National Human Rights Commission

The comments of the NHRC have been sought on the "**Prevention of Communal Violence (Access to Justice and Reparations) Bill**, 2013".

2. In the Commission's view, a new law is needed to protect or promote human rights when:

i) practices that were permissible within the law, or tolerated by society, are proscribed, and a new category of crime defined, as with the *Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act*;

ii) it is essential to spell out the elements of a crime, to distinguish it from cognate practices that are legal and do not violate rights, as with the *Bonded Labour System (Abolition) Act* and the *Child Labour (Prohibition and Regulation) Act*;

iii) the widespread prevalence of a particularly egregious violation of rights, despite the fact that it is an offense under existing law, makes it necessary to highlight it by codifying it in a separate Act, as with the *Protection of Children from Sexual Offences Act*, enacted after the "*National Study on Child Abuse*" of the Ministry of Women and Child Development reported that 53% of the children interviewed had suffered one or more forms of sexual abuse ;

iv) a separate law is a prerequisite for the ratification of an international treaty, which would reaffirm a national commitment to accepted norms of human rights; this was the imperative behind the *Prevention of Torture Bill*, which unfortunately still has not been enacted;

v) when fresh categories of rights are being created, for which a a legal framework is necessary, as with the *Persons with Disabilities Act*.

3. From the volume of complaints that the Commission continues to receive, these laws were essential but much remains to be done to change social practice and the behaviour of public servants. Continued attention is essential to ensure that these, and other, laws, enacted to protect the most vulnerable strata of Indian society, are truly implemented.

4. Against this background, the Commission wishes to point out that while the number of complaints to it of violations of rights has gone up every year, and presently runs at over a lakh annually, it has received only a handful over the last five years on either organised communal violence or the negligence of public servants in preventing an outbreak. While the impact of such violence is devastating for the victims, and places strains on the social fabric, the table below will establish that the practice is not becoming more prevalent, and the number of incidents and attendant complaints has remained at roughly the same level each year, as a minuscule percentage of the complaints received in the NHRC:

Year	Total complaints to NHRC	Complaints on riots	Riots as a percentage of overall complaints
2009	84104	23	0.027
2010	84312	17	0.02
2011	93702	17	0.018
2012	101010	25	0.024
2013 (to Nov 30)	91915	18	0.02

5. The Commission draws attention to this because it finds that the Bill places a wide range of responsibilities upon it. While some of these are part of its ongoing mandate, others would involve radical changes in the role envisaged for it by the Protection of Human Rights Act.

6. The Commission promotes human rights through the measures spelt out in Section 12 (d) to (i) of the PHRA. It protects human rights through the quasi-judicial powers conferred by Section 13. By definition, when it exercises its quasi-judicial powers, it does so on a complaint against an act of commission or omission by a public servant that has led to the violation of human rights. What the Commission does not do, what no national human rights institution is expected to do under the Vienna Declaration and Programme of Action, is to prevent the violation of human rights, which is primarily the responsibility of the executive. There are, however, several sections of the Bill which places upon the NHRC the responsibility to prevent, which would fundamentally alter its role and functions.

7. If, nevertheless, this Bill is enacted, with responsibilities devolved upon the NHRC, it would expect the law, and the Government of India, to ensure that:

i) no provision in it would dilute or qualify the powers that the NHRC presently has under the PHRA;

ii) if it is given extended responsibilities, it is given the commensurate power;

iii) since implementation would be key, and what is envisaged would entail an enormous strain on, and drain of, the NHRC's resources, these would be significantly augmented to make it possible for the Commission to discharge its mandate.

8. The comments that follow, on sections of the Bill, should be read in the light of the foregoing, which reflect the NHRC's reservations on some of its aspects, and its concern over the adverse impact on its work if enacted in its present form.

9. **Section 3(a)** of the Bill defines "armed forces or security forces", vis-à-vis which the limitation of the NHRC's powers, imposed by Section 19 of the PHRA, is incorporated in Section 31 of the Bill. There are two points to note:

i) while the Bill sets out the principle of "command responsibility" in Section 10 B, for public servants in "command, control or supervision of the armed forces or security forces", the restrictions imposed by Section 31 would make it impossible for the NHRC to pin responsibility for lapses;

ii) while Section 19 of the PHRA only applies to the armed forces, the definition adopted in the Bill, and spelt out in Schedule I, extends it to the "armed police forces of State Governments"; therefore, a significant new limitation is imposed on the Commission's powers.

10. The NHRC therefore proposes that

i) "security forces", including the armed police forces of State Governments, should enjoy no special protection under the Bill; and

ii) since the restriction imposed by Section 19 of the PHRA would make it impossible for the NHRC to establish command responsibility, which is an important innovation introduced in this Bill to make public servants more accountable, Section 31 should be deleted.

11. **Section 3(d)**, which defines communal violence, predicates it only on the victim's "religious or linguistic identity", whereas the National Advisory Council had proposed that violence against the Scheduled Castes and Tribes should also be brought within its ambit, with the stipulation that for these two groups, the new law would apply "in addition to and not in derogation of" the POA Act.

12. The NHRC's experience has shown that, not only do these two vulnerable groups suffer violence as communities, communal violence has also broken out between Scheduled Castes and Scheduled Tribes, or between Scheduled Tribes. The exclusion of these groups from the definition of communal violence is therefore unjust for two reasons:

i) though they are victims of communal violence, they would be denied the additional protection of this Act; and

ii) the victims of violence between the Scheduled Castes and Tribes, or between the Scheduled Tribes, do not enjoy the protection of the POA, which applies only when the assailants are not from these groups; these victims would not be covered under either Act.

13. This definition should therefore be broadened to add, after "identity"

"*or membership of a Scheduled Caste or Scheduled Tribe as defined under clause (24) and clause (25) of Article 366 of the Constitution*".

14. This expanded definition should be used *passim*, replacing the present definition in Sections 3(f), 4, 6, 7, 9, 10, 14 and 71.

15. The chapeau of **Section 3(f)** is confusing since it only refers to persons "belonging to any religion", which even excludes linguistic identity. It would be preferable to replace this phrase with "*protected by this Act*".

16. Four of the five sub-paragraphs of Section 3(f) list acts which would create a "hostile environment", and though these are not meant to be exhaustive, since the fifth refers to "any other act" that has the same purpose or effect, it might be useful to specify some of the practices listed in Section 3(1) of the POA Act, which, from the Commission's experience, are commonly used against the vulnerable groups to create the "intimidating and coercive" environment to which the chapeau refers. The ones most relevant are 3(1) (ii), (iii), (iv), (v), (x), (xi), (xii) and (xiii).

17. The **proviso to Section 6** is far too sweeping and would defeat the purpose of the listing of hate propaganda as an offense. It should **be deleted**.

18. **Section 7** defines organised communal violence. In the Commission's view, it would be better to shift this below the present **Section 9A,** and to introduce, after the words "continuing unlawful activity" the following:

"*including the offences outlined in Sections 6, 7 and 8*".

19. In **Section 9B**, the definition of torture is a variation of the formulation adopted by the Select Committee of the Rajya Sabha for the Prevention of Torture Bill, but leaves out two important elements, which should be introduced here:

i) since the crime of abetment has been omitted, while accepting from the Rajya Sabha Bill the concept of "acquiescence", the relevant phrase should be redrafted as "with the acquiescence *or abetment* of a public servant"; and

ii) Explanation II of the definition in the Rajya Sabha Bill, which sets out the acts that constitute torture, might be incorporated in this Section.

20. **Section 10B** introduces the important, but controversial, concept of command responsibility, codified in the Statute of the International Criminal Court, from which this language is drawn, with two important changes:

i) while the Statute pins responsibility on superior officers in "effective command and control" of forces, the draft narrows this down to those in "direct" command; this is more precise, and easier to establish;

ii) however, whereas the Statute made those officers culpable who should have known that the forces under their control "were committing or about to commit such crimes", Section 10B (a) changes this to "would commit or be likely to commit such offences".

21. Since it would be difficult to establish that a superior officer should have been able to divine the intentions of his subordinates, the Commission recommends that Section 10B (a) use the formulation of the ICC Statute, replacing the concluding clause with "*were committing or about to commit such crimes*". [This is the language used in 10C (a)].

22. If command responsibility applies only to the armed forces and security forces as defined in this Bill, all police officers, not deployed with "armed police forces", would be exempt, though it is often at the level of SHOs that the dereliction of duty often occurs. To guard against this, the chapeau of Section 10B should be amended to read "the armed forces or *any police force*".

23. **Section 14 (1)** provides that an area may be notified as "communally disturbed", though this can be in force for a maximum of sixty days at a time. It might be useful to follow a two-step process, starting with the identification and notification of areas that are *prone to communal violence*, following the practice laid down in the POA Act. This could be done by introducing a new sub-paragraph in this Section on the following lines:

> "*The Competent Authority shall identify areas in his or her jurisdiction that are or might be prone to communal violence. The list of these areas shall be compiled and notified by each State Government and reported to the NHRC*".

24. In view of the responsibilities given to the Commission, once an area is declared as "communally disturbed", this should be reported immediately to it. **Section 14 (2) bis** should be introduced, to read:

> "*Any notification made under sub-section (1) shall be reported by the State Government to the NHRC within twenty-four hours*".

25. **Section 14 (4)** vests the State Government concerned with the discretion to seek the assistance of the Central Government for the deployment of armed forces in the areas notified u/s 14 (1). However, while Jammu & Kashmir is excluded from the purview of the Act, the States of the North East are not. Communal violence is not uncommon there, but the Armed Forces Special Powers Act operates in most of these States, and gives the Central Government the power to notify an area as disturbed. In these States, therefore, this provision conflicts with those of AFSPA.

26. In **Chapter V**, which sets out the Commission's "functions related to maintaining communal harmony", **Section 24 (1) (a)** requires it to "receive and collect information on" a wide range of complex issues, which goes well beyond the Commission's responsibilities under the PHRA. The collection of information of the nature required by the sub-sections of 24 (1) (a) would involve a huge intelligence-gathering operation, which would require the resources, skills and manpower of organisations like the Intelligence Bureau. This is not the function of a Commission.

27. Instead, Section 24 (1) (a) should only require the NHRC to "*take cognizance, suo motu, or on complaints or reports received*" of the offences listed in the sub-sections.

28. The scope of the acts of commission or omission presently listed in the four sub-paragraphs of Section 24 (1) (a) is far too sweeping. The NHRC recommends that Section 24 (1) (a) be revised, **deleting sub-paragraphs (i) and (ii)** and amending subparagraph (iii) to read:

"*occurrence of communal violence.*"

29. **Section 24 (1) (b)(ii)** requires the Commission to "issue advisories and make recommendations in relation to" Section 24(a) and Section 25. The NHRC must point out that issuing advisories, too, is well beyond its mandate or what it may reasonably, even with augmented resources, be expected to do. It places upon it responsibilities for early warning, analogous to those of the IB. Not only are these executive functions, the NHRC would be culpable for an outbreak of communal violence which it was unable to predict or prevent. This is a function that no National Commission, set up to promote and protect human rights, can discharge.

30. The NHRC therefore recommends that this sub-section be renumbered as *Section 24 (1) (b)* and be amended to read:

"*make recommendations in relation to clause (a) above.*"

31. **Section 24 (1) (b)(i)** should be placed after this subsection and before Section 24 (1) (c).

32. **Section24 (1) (f) and (g)** stipulate that it may visit:

i) "under intimation to the State Government", any relief camp where internally displaced persons reside; and

ii) "under intimation to the Central Government or the State Government", jails or other institutions where persons are lodged for the purposes of enquiry or investigation into an offence under the Act.

33. Under Section 12 (c) of the PHRA, as adopted in 1993, the Commission could make these visits only under intimation to the State Government, but this requirement was removed by the amendment of 2006. Since then, the Commission can, and does, visit any jail or similar institution without intimation to governments. The formulation in the Bill reverts to the provisions of the original PHRA and dilutes the Commission's powers. These phrases must be **deleted from sub-paragraphs 24 (1) (f) and 24 (g)**.

34. While, under Section 26 of the Bill, the State Human Rights Commissions are placed in a subordinate role to the Commission, the **first proviso in Section 24 (1) (j)** lays down that if an SHRC starts an enquiry under this Act, the NHRC would not conduct its own enquiry. This is in accordance with the provisions of Section 36 (1) of the PHRA, but experience with cases on deaths in encounters has shown that this limitation on the NHRC's remit is being exploited by some States, where the SHRC is more pliable. The temptation for States to abuse this provision would be even greater in the aftermath of communal violence.

35. There has also been more than one recent instance where, following an outbreak of communal violence, several National Commissions conducted separate enquiries and came to very different conclusions.

36. Since the NHRC has been given an overarching responsibility under the Bill, it recommends the following:

i) the first proviso to Section 24 (1) (j) should be amended to lay down that "*An SHRC will commence an enquiry only if the NHRC entrusts it with this responsibility*";

ii) the second proviso to Section 24 (1) (j) should be amended to stipulate that when the NHRC is conducting an enquiry on organized communal violence, "*no other National or State Commission shall have the power to enquire into the same*"; and that

iii) the NHRC "*may enlist the help where necessary of either the SHRC concerned, or of the appropriate National Commission*".

37. **Section 25** expects the NHRC to monitor and review the performance by civil servants of their duties under the Act. Apart from the fact that the supervision of the work of public servants is the duty of their superior officers, not of a Commission, it would be impossible in practical terms for the NHRC to do so. The Commission strongly urges that this section **be deleted**.

38. **Section 31** should also **be deleted**. The restrictions imposed by this Section would, in particular, make it impossible to investigate lapses of command responsibility.

39. **Section 32** should **be deleted**, since, as has been pointed out earlier, it would be a distortion of the NHRC's mandate, and beyond its capacity, to issue such advisories.

40. For the same reason, **Section 35 (1) (a) and (b)** should also be deleted, and **(c)** redrafted to read "*details of actions taken by it under the Act*".

41. **Section 35 (2)**, which makes it mandatory for the NHRC to table its annual report in the Monsoon Session of Parliament, should **be deleted**. This substantive change in the NHRC's reporting obligations need not be brought in through this Bill.

42. In **Chapter VI**, on the powers of the SHRCs, the **first proviso of Section 36** will have to be amended to bring it in conformity with what the Commission proposes for Section 24, and could read as follows:

> *Provided that where any State Commission has not commenced an enquiry within 30 days of directions received from the National Commission, the National Commission shall enquire into the matter.*

43. The limitations placed on the SHRC for visits to relief camp and jails, in **Section 36 (e) and (f)**, should be removed, as for the NHRC in Section 24.

44. In **Section 47 (4)**, the Commission recommends that postmortem reports should be in the revised format of the NHRC, and that copies should invariably be sent to it.

45. In **Section 51 (2)**, the NHRC and the SHRCs should have the power to direct, not merely to request, a State Government to order a further investigation or a reinvestigation when it finds bias on the part of the investigating agency.

46. In **Section 53 (2)**, which stipulates that sanction for the prosecution for offences committed by public servants shall not be refused, except with reasons to be recorded in writing, should also lay down that the NHRC must be kept informed.

47. **Section 61 (5)** authorizes a victim who faces "intimidation, coercion or inducement or violence or threats of violence" "to lodge a complaint with the SHRC". This should be amended to permit a complainant to also lodge a complaint with the NHRC.

48. **Section 67**, which sets out the facilities that, must at a minimum, be provided in relief camps, is derived from, and has in some respects gone beyond, the standards of the UN Guidelines on Internal Displacement, but has ignored some which are important and which should be incorporated, particularly the following:

i) Principle 19.3 of the UN Guidelines, which requires special care to be taken to stop the spread of contagious and infectious diseases in relief camps;

ii) Principle 19.2 on the responsibility of the State to cater to the special needs of women in these camps;

49. In **Section 68**, on the duties of the State Government in relation to relief camps, the Commission believes it would be useful to bring in the provisions of Principle 11 of the UN Guidelines, which asks the State to provide protection against rape, contemporary forms of slavery, forced marriage, sexual exploitation and acts of violence intended to spread terror.

50. From its monitoring of incidents of communal violence, the Commission has noted that sometimes the victims seek shelter in a neighbouring district, or in a neighbouring State. It is therefore essential to spell out in Sections 67 and 68 the duties of the State from which the victims have fled and those of the State that has given them shelter. The Commission proposes the following changes:

i) a clause to be added to Section 67 (1) after "State Government", to read "*including in a State to which victims of communal violence have fled from another State,*";

ii) a proviso to be added to Section 68, before the two presently there, to read "*Provided that, where the residents of a relief camp have taken shelter in another State, it shall be the duty of the government of the State from which they were displaced to render them the services outlined in sub-sections (c) to (h) above*".

51. **Section 69** lays down that one of the Members of the State Assessment Committee will be a "Member of a human rights organization approved by the NHRC". Since the NHRC does not have an approved list of NGOs, it should be clarified that these would be *ad hoc selections*.

52. Given the role that the NHRC has to play in ensuring that relief is provided and reparations made, the report of the State Assessment Committee must immediately be sent to it. Therefore in **Section 71**, the Commission proposes that a new sub-section 4 be introduced, to read:

> "*The report of the State Assessment Committee shall simultaneously be sent to the State Government and to the NHRC.*"

53. For the same reason, the Commission should also have immediate access to the report of the District Assessment Committee when it recommends relief. A new sub-section should be added as **Section 78 (3) bis**"

> "*The recommendations of the District Assessment Committee shall simultaneously be sent to the State Government and to the NHRC.*"

54. **Section 76 (B)**, which lays down principles for assessment of compensation, prohibits discrimination on "grounds of religion, race, caste, sex, place of birth or any of them". Considering that the bill is predicated on victimization on grounds of religion and language, *language and tribe* should be added to the list.

55. In **Schedule II, Part–B**, which sets out offences under the Act, it would be useful to add, from the UN's Guiding Principles, *summary or arbitrary executions* and *forced disappearances, including abduction or unacknowledged detention*.

56. In **Schedule IV**, which lays down scales of compensation, it would be useful to ensure that these are aligned with the levels mandated in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Since the Schedule of the POA Act was revised in 2011, the levels proposed in the Bill are more generous. However, if these are accepted, the Schedule of the POA Act should also be revised.

FURTHER COMMENTS OF NATIONAL HUMAN RIGHTS COMMISSION ON THE "PREVENTION OF COMMUNAL (ACCESS TO JUSTICE AND REPARATION) BILL, 2013"

Para 56

In Section 3 under Definition National Human Rights `Commission is placed at "c" and should be preferably placed at "g".

Para 58

Under Torture, there is no corresponding penal provision.

Section 38 should be amended to include after Section 26, 27 and 28.

Section 62 should be re-written as follows:-

> "All proceedings related to offences under this Act shall be video recorded unless the courts otherwise direct for reasons to be given in writing."

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