

ANNEXURE – 5

Betrayals and Missed Opportunities: The Communal Violence Bill, 2005

A People's Critique of the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005

By ANHAD, HRLN & Jan Vikas

Anti-communal groups, human rights organizations and women's groups have expressed their strong opposition to the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill which the UPA government recently tabled in Parliament. Earlier drafts of this bill were rejected by these citizen groups, but few of their concerns have been addressed in the Bill which was hurriedly tabled in the Rajya Sabha on December 5, 2005. A demand for such a bill had been made in light of an increasing atmosphere of communalisation across the country and particularly in light of the events of Gujarat 2002. On neither front does the Bill deliver.

A people wearied and battered by the politics of hatred that swept the country during almost two preceding decades, have been let down gravely by the Bill recently introduced by the UPA government in the Rajya Sabha. In the deeply troubled times that the nation is passing through, the Bill was awaited with great hope by not just minorities, but by other citizens as well who are intensely concerned about imminent and serious threats mounted to the secular character of our society and polity. The Bill does not respond significantly to the criticisms and fears voiced when its first draft was released a few months ago outside Parliament. The government instead appears bent on diluting, even subverting the spirit of one of its most important commitments on being voted to power. As this Bill is being considered by Parliament, a deep sense of disappointment and anguish prevails.

The basic problem with the Bill is with the foundation of objectives on which its entire edifice is constructed. This foundation of the Bill is so flawed that its architecture cannot be remedied by improvements in specific components. The preamble of the Bill itself states that the Bill aims to 'to empower the State Governments and the Central Government to take measures to provide for the prevention and control of communal violence which threatens the secular fabric, unity, integrity and internal security of the nation and rehabilitation of victims of such violence'. The immediate context for the Bill is the Gujarat massacre of 2002 and its aftermath, but also Nellie in 1983, Delhi in 1984, Bhagalpur in 1989, Mumbai in 1992-93, and a long list of such episodes of national shame and trauma in which democratically elected state administrations were openly partisan and neglectful or even actively participant in the massacre of segments of the populace that followed a different faith from those of the majority of their fellow citizens.

Let us consider by way of illustration Gujarat as the most recent, and the most disgraceful of all of these acts of state abdication and collusion with communal organisations. The state machinery was found by many independent citizen investigators to be gravely complicit in planning and executing the most brutal massacre since Independence of women and children of the minorities. It did little to control the violence for weeks, refused to set up relief camps or to rehabilitate the victims. Almost four years later, many more than half those who lost their homes are unable to return because of continuing fear. The legal process has been subverted.

To legally prevent the recurrence of situations like this is a matter not just of security and restored trust, but actually of life and death for millions of citizens of minority faiths. Its urgency is enhanced by the fact that over the last two decades, political formations with openly communal agendas have directly or through their political proxies, captured political power in many states of the country, and indeed along with a bunch of opportunistic political formations have emerged as the main alternative contenders for power in the central government in the future. The prospect of the infamous Gujarat experiment of a state sponsored terrorising of minority citizens is a realistic imminent fear with which millions of citizens are living in states like Rajasthan, Orissa, Madhya Pradesh, Chatisgarh and Jharkhand. It is for this reason that the Bill pledged in the common minimum programme of the coalition government was so eagerly awaited. But what this law sets out to do is not to protect innocent citizens from future possible acts of criminal communal collusion of their elected rulers, and the civilian and police arms of their administrations. Instead, in its statement of objectives itself, it sets out perversely to vest those same state administrations with even more powers.

Do the framers of the Bill, or the members of the union cabinet who approved its submission to Parliament, genuinely believe that Narendra Modi in 2002, or indeed the administrations of Delhi, Nellie, Bhagalpur or Mumbai when these also burnt in the past in raging communal fires, did not act because they did not have enough powers to do so? Was the failure of disempowered, or of criminally malafide public authority in each of these cases? Even a junior local policeperson or civil administrator has all the powers under the law as it exists, that is needed to quell any communal conflagration. Indeed, no riot can continue beyond even a few hours without the active, wanton, and in my opinion manifestly criminal complicity of state authorities. If this is the case, what purpose is served by a law that sets out as its objective to further 'empower' these same state and central governments?

The core sections of the Bill from Chapter II to Chapter VI, relating to the prevention of communal violence, the investigation of communal crimes and the establishment of special courts will only come into effect if the State government issues a notification. 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. The Act can be invoked only in very extreme circumstances where there

is criminal violence resulting in death or destruction of property and there is danger to the unity or internal security of India. There are many serious communal crimes which may not result in death such as rape. Similarly, social and economic boycotts, forced segregation and discrimination will not fall within the ambit of the statute because they do not result in death or the destruction of property. Even in such extreme circumstances the Act only prescribes that the government 'may' act by issuing a notification. On the face of it, the duty to act is not mandatory.

Chapter III relates to the prevention of communal violence and appears to empower the district magistrate to prevent the breach of peace. The powers of executive magistrates and police-persons delineated here already exist under numerous statutes, such as to requisition the armed forces to control communal violence; to control any assembly or procession; prohibit loudspeakers; confiscate arms, ammunition, explosives and corrosive substances; conduct searches; prohibit displays or 'harangues', or gatherings that may incite communal sentiments; and externment of those who may disturb communal peace. The listing of these powers in the new Bill is at best cosmetic and redundant, as it adds little to what is already legally permissible for these authorities to suppress communal violence. The earlier draft had included new powers, attempting to reintroduce through the backdoor draconian provisions from the repealed POTA and the abused and feared Armed Forces Act. The government was mercifully sensitive to protests that enhanced state powers in communal situations will mainly be misused against minorities, and it withdrew these provisions from its new draft.

For citizens living under the shadow of communally driven (or opportunistic) governments, then, what this Bill offers a listing of powers of the government that mostly already exist, that they *may *use to protect them if they choose to do so. What they needed instead was a law that enhanced the powers of citizens in relation to such governments, and not of the governments in relation to its citizens. They needed a law that did not merely enable their governments to act when communal violence unfolded. They needed a law which made it mandatory for the government to act, in clearly codified ways, before, during and after communal violence, and which made failures of these governments to act, leading often to the avoidable loss of life and property, or sexual violence, criminal acts for which they can be charged, tried and punished. There is virtually nothing in the law that does this; indeed, as observed, this is not even the stated intention of the law. That is why this is not a Bill that can be improved by tinkering with a few of its clauses. Its basic premises are so flawed, that it needs to be rejected in its entirety and replaced by a law of very different objectives, which genuinely protects the human rights and security of citizens in communal contexts and enables them to hold their governments accountable for their acts of omission and commission.

The Bill does contain one clause for punishment of public officials who fail to perform their duties. Section 17 (1) provides for punishment with imprisonment which may extend to one year, or with fine, or with both, for any public servant who '(e)xercises the lawful authority vested in him under this Act in a mala fide manner, which causes or likely to cause harm or injury to any person or property'; or '(w)illfully omits to exercise lawful authority vested in him under this Act and thereby fails to prevent the commission

of any communal violence, breach of public order or disruption in the maintenance of services and supplies essential to the community.' It is explained that offences under this section include willful refusal by any police officer to protect or provide protection to any victim of communal violence; to record any information relating to or to investigate or prosecute the commission of any scheduled offence.

There are however two fatal catches to this otherwise promising segment of the Bill. It neglects to hold accountable the command authority of elected leaders like the chief minister and home minister for these lapses, and at best can result in the mild punishment of some junior policepersons. Even more fatal is the proviso that no court shall take cognizance of an offence under this section except with the previous sanction of the state government. In the context of state governments with communally driven malafide intent, the chances of even police officials being punished under this clause are very remote.

It is well known that hundreds of cases throughout the country are languishing because the state governments have refused to grant sanction for prosecution of public servants. In any case sections 217 to 223 of IPC cover offences by public servants such as the shielding of criminals, preparing false records, making false report in courts, initiating false prosecutions and allowing criminals to escape.

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 or she was unaware of the crimes that were committed on one's beat.

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

Chapter XII which grants immunity to the police and army is particularly insensitive. Various Commissions of Enquiry 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.

There are other problems with the Bill as well. The definition of 'communal violence' is limited to a listing of offences under existing acts, such as the Indian Penal Code, 1860; 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. Given the character of communal violence as it is unfolding in many parts of the country, a much wider definition is needed, not just of violence, but of discrimination and human rights violations on communal grounds.

The act should cover communal crimes such as hate speeches and mobilisation; spreading ill-will and distrust between communities; communal literature and textbooks as well as classroom teaching; forced ghettoisation and expulsion and exclusion from mixed settlements; discrimination in employment, tenancy, admission to educational institutions etc on communal grounds; discrimination on communal grounds by professionals like doctors and lawyers; and so on. Many of these such as hate speeches are addressed by existing laws, but the flaw is the same, that there are no binding duties of the state to act against these. In fact, governments are mostly known to withhold permission to prosecute hate speakers and writers, even when complaints are registered against them by human rights groups. The mandatory duties of the state under this Bill should therefore include prevention of these communal crimes as well, such as prohibiting and punishing (in a purely illustrative list) hate speeches and writings of the kind that Bal Thackeray, Modi and Tagodia routinely indulge in; the pedagogic content and methods used openly in Sangh schools; or refusals to rent a house or employ someone on the grounds of their faith, caste or gender.

The Bill does little to address gender violence, which has become the feature of most communal incidents, where the bodies of women are used as battlefields to establish dubious communal male superiority. Incidents like Gujarat in 2002 alert us to the need for a much wider definition of sexual violence (generally, but also specifically in the communal context) to include acts like stripping before women or stripping them, insertion of objects, piercing, sexual taunts etc, and should not require evidence of actual penetration of the kind required under rape laws. The Bill needs to change rules of evidence to shift the burden of proof to the accused, rather than place it on the women survivors. It needs to protect the dignity and confidentiality of the survivors of violence at all stages, from recording of complaints and statements, to investigation and trial. There should be mandatory services of counselling and medical attention to the survivors.

An unresolved controversy relates to whether the powers of the central government should be extended in the event of a state government failing to perform its legal and moral duties in expeditiously and impartially controlling large-scale outbreaks of communal violence. This would be important if the central government is comprised of parties and coalitions of different political persuasion from those of the state government. The Bill remains conservative in this, and section 55 requires the Central Government, in cases where it is of the opinion that 'there is an imminent threat to the secular fabric, unity, integrity or internal security of India which requires that immediate steps' to 'draw the attention of the State Government to the prevailing situation'; and to direct it 'to take all immediate measures to suppress' the violence. If the state government fails to act, the Bill provides first for the central government to declare any area within a State as 'communally disturbed area' under this Bill; but this is not significant because, as we observed, such declaration does not require mandatory actions by the state government to

control the violence. The Bill also provides for central 'deployment of armed forces, to prevent and control communal violence', which would have been very significant, but the provision is neutralised by the requirement that this central deployment is legally permissible only in the event of 'a request having been received from the State Government to do so'. In other words, only the state government still retains the power to decide about the deployment of armed forces to control communal violence. Once more the Bill elaborately ensures that nothing changes in the prevailing legal position, although it is made to appear superficially that it does.

The Bill takes some halting steps to fill one major gap that exists in the law at present. There is no law that defines the rights of survivors of communal violence to rescue, relief and rehabilitation. The Bill once again provides no protection against a government like that of Modi, who refused for the first time in a major communal conflict after Independence, to even set up relief camps, announced no rehabilitation package, and has yet to take steps to secure the return of more than half the survivors who fled or lost their homes in the carnage of 2002. There is no defence against the contempt displayed by Modi against a segment of his own citizens when he was asked why he did not set up relief camps. He is reported to have replied, 'I refuse to set up baby-producing factories'.

Instead Chapter VII deals with relief and rehabilitation in a largely ceremonial manner. It calls for the setting up of national, state and district level 'Communal Disturbance Relief and Rehabilitation Councils' but nowhere in the Statute does the right of the victim to relief, compensation and rehabilitation emerge *as* *a right *according to an acceptable international standards. 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 the right of the victim to be provided immediate relief according to well established norms? All this is sadly missing in the Bill.

Chapter IX deals with the funds for relief and rehabilitation and once again the shallowness of the central government stands exposed. The financial memorandum to the Bill which is supposed to indicate the liability of government ends on a dismal note: "As involvement of expenditure depends mainly on the occurrence of communal violence, it is difficult to make an estimate of the expenditure from the Consolidated Fund of India". The entire orientation is in keeping with the approach seen in the rehabilitation of Tsunami victims of getting the NGOs to spend for the entire rehabilitation.

The Bill needs instead to lay down once again legally binding duties of rescue, relief and rehabilitation; the relief camps must meet internationally endorsed standards for refugees; the government must give a subsistence support until it is possible for survivors to return with a sense of security to their homes; and rehabilitation must ensure that people who survive must be restored to a situation better than that in which they were placed before the violence. There must also be special measures prescribes for widows and orphans.

The Bill provides once again on the initiative of the state government, the establishment of special investigation teams and special courts. It lays down time limits for investigation of communal crimes of three months, beyond which the cases will be reviewed by senior police officials. The only qualification it lays down for public prosecutors is seven years of service, but there is no impartial process of selection, and no bar to those with known partisan links hostile to the interests of the victims. (It is established before the Supreme Court that many public prosecutors were members of Sangh organisations in Gujarat, therefore instead of prosecuting the accused, they openly acted as their defence.) The law needed to go much further in defending the rights of the victims, and the role that their lawyers could play if the prosecution is partisan. There is also the arguable provision for enhanced punishment of those convicted of communal crimes, but the conventional wisdom remains that the certainty of punishment is a much greater deterrence than its severity.

The Bill contains some provisions for witness protection under section 32, which provides that for keeping the identity and address of the witness secret. These measures include '(a) the holding of the proceedings at a protected place; (b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public; and (c) the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed.'

These measures are welcome but hardly go far enough. The witness protection under Section 32 has been drafted without application of mind as to the Law Commission's recommendations. The main aspects of modern day witness protection which shields the witness from the accused, compensates her for the trauma of the crime and the trial and creates new identities and a new life for the witness is totally missing. Genuine witness protection includes a substantial financial obligation of the state to take care of the witness and her family in secrecy, often for the rest of their lives.

No law by itself can defend people against injustice. People need to be mobilised and organised to secure their rights. But laws can be vital democratic instruments by which people can resist and shield themselves against injustice, particularly when the governments they elect defy their moral and constitutional duties by failing to secure them against communal mobilisation and crimes. The law that Parliament is considering is critical for the defence not just of the lives and properties of minorities, but of their equal rights and protection under the law, and indeed the secular character of the polity. Let our law-makers not miss this critical moment in our history to allow mounting and endemic state injustice in communal situations to persist unchallenged.

ANNEXURE – 6

CRITIQUE OF THE CV BILL, 2005

HON'LE CHIEF JUSTICE AHMADI OF THE SUPREME COURT OF INDIA [RETIRED]

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Comments on the Communal Violence (Prevention, Control, And Rehabilitation of the Victims) Bill, 2005, (Bill no.cvx of 2005), hereinafter called the 'Revised Bill'.

Recently THE COMMUNAL VIOLENCE (PREVENTION, CONTROL, AND REHABILITATION OF THE VICTIMS) BILL, 2005, (bill no.cvx of 2005), hereinafter called the 'revised bill' came to be introduced in the Rajya Sabha generating lots of hope. At the first blush it is indeed good news for all who have been fighting against the evil of communal violence, which erupts in our country at regular intervals. At the same time care must be taken to ensure that it is not viewed as lip sympathy and does not turn out to be a mere paper tiger or a remedy worse than a disease, least a well intentioned piece of legislation does not get a bad name.

1. Earlier the home ministry had circulated the communal violence/prevention bill of 2005. That bill provoked wide-ranging debate and discussion. The following concerns emerged:

Legislative competence of the parliament to enact laws in the form and substance of the bill was doubted.

The common criticism was that the communal riots were not prevented and/or controlled, not because there was any want of powering the state government to do so, but because the concerned state government either conned or adapted a partisan stance or lacked the will to act and also because a cover of immunity was provided to the state administration and its officers, particularly the police, from any legal actions for their acts of commission and omission on the pretext that they were done "bonfide". It was therefore felt that the provisions will ultimately end up a toothless tiger. There was nothing in the act that would deter the local administration/ police, etc from taking a partisan stand.

The bill provided for more stringent punishment for scheduled offences. The criticism was that since there was no political will in the establishment to prosecute offenders under the existing laws for dereliction of duties, making punishment for such offences more stringent would become counter productive, in that, it is well known that harsher laws result in lesser convictions and do not help to cure the malady of Communal Violence.

It is generally noticed that whenever Communal Violence erupts in any part of the country, the issue is immediately politicized and the parties in power are reluctant to exercise state powers to prevent / control communal violence.

Since the exercise of such powers to declare an area as “Communally Disturbed Area” will normally be left to the state government, it will depend on political equations between Center and State at a given point of time. If the same political party rules the Center and the State, then both will naturally have an inclination to avoid “political embarrassment”; both will be reluctant to exercise such powers. In the event the Centre and the State are governed by different political parties then again the exercise of powers by the Centre will immediately attract allegations of political motivations. In such situation the absolute power vested in Para military/ military forces can pose the danger of being abused, e.g. In Assam, Manipur, Nagaland and Kashmir. Therefore it is very necessary that the bill must contain the provision for accountability for non-exercise/malafide exercise of powers to declare an area as a community disturbed area. For want of accountability the entire exercise appeared to be an exercise in futility lacking concern for violation of Human Rights.

2. Now the home ministry has introduced an official bill captioned “ The Communal Violence Prevention, Control, And Rehabilitation Of Victims Bill, 2005” i.e. the Revised Bill. Let me at the end out-set address the issue concerning the legislative competence. Since the Revised Bill covers the area concerning criminal law, legislative competence can be traced to Entries 1 and 2 of list III in the VII Schedule of the Constitution of India, which read:

1- Criminal law, including all matters included in the Indian penal code at the commencement of the constitution but excluding offences against laws with respect to any of the matters specified in list I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2- Criminal procedure including all matters, included in the code of criminal procedure at the commencement of this Constitution.

It is obvious, on a plain reading of these entries, that the amplitude of the expression ‘criminal law’ is wide since it is followed by the inclusive words covering all matters falling within the IPC save and except that which is expressly exempted. The inclusive nature of the expression enlarges the amplitude of the said expression. It is therefore clear that the parliament can make laws, which are penal in nature and prescribe the procedure in respect thereof to bring in a social reform with a view to prevent the scourge of communal violence. Parliament can create new offences and prescribe punishments in respect thereof or enhance the punishments for the offences in the IPC existing at the commencement of the Constitution. Therefore, “Criminal Law” means “the criminal law in its widest sense.”¹Entry 46v in List III also provides for conferment of “*jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in the List*” which I propose to discuss separately since a similar entry is to be found in the other two lists as well.

¹ Propriety Articles Trade Asson and others Vs. Attorney General of Canada AIR 1931 Privy Council 94(99)

- 2.1 Entry I in List II of schedule VII relates to “Public Order”; the further inclusive part is not relevant for the discussion. This expression is of wide import and would include public peace, safety and tranquility within a State. The federal court while dealing with the expression “public order” in Entry I, List II, Schedule VII of G.I. Act, 1935 held that the said expression was wide enough to include public safety or interest.² Again while interpreting the same expression ‘public order’, the Federal Court held that it was almost comprehensive term and observed: *Maintenance of public order within the province is primarily the concern of that province and.....the Provisional Legislature is given the plenary authority to legislate on all matters which relate to or [are] necessary for maintenance of public order.*³ While dealing with the scope and ambit of the said expression in Entry I, List II, the Supreme Court observed: *public order is an expression of wide connotation and signifies that state of tranquility prevailing among its members of a political society as a result of the internal regulations enforced by the government which they have instituted.*⁴ Next I turn to Entry II in the state list, which concerns ‘Police (including railway and village police) subject to the provisions of entry 2A of List I’. Entry 2A refers to the deployment of the armed force of the Union or any other force subject to the control of the Union.....in any State in aid of civil power, etc. Although ‘police’ is within the control of the state government, the Police Act, 1861 being a ‘law in force’ before the commencement of the constitution, is still a valid law, vide Article 372. Therefore the police will be within the exclusive control of the State Government. Section 2 of the said Act empowers the State Government to constitute a police force and Section 3 places the police force under the State Government. That being so, the question for consideration is whether the provisions for the revised bill trench upon Entries 1 and 2 of the State List, and if so, to what extent, and with what consequences.
- 2.2 Entry 46 in list III also provides for the conferment of “*jurisdiction and power of all courts, except the Supreme Court, with respect to any of the matters in the List.*” Verbatim, similar power is conferred by Entry 65 of List II on the State Legislature. Again, Entry 95 in List I confer similar powers on parliament to legislate on the question of conferment of jurisdiction and powers to all courts, except the Supreme Court. It therefore appears that the constitution by using the same phraseology applicable generally has qualified the power by the words, “with respect to any of the matters in the list’, thereby confining the scope of entry in each list to the matters within the concerned list. It would therefore be exclusively within the legislative competence of the concerned state not only to establish courts for the administration of justice but also to confer jurisdiction on them to hear cases which concern offences under the Revised Bill related to Entry I in List II i.e. concerning ‘public order’. It can therefore be seen that the power conferred by Entry 95, List I

² Emperor V Sibnath Banerjee AIR 1943 FC 75 at 83

³ Lakhi Narayan Das V State of Bihar AIR 1950 FC 59 at 63(para 12)

⁴ Romesh Thappar V State of Madras AIR 1950 SC 124 at 127(para 7)

and Entry 46, List III cannot derogate from the exclusive power of the state under Entry I List II in relation to the public order. This being the position emanating from the interplay of these entries in the three lists, I am afraid on the ground level the reigns to enforce the provisions of the Revised Bill would remain in the hands of the State Government. Apart from potential of such powers being misused against the targeted group, they could become an added weapon of oppression /harassment in the hands of the prejudiced or biased administration... And the Government at the Centre also chooses to turn a Nelson's eye, as happened in the case of Gujarat, there is the further possibility of the harsh provisions being selectively used against the targeted groups.

3. Introduction of the Revised Bill in The Rajya Sabha undoubtedly manifests the UPA Government's concern to prevent and suppress communal violence, which notoriously occurs at intervals. It is in consonance with its common minimum programme. But, apart from the question of competence discussed above, the Revised Bill has several shortcomings. It is therefore necessary to briefly enlist them here under as follows:

- **Commencement of the Act:**

- **Section I Sub-Section (4)**

- The provisions of the Revised Bill, except chapters II to VI, can be brought into force in the States by the Central Government whereas insofar as Chapters II to VI are concerned, they can be brought into force only by the State Government on dates it may determine. Thus important provisions relating to the declaration of the disturbed area, prevention of acts leading to communal violence, enhanced punishments, investigation and special courts, all fall within the State Government's discretion.

- Therefore on passing of the Revised Bill by the parliament, none of the provisions will come into force as the application of its commencement will depend on the sweet will of the Central Government/ State Government. Assuming the present Central Government brings it into force at once and the State Government does not bring into Chapters II to VI into force, the law will be ineffective. If the party in power at the Center as well as the State is the same and does not invoke the provisions of the statute, nothing can be done about the same. One cannot forget the experience of the 2002 Gujarat Riots.

- India is a secular country. Every section of the population, particularly the minorities and the dalits are entitled to State protection in so far as their safety and security is concerned. That in fact is the hall-mark of good governance. Since the UPA Government has promised good governance, it is the duty to enact an effective and efficacious legislation, which can act as a strong instrument to prevent/suppress communal violence and not merely 'a teasing illusion, a toothless tiger'.

- The Revised Bill under clause 4(2) again leaves it to the discretion of the State Government to decide whether it needs the assistance of the Central Government to quell the violence through deployment of armed forces. Once again experience has shown that State Governments have been reluctant to seek such help lest it may be viewed as its failure. Even when

the armed forces are sent, they are not deployed but used for limited purposes, such as flag march and the like.

It is no use pointing out such other provisions in the Revised Bill. Such provisions can render the legislation a mere paper tiger and can become a laughing stock if the State Government chooses not to act under the said law or to misuse it. **Would it not be more advantageous to strengthen the provisions of the Protection of Human Rights Act, 1993 and arm the National Human Rights Commission by incorporating appropriate provisions in the Act? In my opinion that would give the Central Government greater power and leeway to act in situations that demand its intervention if it finds that the State Government is not acting or is ineffective.**

- 3.1 The maintenance of law and order is the primary responsibility of the State. When there is complete break down of law and order, and complete disturbance of Public order and breach of Public peace and tranquility, the law must hold the State *per se* responsible for such a situation and visit the State and its diverse agencies/ instrumentalities with penalty and other civil and criminal consequences. It is common experience, as is evident from diverse reports of the Commission of Enquiry set up after communal violence in various parts of country, (often headed by sitting or retired justices of High Courts or the Supreme Court) that of active complicity or sheer connivance or negligence of State actors. In short, the provisions of Revised bill do not remedy this basic malaise. **It is but necessary that some provisions should be made for effective intervention of the Central Government if the State Government fails to control and quell the riot victim, say within 24 hours of its occurrence. Such a provision will compel the State Government to act effectively for fear of Central intervention. That is possible through the Protection of Human Rights Act, 1993.**
- 3.2 Then in the event of Communal riot, the concerned authorities should be made answerable/ accountable for non-existence of powers for preventing, controlling and quelling the riots. Unless they are held responsible for their acts of omission and commission, they will continue to behave in the same way with impunity.
- 3.3 The Revised Bill repeats the provisions relating to the stringent punishment for scheduled offences but ignores the criticism that since there was no political will in the establishment to punish offenders under the existing law, by merely enhancing punishment, without strengthening the law accountability and responsibility, the law will become counter productive. **What is important is that provisions relating to discipline, responsibility and accountability of the State and its officials should be strengthened.**

- 3.4 As regards the use of force by Police or Military/Paramilitary force to prevent or contain communal riots, the past experience has shown that such powers have often been used by such authorities against the targeted minorities and other marginalized sections of the people, like Dalits. There is no adequate provision to make the police or other paramilitary forces accountable/answerable for excessive/ malafide/ biased/ partisan use of force. Thus there is no remedy even if there us complete neglect and violation of Human Rights.
- 3.5 Clause 5 of the Revised Bill under Chapter III invests District Magistrate with the powers to take preventive measures when there is an apprehension of breach of peace or creation of discord between members of different groups. He may, by order in writing, prohibit any act which in his opinion is likely to cause apprehension in the minds of members of another community or caste or group that it is targeted, intimidated, threatened or ill will promoted against that community or caste or group. The power conferred upon the District Magistrate under the clause, if properly exercised, may go a long way in defusing build up of communal tensions in the area, which normally precedes a communal riot. By rules the indicia of failure should be prescribed so that action can be taken against the incumbent. **But there is no such provision in the Bill providing for consequences for failing to obey or for defying such order. This defect should be remedied.**
- 3.6 Clause 17 of the Revised Bill is quite important. It makes any public servant who exercises the lawful authority vested in him under the act in a malafide manner or willfully omits to exercise such authority vested under the Act and thereby fails to prevent the commission of any communal violence etc., with punishment up to three or with fine or with both. However, no court can take cognizance of offence under the section except with previous sanction from the State Government. The State Government is required to dispose of every request for grant of sanction within 30 days from the date of the request. **This is indeed a wholesome provision** but what if it does not? I think it should further be provided that failure to dispose of the request within the said period shall be deemed to the request having been granted.
- 3.7 Further, what is the remedy to riot victims against the State Government or Central Government for not declaring an area as communally disturbed area despite there being factual justification for making such declaration? Such eventuality would render the major provisions of the Act inoperative. Therefore, the concerned Government must be made accountable/ answerable for the inaction on its part; otherwise the whole exercise of enacting the proposed law may prove to be an exercise in futility. Also there is no provision or the power to curb it being used selectively against the target group.
- 3.8 Clauses 22 and 23 of the revised Bill provide for constitution of Review Committee by the State Government to be headed by an Officer of the level of Inspector General of Police. There is no mention about the size of the Review Committee and the qualifications of its members. The Review Committee and

qualifications of its members. The Review Committee is empowered to order fresh investigation in a case where charge sheet is not filed within three months from the date of registration of the FIR or even in cases where the trial ends in acquittal. It provides for submitting a report to the DGP. If the FIR is against the local police or the grievance is that the local police or official guilty of acts of commission or omission, the victim group will not have confidence in the Review Committee should be headed by local police even of the level of IGP. **Therefore, either the Review Committee should be headed by a Judicial Officer of sufficient experience or the scheme of the clause should be that upon request from the State the Central Government shall place the services of an IPS officer to Chair the Review Committee. That would leave the option with the State and thus raise no issue as to legislative competence and at the same time put pressure on the State to make the request.**

3.9 Chapter IX of the Revised Bill contains clauses 40 to 52, which provide for establishing at the State and District level Funds for Relief and Rehabilitation. There is criticism about the constitution of Relief and Rehabilitation Council as per the provision in the Revised Bill. The effectiveness of such Councils is doubted, as Government nominees do not take sufficient interest in relief and rehabilitation work due to their other preoccupations. **It is suggested that this task should be entrusted to an independent agency, like the State Human Right Commission, to ensure speedy relief and rehabilitation.**

3.10 Clause 53 of Chapter X of Revised Bill provides that the Special Court may pass an order directing the offender to make such monetary compensation as may be specified for compensating the riot victim(s) mentioned in sub clauses (5). This is an illusory relief, as it is well known that those involved in rioting are generally hired lumped elements who have no capacity to pay. **Such a provision a provision would turn out to be a cruel joke and needs to be scraped. Besides, past experience shows that very few individuals are prosecuted and fewer convicted of offences committed during communal riots. The main lacuna in proposed law is that it does not target those people or organization who/ that actually conspired and planned the riots even when named by a Judicial Commission. Unless and until we have some effective legislation which holds responsible such individuals and/or organizations, be they political, social, cultural, community- based or the like, for providing compensation to the riot victims, the objective of preventing recurrence of communal riots will not be achieved. The Bill lacks such a provision.**

3.11 Secondly, at present compensation is paid in adhoc basis depending on who announces it. There is no uniformity whatsoever. Courts also determine the compensation on unscientific basis. It is always proverbial chancellor's foot premises. There is a need for rationalizing basis so that there are no allegations of favoritism or bias/prejudice. **An independent body needs to be created to determine the compensation.**

4 NATIONAL COUNCIL:

4.1 Chapter VIII contemplates the formation of a National Communal Disturbance Relief and Rehabilitation Council comprising not more than 11 members. The members of the National Council will be three acting bureaucrats and eight government Nominees, four representing Minority and weaker sections of the society and another four representing other sections of the society striving to maintain communal harmony, vide clause 45. Its role is merely advisory. It has to submit its report periodically to the Central Government.

4.2 Secondly, clause 38 and 39 posit that the State Government shall establish a State Communal Disturbance Relief and Rehabilitation Council comprising seven bureaucrats and eight Government nominees; three to represent individuals or private voluntary organizations working to promote communal harmony and relief to victims of communal violence and another five so as to represent all important religious groups. It becomes evident that the State council would be dominated by personnel serving under the State Government and its nominees. Its functions inter alia are recommendatory or advisory. **It is unfortunate that such an important body whose functions include advising the State Government in matters concerning relief and rehabilitation, interim compensation for loss of life and property, impact of sexual assaults, setting up relief camps/shelters and making arrangements for security, food, water, sanitation, etc., should be loaded with Government officials and its chosen nominees.**

5. **A few Suggestions: -**

(A) From the public debates and discussions some constructive suggestions have also emerged which are as under: -

- (i) **To seize this opportunity and treat the communal riots on par with Genocide as per the provisions of Genocide Convention of 1948 to which India acceded in 1949**
- (ii) **In this connection it is useful to refer to the treatment meted out to the subject of genocide by Ireland, Germany etc. THE legislations drafted by some countries (as available on internet) are annexed herein.**
- (iii) **It is high time that the occurrence of communal violence within jurisdictional area of any police station disrupting the ordinary tempo of life therein should be ground enough to apply the doctrine of *res ipsa loquiter* and the dereliction of duty by such officers should be declared as criminal offence for which all the higher police officials of the area could be charged criminally. In addition to that the police manuals / conditions of service of police be suitably amended to provide that happening of any such event within jurisdictional area of any police/ administrative officers whose duty is to maintain public tranquility and avoidance of public disorder be made the grounds for disciplinary action for departmental**

s\disciplinary proceedings of *res ipsa loquiter* should be applied against the errant public servants.

- (iv) **The bill should be amended to introduce the vicarious criminal responsibility in the matter of abuse of powers by inferior / subordinate officers and concept of command responsibility be enacted to rope in the administrative and police officers of higher echelon including their political masters being the minister in charge of portfolios relating to maintenance of public order / tranquility and safety of public and private property. In short, the failure of a Policeman, Bureaucrats or Minister to take all the necessary and reasonable measures within his/her power to prevent/repress the commission of mass violence must render individual concerned liable for prosecution and exemplary punishment.**

- (B) It is necessary to define what is dereliction of duty by a public servant or the State or the State instrumentality? The concept of dereliction of duty must be unambiguously set out in the proposed Bill.**

(C) An independent and impartial Enquiry Commission and State Security cum Administration Commission should be set up to examine the cases of dereliction of duties by the State or State instrumentalities of public servants in the matter of preventing or containing / controlling the communal riots and such Enquiry Commission should be invested with adequate powers to investigate into complaints of dereliction of duties by the State / State machineries/instrumentalities public servants and the State should make available investigating agencies to such Commission.

- (D) The proposed Bill must incorporate the concept of State responsibility to compensate riot victims. It should not be left merely to the offenders to compensate riot victims. The responsibilities to compensate riot victims of communal violence is recognized in several foreign jurisdictions like New Zealand in 1963, Britain in 1964 and subsequently Canada, Northern Ireland, USA and Australia also enacted laws to compensate riot victims. The American Jurisprudence, 11th Edition – Vol 54 has the following passage: -**

“In many jurisdictions, Municipal Corporations are made liable by statute for injury to persons or property resulting from the acts of mob. Those statutes are in recognition of public duty entrusted by the State to the Municipality and other such division to preserve peace and order and to protect lives and property.”

The 6th Report (1981) of the National Police Commission also observed; “it is the duty of the administration to compensate to those unfortunate (sufferers of communal riots) for the loss and sufferings by them and to assist them in their rehabilitation.”

This opportunity must be seized to implement recommendations made by the National human Rights Commission in its various Reports submitted to the Government.

In the end I would once again emphasize that in order to overcome the issue in regard to legislative competence, the basis of law should be the (i) the Universal Declaration of Human Rights (ii) International Covenant on Civil and Political Rights (iii) International Covenant on Economic, Social and Cultural Rights and (iv) Genocide Convention of 1948 to which India acceded in 1949. The first three are included in the definition of ‘human rights’ under the Protection of Human Rights Act, 1993. Just as this law could be made by parliament by virtue of Article 253 read with Article 51 (c) and Entries 10 to 14 of List I in the VII Schedule of the Constitution, so also the provisions of this Revised Bill could be further revised to make them conform to the said international covenants and conventions to fall within the competence of Parliament. It is essential that the Union Government should have the power to effectively control situations such as the one that arose in post- Godhra riots in Gujarat.