

National Advisory Council

EXPLANATORY NOTE

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

Rationale & Key Provisions
July 21, 2011

1. RATIONALE & PURPOSE OF THE BILL

The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 is intended to enhance State accountability and correct discriminatory exercise of State powers in the context of identity-based violence, and to thus restore equal access to the law for Scheduled Castes, Scheduled Tribes, and religious and linguistic minorities. That such acts of violence occur repeatedly is a tragedy for a modern democracy. However, when they do, then it is the Constitutional right of every citizen, no matter how numerically weak or disadvantaged, to expect equal protection from an impartial and just State. Evidence from state records and several of Commissions of Enquiry has confirmed institutional bias and prejudicial functioning of the State administration, law enforcement and criminal justice machinery when a *non-dominant group in the unit of a State*, based either on language or religion, or a member of a Scheduled Caste or Scheduled Tribe, is attacked because of their identity in the unit of that State. This prevents such *non-dominant groups* from getting full and fair protection of the laws of the land or equal access to justice.

The Bill does not seek to give additional powers to the State. This is because the administration already has adequate powers to prevent and control communal and targeted violence when it chooses to do so, and thus it is not considered necessary to further enhance any powers. Communal and targeted violence spreads mainly because the public officials charged with protecting and preventing, either fail to act or act in a biased manner.

Over the past 63 years, the country has often witnessed discriminatory exercise of State power. Several episodes of communal and targeted violence against non-dominant groups provide evidence of abdication of state responsibility, bias and even complicity of local administration, failure to prevent, control, or provide basic relief. This is established by Judicial Commissions of Enquiry reports, and ratified further by fact-finding reports. Such deliberate abdication of public duties, occurs repeatedly in episodes of mass violence including, for instance, in the targeting of Biharis in Maharashtra, Assam and elsewhere, of Sikhs in several states in 1984, of Muslims in Nellie, Bhagalpur, Bhiwandi, Mumbai, and Gujarat, of Tamils in Karnataka, of Christians in Kandhamal, and of Dalits and Tribals in several parts of the country.

Existing laws of the land and the machinery of the State are found to work relatively impartially when targeted identity-based offences are committed against *dominant groups* in a State, but not similarly for non-dominant groups. Every episode of communal and targeted violence has been followed by a political and public call for

measures to equalize this institutional bias; to correct discrimination by the State in applying laws of the land equally for all, including in prevention of violence as well as in unbiased, impartial investigation and prosecution if violence occurs, followed by comprehensive relief, reparation and compensation afterwards. Hence there is a need for the proposed *Prevention of Communal and Targeted Violence Bill, 2011*, to restore equality in the working of the law for non-dominant groups in every state in the Union of India. This Bill will provide correction of institutional bias against groups particularly vulnerable in any State, thus giving all citizens, no matter how small their numbers or where they choose to be domiciled, an equal playing field, in enjoying their full measure of rights as citizens. This is a special provision Bill, for the non-dominant groups, being the linguistic and religious minorities in the unit of the State, and the Dalits and Tribals across the country.

2. KEY PROVISIONS OF THE BILL

- Defining communal & targeted violence: The provisions of this Bill will apply only when it is first established that the offence was 'targeted' in nature i.e. it was knowingly committed against members of a non-dominant group because of their membership of that group, and not for any other reason. Offences under the Indian Penal Code shall be considered offences under this Bill when they meet the definition of 'targeted' above. The Bill also specifically defines '*organized*' communal and targeted violence as mass violence that consists of multiple or mass commission of crimes that is widespread or systematic in nature.
- Dereliction of duty by Public Servants: This Bill recognizes offences of both omission and commission. Often the greatest cause for communal and targeted violence against non-dominant groups occurring, spreading and persisting, is that public officials *do not act*. Public servants who act or omit to exercise authority vested in them under law and thereby fail to protect or prevent offences, breach of public order, or cause an offence, screen any offender, or fail to act as per law, or act with malafide and prejudice shall be guilty of dereliction of duty with penal consequences. This is the heart of the legislation, for such accountability shall serve as a deterrent to biased action.
- Breach of Command Responsibility: 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'. 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 junior officer on the ground whose dereliction is visible. The tendency for accountability to be fixed only at the most powerless levels of the official hierarchy is being prevented through the offence of breach of command responsibility. The chain of command responsibility may extend to any level where effective decisions to act or not act are taken.
- Sanction for prosecution of public servants: This Bill proposes that if there is no response to a request for sanction for prosecution within 30 days from the date of the application to the concerned government, sanction to prosecute will be deemed granted. In relation to certain offences under the Indian Penal Code, 1860, when committed by a public servant, the requirement of obtaining sanction is being dispensed with. This is because these are offences against public justice. Judges

shall be the most competent persons to assess the situation and proceed without sanction when satisfied that public justice has been obstructed.

- Monitoring and Accountability - National Authority for Communal Harmony, Justice & Reparation and State Authorities: This Bill seeks to put in place mechanisms that can make the administrative and criminal justice system work as it should, free from favour or bias or malafide intent. Monitoring and grievance redressal shall be the responsibility of the National Authority for Communal Harmony, Justice and Reparation (NACHJR) and corresponding State Authorities for Communal Harmony, Justice and Reparations (SACHJR). Their mandate is to ensure *that public functionaries act* to prevent and control communal & targeted violence and also that public servants ensure victims have access to justice and reparation when violence occurs. The functions of the NACHJR/SACHJR are to watch, advise, remind, recommend and warn of consequences if public servants fail to act as per law. The NACHJR or the SACHJR do not, in any instance, take over any existing powers of any public official or institution, nor supersede the existing law enforcement machinery. They merely monitor to ensure that the system works impartially.

The NACHJR/SACHJR 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. 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.

The NACHJR and the SACHJR shall monitor the implementation of the law and prevention of communal and targeted violence. Almost all modern legislations enacted in the last 5 years like the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 and the Right to Education Act, 2009 have built-in provisions for monitoring and grievance redressal.

- Bi-partisan selection of members of the National Authority for Communal Harmony, Justice & Reparation (NACHJR): The Bill proposes a bi-partisan Selection Committee for members (including Chairperson) of the NACHJR consisting of the Prime Minister (Chairperson), Leader of the Opposition in the Lower House, Leader of Opposition in the Upper House, Minister for Home Affairs, and the Chairperson of the National Human Rights Commission.
- Composition of the National Authority for Communal Harmony, Justice and Reparation: The Bill proposes a total of 7 members of the NACHJR, of which 4 shall belong to the non-dominant 'group' i.e. 4 members must belong either to a linguistic minority in any State in the Union of India, or to a religious minority in any State in the Union of India, or to SCs or STs. This is expected to ensure that those who have the experience of being a non-dominant group in any State (either by virtue of language or religion), and those historically vulnerable (SCs & STs) bring their experience and understanding of the institutional bias of the State to bear on their role in the NACHJR, and thus provide an effective corrective. Further, no more than 2 members of the NACHJR may be retired public servants.
- Offences of communal and targeted violence: The Indian Penal Code (IPC) contains most offences committed during episodes of communal and targeted violence. These have been appended in a Schedule to this Bill, and shall be considered offences under this Bill when they meet the threshold of being 'knowingly directed against

any person by virtue of membership of a group'. These offences shall attract the same penalties as laid down in the IPC.

Government is currently considering two other forms of violence for inclusion as offences in our statute books, either in the form of amendment bills or new bills. These include brutal forms of **Sexual Assault** (beyond the limited IPC definition of Rape in S. 375) and **Torture**. Both these offences have therefore been included in this Bill. Additionally, this Bill defines an offence of **Hate Propaganda**, because if hate propaganda can be effectively stopped it will enhance the chances of preventing violence.

- Victims Rights: This Bill seeks to strengthen the rights of the victim in the criminal justice system, through certain provisions 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 protection, right to appeal, and the right to file a complaint with the NACHJR/SACHJR if and when they are aggrieved by failure of the system to protect and secure for them justice and reparations. These provisions are based on the documented experience of the denial of basic rights to victims of non-dominant groups in a State. Indian criminal law is based on the assumption that the State is always on the side of the victim, against the accused, and therefore primarily the rights of the accused need to be protected. The State investigates, prosecutes, and also adduces evidence and appeals. The victim has limited rights in this process. The reality of targeted violence against non-dominant groups is that a biased State may in these cases, be on the side of accused and actively hostile to the victim. This Bill seeks to correct this bias.
- Relief and Reparation including Compensation for all affected persons whether or not they belong to a non-dominant 'group': This Bill recognizes that there are no statutory norms and rights for any Indian citizen under present law, for relief, reparation, and compensation. Thus, **all** affected persons, whether or not they belong to non-dominant groups in a State have been given justiciable rights to immediate relief, and comprehensive reparations, including compensation if they suffer any harm as a result of any offence of communal & targeted violence recorded under this Bill.

The Bill casts legal duties on the State to provide rescue, relief, rehabilitation, compensation and restitution, to ensure that all affected persons are restored to a situation better than which prevailed before they were affected by violence. This is based on the experience that some state governments fail to provide even elementary humanitarian services, by refusing to establish relief camps or forcefully disbanding these prematurely. The Bill also recognizes and protects the rights of Internally Displaced Persons, who are temporarily or permanently dislocated because of targeted violence.

- Compensation – a national standard for all 'affected persons': This Bill requires that 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. 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 Rs. 5 lakhs.

- The Federal Principle: This Bill takes care not to violate in any way the federal nature of our polity. The advisories and recommendations of the National Authority for Communal Harmony, Justice and Reparation are not binding on State Governments. Law and order remains entirely with the State Government. All powers and duties of investigation, prosecution, and trial remain with the State Governments.

3. WHO ARE THE NON-DOMINANT GROUPS IN ANY STATE?

- The Bill defines non-dominant 'groups' as *religious or linguistic minorities in any State in the Union of India, and SCs and STs*. Examples of non-dominant groups who have, in recent years, come under attack because of their identity in different States and where the State machinery has acted prejudicially, would include Tamils (as a linguistic minority) in Karnataka, Biharis (as a linguistic minority) in Maharashtra, Sikhs (as a religious minority) in Delhi, Muslims (as a religious minority) in Gujarat, Christians (as a religious minority) in Orissa, and Dalits and Tribals in several places in the country.
- The salient principle is that each of these non-dominant groups in a State may be vulnerable to institutional bias, and thus need special support to restore equality in the way the law works at the local level.
- 'Minority' which refers to both linguistic groups and religious groups, is a shifting category at the level of the States. Thus Biharis, of all religions, constitute a linguistic minority in Maharashtra or in Assam – where they have been vulnerable to attack based on their regional/linguistic identity, but they are dominant in Bihar. Tamil speakers are similarly a linguistic minority in Karnataka, but not in Tamil Nadu. In several states in the Northeast, in Punjab, in the Union territory of Lakshadweep, and in Jammu & Kashmir, Hindus, belonging to any region, are numerically a religious minority. Constitutional arrangements in this regard require that the State of Jammu & Kashmir may suitably domesticate relevant aspects of this legislation, keeping in mind the unique situation prevailing in that State.

4. IS ANY PARTICULAR GROUP THE PERPETRATOR OF COMMUNAL & TARGETED VIOLENCE?

- The Bill does not classify or assume any particular group to be the perpetrator of communal & targeted violence.
- The perpetrator of violence could be any person, belonging to any region, language, caste or religion.
- The Bill is only concerned with ensuring that when the group *under attack* is non-dominant in that State, then the officers of the State machinery must not be allowed to let bias to breach their impartiality or colour the performance of their sworn legal duty.

5. THE CONSTITUTIONAL MANDATE

There exists a clear mandate to legislate on the issue of prevention and control of communal and targeted violence. Positive and rational legislative measures to correct discriminatory exercise of State power draw their strength from the Constitution of India.

- Article 14 states that ‘the State shall not deny to any person equality before the law *or equal protection of the laws* within the territory of India’.
- Article 21 guarantees right to life and personal liberty, thus State is under duty to protect all its citizens from any kind of violence against them.
- Article 15 (1) lays down that ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them’. The Constitution thus recognizes that vulnerable groups, defined in Article 15(1), may require *protection from discrimination by the State*.

The Protection of Women from Domestic Violence Act, 2005 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are examples in the Indian legal system of special legislative provisions for vulnerable groups in response to social reality and experience.

Entry 2A and 97 under List 1 of the seventh schedule empower the Central Government to enact laws for the protection of life and liberty.