic but its impact and trauma are long term and ongoing. Targeted or communal violence has every possibility of recurring.

Second, though laws exist concerning hate speech, they cannot be set into motion without the prior sanction of the government. And experience shows that it rarely matters which party is in power. Just as the Bharatiya Janata Party (BJP) government in Gujarat refused to grant sanction to take newspapers which were spitting venom against Muslims to task, the Congress government acted similarly in the case of Bal Thackeray's vitriolic attacks against Muslims in Maharashtra.

Third, even to prosecute public servants it becomes necessary to obtain the consent of the State which is a long, tedious process and, in most cases, an unlikely proposition.

Fourth, a large number of these carnages take place with the connivance of the police, the bureaucracy and the political class. However, the law of conspiracy under the IPC is such that a heavy burden is cast to prove "meeting of minds" on the part of the conspirators and which becomes virtually impossible to prove. There is no criminal law of command responsibility and vicarious liability in India.

Fifth, a large number of cases in court collapse because witnesses are too frightened to depose truthfully. Though an individual witness can ask for police protection against threats there is no comprehensive witness protection law in India.

Sixth, while in the aftermath of every carnage, a relief and rehabilitation package is announced, there is no uniformity in these packages. They do not deal with reparations and the machinery to identify the damage and pay the compensation is almost non-existent. There is no legislative mandate or compulsion for reparation including relief and rehabilitation.

Besides, history shows that communal and targeted violence is a specific form of brutality which is required to be dealt with in a holistic and comprehensive manner since it includes within it elements of hate propaganda, sexual assault, uprooting of communities, societal bias, state complicity and judicial indifference.

A law which deals specifically with targeted or communal violence thus becomes necessary.

The Draft Law

The present bill with the recent amendments is a dramatic qualitative improvement on the earlier effort of 2005 though it still falls short in a number of areas. It is aimed at preventing and redressing communal and targeted violence against members of a religious, linguistic, caste based or other group similarly situated. Apart from treating some of the offences under the IPC as crimes under this law, the bill also creates certain additional offences like torture, command responsibility, etc. There are measures to prevent communal violence through control of hate speech and which require the police to take adequate action to disperse assemblies of people. Special public prosecutors are to be appointed; witness protection provisions are incorporated. There is an accountability framework set up concerning the police, which includes accountability for irregularities in filing FIRs, torture, dereliction of duties, etc. National and state level bodies are to be set up broadly in line with national and state human rights commissions having the power to enquire into various issues and make recommendations to the governments. Finally, the bill details the provisions of relief and rehabilitation.

The underlying principle is that certain minorities are institutionally and structurally disadvantaged and therefore need protection through a separate law. It thus applies to those groups – religious, linguistic, etc, which are minorities within a state. For instance, it would not apply to Hindus in Gujarat but would apply to Hindus in Jammu and Kashmir. This is one of the most debated clauses of the act. The argument being that it will generate fissiparous tendencies and also that it assumes that the majority community is communal and that it is never the target of group violence.

But this argument misses the point, deliberately or otherwise. Every democracy is premised on the underlying assumption that the majority can take care of itself while the minorities need special protection. This is true of the blacks in the US, the Hindus in Bangladesh and the aborigines in Australia. It is on this basis that special laws are enacted even in our country to protect women, dalits, tribals, etc. Article 30 of the Constitution gives specific rights to minorities to set up their own educational institutions. Article 29 provides that any section of citizens residing in the territory of India has a right to conserve its language, script and culture. Article 15 which deals with prohibition of discrimination makes an exception providing that nothing in the article shall prevent the State from making special provisions for women and children and for advancement of socially and educationally backward classes or for the scheduled castes or tribes.

The assumption behind the present bill is not that the majority community is communal but that there is an institutional and structural bias against the minority communities which plays out sharply especially during riots. Our experience since independence shows this. Enquiry reports of many communal riots or many of the civil society fact-finding reports have revealed this bias. The victims of the Godhra carnage can take solace in the fact that those who allegedly burnt the train have all been behind bars for nearly a decade and that the entire government machinery was mobilised in their support. It did not require prodding by the National Human Rights Commission or sanctions by the Supreme Court to arrest Muslims. The victims of the post-Godhra carnage have no such comfort. The main perpetrators are still in power, those who tried to support the minority community have been victimised, and no action has been taken against those who spewed hate. The members of the majority community were not displaced from their neighbourhoods while a large number of members of the minority community are not permitted to go back to their villages or are permitted to do so only under humiliating conditions, even after 10 years.

This is not to suggest that the new law will allow the Godhra perpetrators to get away. With or without the new law, they would still be in jail. Amongst the innumerable reports and studies there is not one which suggests an institutional bias against the majority community, unless one is talking about institutional bias against the Muslims in Kashmir or against many of the minorities in the north-east.

Communal and Targeted Violence

The bill deals not just with communal violence but also with "targeted violence". The definition as it originally stood defined communal and targeted violence as any injury caused to any person by virtue of his or her membership of any group, which destroys the secular fabric of the country. A large section of civil society had objected to this definition arguing that it may well neigh be impossible to prove that the secular fabric of the country is being destroyed. Even in cases such as that of Gujarat the destruction of the secular fabric of India might be a difficult argument to sustain. Fortunately, the NAC has now accepted this reasoning and one of its recent amendments does away with this requirement. All the offences notified under Sections 7 to 12 of the bill

are treated as offences of communal and targeted violence.

Section 7 makes sexual assault an independent offence. Apart from rape, gang rape and mass rape which specifically target women, the section also penalises various sexual acts committed on either men or women. Besides including the traditional offences it also encompasses sexist contact of any sort, removing a person's clothes or any other conduct that subjects a person to sexual indignity. Civil society members demanded that some specific procedures and evidentiary standards for sexual assault perpetrated in context of communal and targeted violence need to be introduced. It was demanded that judicial cognisance should be taken of the coercive circumstances under which the crime (sexual assault) has occurred, and accordingly delays in reporting it, absence of medical evidence or lack of corroboration of the victim's testimony should not adversely affect the case. This is one of the amendments agreed to by the NAC though the details are yet to be articulated.

Section 8 deals with hate propaganda as an independent offence while Section 10 makes financially aiding or abetting communal violence an offence. Section 11 provides that certain listed offences under the IPC (like offences pertaining to hurting religious feelings, rioting, murder, etc) when committed against a person or a group by virtue of his or her membership of a group, shall be treated as offence of communal and targeted violence. Torture by a public servant of any person because of his or her belonging to a group is treated as a separate offence under Section 12.

Civil society groups had demanded that the definition of torture should be more comprehensive as provided under the Rajya Sabha Select Committee recommendation in respect of the Prevention of Torture Bill. This demand has been acceded under the amendments. One of the complaints of civil society has been that disappearances as an offence has not been included despite India being a signatory to the Convention against Enforced and Involuntary Disappearances. In the amendments, the NAC has asked the ASG to rectify this.

Section 9 deals with "organised communal and targeted violence". It is important to realise that offences such as torture, sexual assault, as well as many offences under the IPC which are defined as offences under this bill can be invoked even if a single individual is a targeted subject on the condition that such earmarking has been done due to her belonging to a particular "group". These are not confined to riot situations. On the other hand Section 9 deals with a mass crime situation. In order to be covered under the provisions of this section, a one-off act of violence or threat is not enough. If an individual or collective engages in continuing unlawful activity of a widespread or systematic nature directed against a community or a section of it by virtue of their membership of that community through violence or threat of violence or intimidation or coercion, they are said to commit the offence of organised communal and targeted violence. Sections 7 to 12 have varying degrees of punishment.

There are separate provisions concerning dereliction of duty including acts of omission and commission by a public servant by which he fails to prevent communal and targeted violence.

One of the most significant provisions pertains to command responsibility. Any public servant in command, control or supervision of armed or security forces who fails to exercise control over his subordinates and which results in offences under this bill committed is guilty of breach of command responsibility. But this is subject to the fact that the public servant knew or ought to have known that his subordinates would commit or are likely to commit such an offence and he failed to take adequate steps to quell it or submit it to the competent authority to investigate or prosecute. Two issues arise. First, whether civil servants (not belonging to the police cadre) are covered under this provision and secondly, whether the political class is covered under it. No doubt, the Supreme Court in the Narasimha Rao case has clarified that MPs and MLAs are also public servants. But whether, for instance, the home secretary or the home minister is treated as a person in "command, control or supervision" of the police force is a moot question.

The section also provides that whenever there is widespread or systematic unlawful activity it is to be presumed that there is a breach of command responsibility. Critics have castigated this section. But looking at the history of riots and the underlying institutional bias, a stringent clause such as this is needed. Similar offence is also created in respect of non-State actors especially in respect of heads and office-bearers of organisations. However, there is no presumption of breach of guilt of command responsibility in case of non-State actors.

Under the pre-amended bill, Section 20 empowered the central government to treat organised communal and targeted violence as an "internal disturbance" under Article 355 with the power to take action accordingly. This was justified as providing an entry point to the central government in the context of a federal structure where law and order is a State subject. It was suggested that instead of relying on the first part of Article 355 which provides for "internal disturbance" it would be better to rely on the latter part of Article 355, "to ensure that the governance of every state is carried on in accordance with the provisions of this Constitution". In the amended draft Section 20 has been scrapped altogether. This raises the question of what, if any, powers the central government has to deal with issues under the Act and what would be the source of such power.

Prosecution of Public Servants

A public servant, while acting in the discharge of his duties can only be prosecuted with the sanction of the government and such sanctions are rarely given. According to this bill, sanction will not be required for certain crimes (such as tampering of evidence, etc) under the new law but it would still be needed in respect of more serious crimes such as murder, rape, etc. If it is not refused within 30 days it will be presumed to have been granted and reasons are required to be furnished for refusing to grant sanction. Two problems arise following this. There is no justification for doing away with sanction for lighter offences while retaining the requirement for more serious ones. Second, if the sanction is refused there is no machinery for remedying the situation. The Supreme Court has consistently held that the judiciary cannot go into the justification behind grant or refusal of sanction and that it can only see if relevant material has been considered. If sanction is going to be a requirement, it is absolutely essential to provide a machinery possibly presided over by a retired high court judge to look into the validity of reasons for rejecting it. No matter what the objective of the law is, while drafting a criminal law of any nature it is important to bear in mind the rights of the accused and to ensure that the drive to protect the victims of crime does not lead the law to become a draconian one. A critique of the bill cosigned by a large number of individuals and organisations (such as Anhad, Usha Ramnathan, Vrinda Grover, Saumya Uma and many others) highlights some of these clauses.

> It is extremely unfortunate that the NAC draft bill draws upon provisions found in draconian laws such as MCOCA and earlier in TADA and POTA, to modify criminal procedure. Illustrative of this is Clause 82, which authorises attachment of property of the accused at the stage of charge, without the usual guidance that such property should be linked to the offence. Again Clause 85, increases the period of detention of the accused and places a heavier burden on the accused for securing bail. Similarly Clause 67, of this Bill gives the state and central government the power to intercept telephonic communication, and censor and control the same. The draft Bill states that "any message or class of messages to or from any person or class of persons or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the government ..." This could well be used to stop messages going out to, or from, victim groups. Why would we want to risk legalising this kind of power? It is regrettable that no lessons seem to have been learnt, that the whittling down of civil liberties in one sphere provides the State with an alibi to erode rights across the board. The very "group" that this bill seeks to protect could well become the target of such excessive measures.

Fortunately, the provision concerning telephone interception and attachment of property unrelated to the crime have been deleted under the recent amendments.

The draft bill provides for witness protection but only during the period of investigation and trial. This is a major drawback because experience has shown that witnesses turn hostile among other reasons because they are not certain of their future safety after the trial is over. The Law Commission of India's 198th report (2006) focuses on victim and witness protection and provides a balance between rights of the accused and protection of witnesses. Many of the provisions of this Law Commission Bill need to be included in the draft bill to give effective long-term protection to witnesses.

There is a separate chapter on relief and rehabilitation which must be seen as a positive step. There is an obligation to set up relief camps, a mandatory duty enjoined on police officers to visit the relief camps, filing of FIRs and recording of statements within the relief camps, provision for compensation for injury, loss of life and property. A duty is cast on the government to rehabilitate victims in a totally different space if they so want. However, there are certain gaping holes. The term reparation has been used loosely while in the international context it is held to include aspects of rescue, relief, compensation, rehabilitation, public apology and guarantee of non-repetition. Besides, as pointed out in the critique of the civil

society this entire chapter is paternalistic rather than rights based.

A large section of the bill looks at setting up national and state-level toothless bodies. Experience says that it is unlikely that these bodies will have any significant impact on communal violence.

To conclude, the amended draft of the Communal and Targeted Violence Bill is a major step forward. However, it needs to incorporate within it lessons learnt from recent international advancement especially in matters pertaining to reparation and command responsibility. The chapters concerning setting up of national and state level bodies need a complete review as do the provisions concerning dereliction of duties and witness protection. It is altogether another matter as to how much of even the existing draft will percolate down to the bill when it is presented in the Parliament.

NOTES

1 1961 Jabalpur riots, the Madon Commission report of Bhiwandi riots in 1970, the report into the Bhagalpur riots of 1989 and the Srikrishna Commission report on Bombay riots of 1992-93.

2 In July 2010 the NAC Working Group on the Communal Violence Bill set up an Advisory Group and Drafting Committee, to prepare a draft legislation on the subject.