

COMMUNAL-SECULAR DICHOTOMY: ARE THE COMMUNAL VIOLENCE BILLS ADEQUATE TO TACKLE THE 'FRANKENSTEIN'S MONSTER'?

*Vatsal Joshi and Ananya Kumar Singh**

Abstract

The framers of the Constitution had intended our nation to be a secular one. It was envisaged that unlike the Western concept of secularism, the Indian state would not be indifferent, but equally respectful towards all the religions. This conception of Secularism is peculiar to India, and so is the phenomenon of Communalism. This Communalism-Secularism Dichotomy is viewed as a major force in sustaining this phenomenon in the country. Communalism may be defined as a feeling of antagonism between various communities, usually along religious lines. Communalist sentiments may manifest themselves in a silent and imperceptible manner, and also in the extreme form of violence and riots. The authors seek to analyze the various causes which are responsible for endemic communal violence in India. India has been the site of one of the worst communal riots that the world has ever

*Vatsal Joshi and Ananya Kumar Singh are 3rd year students at National Law Institute University, Bhopal. The authors may be reached at vatsal.nliu@gmail.com and ananya.nliu@gmail.com.

witnessed. These include the Post-Partition riots (1946-47), the Bhagalpur Riots (1989), Sikh Riots (1984), Bombay Riots (1994), Godhra Riots (2002) and the more recent Muzaffarnagar Riots. The unparalleled frequency of communal frenzy in India makes it relevant to examine the various Bills which were introduced to tackle the menace of communal and targeted violence. The authors have attempted to analyze these Bills and examine their actual practicality and applicability. The authors have also given certain recommendations which would enable the Government to tackle Communal Violence.

I. DIMENSIONS OF COMMUNALISM IN INDIA

"Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance."¹

As Jawaharlal Nehru announced India's arrival at the world-stage the entire country came to a standstill and listened with rapt attention.

¹Excerpt from the historic speech by Jawaharlal Nehru while addressing the Constituent Assembly on Aug. 15, 1947. This speech has been rated as one among the 14 great speeches of 20th century by The Guardian.

The country was engulfed with a sense of pride and elation. On the same day, in marked contrast to the seemingly ubiquitous utopia, were the lanes of Noakhali and other cities in Bihar, Bengal and Punjab which were torn apart by communal riots and instances of violence and atrocities. This is known as the "Communal Holocaust"², which was a direct consequence of the partition of India on the basis of religion. The brunt of partition was borne equally by minorities on both sides of the border as they were victims of unspeakable atrocities. In the span of a few months 500,000 people were killed and property worth thousands of millions of rupees was looted and destroyed.³ Ironically, the moment of India's birth or coming to 'life' was marred by death and despair due to large scale communal violence.

India is one of the most culturally diverse countries of the world. The diversity of our nation has been beautifully captured by Dr. S. Radhakrishnan who described India as a symphony where there are, as in an orchestra, different instruments, each with its particular sonority, each with its particular sound. ⁴

Its population consists of people belonging to all major religions of the world, 22 scheduled languages belonging to four different families, namely Indo Aryan, Dravidian, Austro Asiatic and Tibeto-Chinese along with 179 other languages and 544 dialects. Thus, the cultural landscape of India assumes mind boggling cultural diversities. We must understand that this Diversity is a double edged sword, which may act as strength, as well as a hindrance to the unity

²As per the Oxford Dictionary, Holocaust means "destruction or slaughter on a mass scale, especially caused by fire or nuclear war." Historically, it refers to the mass killing of Jews under the German Nazi regime during World War II. A parallel has been drawn between the killing of Jews (who were minorities) and the atrocities perpetrated upon minorities during the partition in both India and Pakistan.

³BIPAN CHANDRA, INDIA SINCE INDEPENDENCE 98 (Vikas Publishing Home, 2008).

⁴CONSTITUENT ASSEMBLY DEBATES, Vol. I, Part III (Part of address made on Dec. 11, 1946), <http://parliamentofindia.nic.in/ls/debates/vol1p3.htm>.

of a nation. There is a tendency among communal forces to despise plurality in a society, they lay undue emphasis upon homogeneity. This is true of Hitler's fascist regime in Germany, which was hell bent upon ethnic "cleansing" by wiping out the Jews. A similar model remains the unfulfilled dream of the communal forces operating in our country, who view this diversity as a weakness. The richness of our culture cannot be fathomed by an individual with an exclusivist and constricted outlook towards cultural identity.

Two hundred years of British rule were marked with social, political and economic inequalities, exploitation, bigotry and attempts to divide our culturally divergent society along communal lines. Leaders of our nation had envisaged restructuring of the social order to eliminate all such evils and establish an egalitarian society. They believed that modern democratic tradition and exposure to modern scientific education would enable people to break the shackles of orthodoxy and rise above all fickle religious affiliations. Sadly, we have failed our leaders, as communalism and communal violence are still seen as a serious threat to the unity, integrity and secular fabric of our nation.

Communalism may be defined as a feeling of antagonism between two groups based on their religious affiliations. Discrimination may be a milder manifestation of that antagonism, whereas the extreme form of such antagonism is communal riots, which involve loss of life and property. However, riots are only an overt manifestation of the existing animosity. The communalist sentiments are always present in a silent and unapparent manner. The imperceptible undercurrents play a major role in inciting communal violence. Both these aspects can be seen to form as components of the same continuum, each complementing the other.

Therefore, communalism is inevitably a conflict between the supposed interests of majority and the minority communities in a society. In India, communalist sentiments with respect to religion

have always been a fertile ground for political actors to exploit and they have skillfully used it to further their vested interests. The political class has played a vital role in keeping these evil and vengeful communalist sentiments alive even today and transforming it to an ideology. Fortunately, aggressive communalist beliefs and tendencies with respect to language subsided post the creation of states on linguistic basis.⁵ Therefore, in common parlance communalism has come to be associated with religious narrow mindedness or religious fanaticism, which is in opposition to the principle of Secularism embodied in our Constitution. We shall examine the principle of Secularism in the next section, and the threats posed by Communalism.

II. SECULARISM WITHIN THE CONSTITUTIONAL FRAMEWORK: AN ANTITHESIS TO COMMUNALISM

"Render unto Caesar the things that are Caesar's and to God the things that are God's."

Communalism is antithesis to the principle of Secularism. Secularism was essentially believed to be a western concept and its roots could be traced to the Bible. This oft quoted phrase from *The Bible* presents a very vivid demarcation between the affairs of the State and the

⁵BIPAN CHANDRA, *INDIA SINCE INDEPENDENCE* 115 (Vikas Publishing Home, 2008); The State Reorganisation Commission was established in 1953 to look into the creation of states on a linguistic basis. It consisted of Fazl Ali, KM Panikkar and HM Kunzru. The Commission submitted its report in 1955, and recognized that the boundaries of Indian states should be altered on the basis of language, and recommended the formation of 16 States and 3 Union territories. In pursuance of the recommendation of the Commission, Andhra Pradesh was the first State to be formed on a linguistic basis in 1956.

Religion. This was possibly the first conception of what secular actually means.

In modern context Secularism has been most aptly defined by Amartya Sen as the principle which basically demands symmetric treatment of different religious communities in politics and in the affairs of the State. As a principle, Secularism was not incorporated in the Constitution initially, as the framers of our Constitution were of the opinion that the creation of Pakistan along communal lines had already solved our problems to a large extent and it would not raise its ugly head in independent India.⁶ Understandably, apprehension of instances of violence led the Muslims to keep a low profile and resulted in non-assertiveness. Figures suggest that after the post partition violence had subsided, there was a relative calm on the national scene for almost a decade. The focus had now shifted from mindless violence to the huge task of nation building which involved carrying out land reforms, chalking out a viable economic framework for the infant nation and tacking the linguistic hardliners⁷.

The word 'Secularism' was included in the Preamble by the 42nd Amendment Act, 1976. Indira Gandhi was the chief architect of this Constitutional Amendment Act. It is pertinent to understand secularism from the perspective of the framers of Constituent Assembly and the architect of 42nd Constitutional Amendment Act to grasp its fundamental nature. Indira Gandhi was of the opinion that

⁶ASGHAR ALI ENGINEER, COMMUNAL RIOTS AFTER INDEPENDENCE 1 (Centre for Policy Research, 2009).

⁷RAMACHANDRA GUHA, INDIA AFTER GANDHI 187 (Harper Perennial, Reprint ed. 2008); The decade following India's independence was marked with linguistic violence. Demands had crept up in the southern region for division of states on the basis of language and serious conflict between Gujarati and Marathi speaking population in the province of Bombay. The existing situation was exacerbated by continued violence and death of a Gandhian Telugu activist Potti Sriramulu, following which Andhra was created and demands for making states on linguistic basis was recognised. Post the creation of states on linguistic basis, such instances of violence have come to an end.

Secularism or *Dharmanirpekshita* should not be taken literally to mean religious non alignment, but equal alignment with each religion.⁸ This was practically a reiteration of the view of the Constituent Assembly through Dr. S. Radhakrishnan. The Constituent Assembly opined that no one religion should be given preferential status or unique distinction. According special privileges to any religion would be a violation of the basic principles of democracy and contrary to the best interest of religion and government. No group of citizens shall arrogate to itself, rights and privileges which it denies to others.⁹

Thus, there was an emphasis on extending the principle of democracy to the arena of religion. It was envisaged that the Indian state would not be indifferent, but equally respectful towards all the religions. It must be understood that noble values like secularism, democracy and equality would go a long way in binding together the vastly fragmented Indian society.

The essence of secularism in Indian context differs from the western conception. The western understanding "secularism" is indifference towards all religious matters. For example, secular system in USA is such that religion is regarded as a private matter and the State is not concerned with it in any way. The conception of secularism in India is slightly different; it is characterized by the State's respect for all religions. The authors consider this to be a reason for the fragility of Indian Secularism. The importance of Secularism in the scheme of Constitution has been recognized by the landmark case of *Kesavananda Bharati v. State of Kerala*¹⁰, which lay down the *basic structure doctrine*. Justice Sikri while elaborating upon the *basic*

⁸P. CHATTERJI, *SECULAR VALUES FOR SECULAR INDIA 2* (Paula Press, 1995).

⁹S. RADHAKRISHNAN, *RECOVERY OF FAITH* 202 (Indus Publishing Company, 1981).

¹⁰*Kesavananda Bharati v. State of Kerala*, (1973) AIR SC 1461.

*structure*¹¹ mentioned Secularism as one of its essential components. This view was supported by the whole bench comprising of 13 judges. S.R Bommai Case¹² , Ismail Farookhi's¹³ and a catena¹⁴ of recent cases have also reiterated that secularism is a part of the basic structure.

III. COMMUNALISM AS AN IDEOLOGY: FACTORS WHICH SUSTAIN THE FRANKENSTEIN'S MONSTER

*“The basic cause for communal frenzy is the same: poverty, economic deprivation and a history which has been perverted and misused by religious zealots.”*¹⁵

Communalism has been an endemic feature of Indian political system and social life since independence. Interestingly, historical accounts show that communal sentiments and instances of communal violence were not unknown, but insignificant, even in the Medieval Ages.¹⁶

¹¹*Id.*; Basic Structure Doctrine was propounded by Justice HR Khanna. Khanna held that there is no implied limitation on the amending power of the Parliament but that does not include the power to abrogate the Constitution. The powers of the Parliament are wide but they cannot destroy the basic structure of the Constitution. The basic structure has not been explicitly defined anywhere, the 13 judges on the Bench had differing opinions on what constituted the basic structure. J. Sikri was of the opinion that secularism formed the basic structure of the Constitution. This view was reaffirmed in a catena of cases as discussed later.

¹²S.R. Bommai v. Union of India, (1994) AIR SC 1918.

¹³Ismail Faruqui & Ors. v. Union of India & Ors., (1995) AIR SC 605.

¹⁴Bharatiya Janta Party & Anr. v. The State of West Bengal & Ors., (2013) AIR Cal 215; Joseph Sriharsha Educational Society & Ors. v. State of AP, 2014 (1) ALT 16.

¹⁵M.J. AKBAR, RIOT AFTER RIOT 2 (Penguin Books India, 1991).

¹⁶Harbans Mukhia, *Alternative to Communalism*, FRONTLINE, Feb. 1989; The medieval period in Indian history was marked by a dominant Muslim rule, beginning with the Delhi Sultanate in 1206 and the great Mughal Empire later. Even in situations when the medieval Muslim State was engaged in life and death political conflicts with various religious groups- the Jats, Maraths, Hindus and the

Diversity had always been a characteristic feature of Indian society, but a communal hue was added to it by the British Rule.¹⁷ It was an essential cog in their Divide and Rule policy. The vices of electoral politics and inherent defects in our society sustain it in modern day India. This part shall deal with the causes of communal violence.

On the exterior, communalism appears to be a result of the politics of identity and is believed to be entirely grounded in religion, caste or linguistic group. This assertion is not completely correct. Religion is emotionally appealing and thus acts as powerful tool of mobilization of the masses. Indian society is the perfect reflection of Marx's religion and opiate analogy. But there are several other factors, which are so not apparent, but at the same time very important in propagating communalism as an ideology. Attempts to define communal violence in purely religious terms would be fallacious. Diversity as a progenitor of communalism has already been discussed in detail.

Religious and cultural differences in a society as diverse as India are unavoidable and inevitable. But these differences assume antagonistic proportions as a result of manipulation, deceit and misrepresentations by the political parties. Scholars agree that modern democratic politics and capitalism being essentially competitive in nature

Sikhs, peace prevailed at the social level. This was because political mobilisation was far less then, and very seldom when it did exist, it had the State as its target rather than another community.

¹⁷RODERICK MATTHEWS, *JINNAH V. GANDHI* 37 (Hachette India, 2010); The British had created separate religious electorates by the Morley Minto Reforms of 1909, and this continued till 1947. It was envisaged to be an attempt to ensure that minority interests were adequately represented. They were not given substantial executive powers, but were expected to voice their opinion and vote according to what they were. This ensured that religious identity came before policy in Indian electoral politics from the very beginning. Thus, the seeds of communalism were sown by the British.

aggravate the problem.¹⁸ The process of democratization has made the minorities more assertive of their rights. This in turn has led to a tendency amongst the political class to pacify them. Leading political parties have often been accused of following a policy of "Muslim Appeasement" to strengthen their vote banks. The Shah Bano¹⁹ Controversy was a classic example of communal appeasement.

A. Shah Bano Controversy: The Irreversible Chain Reaction

Shah Bano, a divorced Muslim woman approached the Court for maintenance. The Supreme Court obliged by allowing her maintenance under Section 125 of Criminal Procedure Code²⁰. This section provides for maintenance to a divorced woman who has no means of income and is unable to maintain herself. The judgment had come as a huge relief to the destitute and deprived women, who had been driven out of their matrimonial homes. Invocation of Section 125 would provide relief to every woman irrespective of her caste,

¹⁸ASGHAR ALI ENGINEER, COMMUNAL RIOTS AFTER INDEPENDENCE 1 (Center for Study of Society and Secularism, 2004).

¹⁹Mohd. Ahmed Khan v. Shah Bano Begum, (1985) SCR (3) 844.

²⁰The Code of Criminal Procedure, 1973, § 125;

§ 125: Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means

creed or religion. But the Muslim orthodoxy, comprising of the influential *ulemas* and *maulvis* viewed it as a derogation of the Muslim Personal Law. The grant of alimony to a Muslim woman was seen to be in conflict with the Islamic law. The current Government headed by Rajiv Gandhi wilted under pressure as elections were scheduled to be held in many states that year and Muslim votes would play a decisive role. The Parliament hurriedly passed the *Muslim Women (Protection of Rights on Divorce) Act 1986*, with the aim of nullifying the Shah Bano judgment to pacify the Muslim clerics. The passing of the said act would eclipse Section 125 of CrPC when dealing with Muslim women.²¹ This case prompted a debate on the importance of having a Uniform Civil Code in the country, which would treat all citizens equally irrespective of their religion.

This controversy triggered a chain of events which have had serious implications on the society and politics in India. This controversy revived the communally charged atmosphere and gave the communalist forces a fresh lease of life. An immediate consequence was seen in the district of Bhagalpur in Bihar in 1989.²² This controversy triggered a chain of events, which led to the opening of the gates of Babri Masjid on the request of VHP (a right wing Hindu organization, Vishwa Hindu Parishad) and then its consequent

²¹The Latin maxim *Lex specialis derogat legi generali* shall operate in this case. This maxim forms an essential component in the Interpretation of Statues. It means that an existing general law (in the instant case, § 125 of CrPC) governing a particular subject shall be eclipsed on the formation of a specific law governing the same subject.

²²*Supra* note 18; Bhagalpur Riots were a direct consequence of the Government's orders to reopen the gates of the Babri Masjid post the Shah Bano judgment. The entire issue was communalised by the Vishwa Hindu Parishad and Bharatiya Janta Party by appealing to the religious sentiments of the Hindus by raising the question of Ram Janma Bhoomi and issuing the clarion call for the construction of the Ram Mandir at the site of the Masjid. VHP had organised a procession at Bhagalpur for collecting bricks for the construction of the Ram Mandir. Bhagalpur has a sizeable Muslim population, and the entire incident took a communal turn. This resulted in the worst riots India has seen since independence.

demolition.²³ The Bombay riots in 1993 and the serial bomb blasts in Bombay in the same year were serious ramifications of the perverted approach followed by our political masters. This was probably the first instance of a terrorist attack on India and many were to follow in future. Thus, policy of minority appeasement turned into a *Frankenstein's Monster* and even today, India is reeling under the impact of the Government's response to the Shah Bano judgment.

Religious and cultural differences in a society as diverse as India are unavoidable and inevitable. Naturally, they give rise to divisive and disruptive tendencies. It is the duty of the political class to curb such tendencies and promote a sense of brotherhood amongst different communities. Mahatma Gandhi, Maulana Abul Kalam Azad, Jawaharlal Nehru and Sardar Patel represented the brand of catholic, idealistic and broad minded leaders who supported and promoted communal harmony. Sadly, these *leaders* have been replaced by a class of shrewd *politicians* who are devious and shorn of principles. They would not hesitate in flaring the communal passions to pit one community against the other.

There have been noticeable economic trends behind communal violence in India. These trends are not visible on the exterior, but they are intricately and surreptitiously wound up with the seemingly broader religious purpose. Vying for economic resources and the subsequent economic competition has been identified as a major cause of communal violence in India. However, this dimension has not been explored or highlighted by the media or socio political analysts. The politicians and opportunistic individuals are adept in imparting a communal color to such conflicts and reap benefits. Thus,

²³Malik Rashid Faisal, *The Ghost of Shah Bano*, BUSINESS AND ECONOMY (Jan. 17, 2014), <http://www.businessandconomy.org/14052009/storyd.asp?sid=4364&pageno=1>.

a class struggle in Marxian context is transformed into a religious conflict.

The most striking example of this phenomenon is the town of Godhra in Gujarat. It has always been a communally sensitive town as a result of rivalry between the Ghanchi Muslims and Sindhi community. The hostility may be traced back to partition after which a lot of Sindhi businessmen migrated to this small town and threatened the monopoly of the Muslim businessmen. Ensuing tensions were given a communal color to fulfill certain vested political ambitions. The landscape of India is littered with such examples, where economic factors were camouflaged as communal tensions.²⁴ Thus, the root cause of spreading endemic violence is economic: religious, linguistic and ethnic differences provide the excuse and motivation to indulge in it.

Lack of Education and awareness makes the people susceptible to a communally charged atmosphere. Low level of literacy has played a major part in making communal violence endemic in India. The Sachar Committee²⁵ Report suggested that a plethora of reasons were responsible for low levels of education amongst the Muslims. The literacy rate among Muslims in 2001 was 59.1 % which is far below

²⁴*Supra* note 18; Moradabad Riots (1980) were caused by economic competition between the Punjabi Hindu traders and upcoming Muslim artisans, challenging the Punjabi monopoly of brass artefacts. Similarly, Varanasi has traditionally been a site of communal conflicts as a result of animosity between the Muslim julahas and the Marwaris and other Hindu business communities. A Land dispute between two parties sparked off the riots in Bihar shariff in 1980.

²⁵This was a High Level Committee set up under the chairmanship of Justice Rajinder Sachar in 2005. The objective was to prepare a Report on the Economic, Educational and Social status of the Muslims in India. The Committee was formed on Mar. 9, 2005 by a notification of the PMO and submitted its 405 page Report on Nov. 17, 2006. http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf.

the national average (65.1%).²⁶ The report suggested that the "communal" contents of the textbooks, as well as the school ethos have been a major cause of concern for Muslims in many states.²⁷

The Report also pointed out that education was not easily accessible to all sections of the Muslims easily. Education being a State subject²⁸ for a very long time did not come under the ambit of Central Government. Textbooks were distorted as per the whims and fancies of State Government and there is lack of uniformity. At large, the task of educating the Muslims is left to the *madrasas* and *maktabs*, which is preventing a holistic integration of the community with the mainstream. Education in *madrasas* might be deemed to be "culturally appropriate" by the clerics, but it has done little to fetch the students jobs or sufficient economic opportunities²⁹. It has led to further isolation and alienation of the Muslims from the mainstream. This sense of alienation leads them to secluded and somewhat sheltered existence in the ghettos. "Ghettoisation"³⁰ insulates them

²⁶Sachar Committee Report, 52, http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf.

²⁷*Id.* at 16.

²⁸CONSTITUTION OF INDIA, 1950, Seventh Schedule; Education had been a part of State List till 1976 (Entry 11 of List II). However, by the 42nd Amendment Act of 1976, it was deleted from the State List and added to the Concurrent List (List III) as Entry 25.

²⁹*Supra* note 26; The employment of Muslims in Govt. jobs and PSU's is abysmally low. The rate of employment of Muslims is not in proportion to their share in the population of the country. Less than 6% Muslims are employed with PSU's or Government. Their share in Class I Government Services and other State services- IAS-3% ,IFS-1.8 % , IPS-4% , Indian Railways- 4.5%, Education Department (State Level)- 6.5 % , Home Department (State Level)- 7.3%, Health Sector-4.5%, Transport Sector-6.5% , Judiciary-7.8 % . The most striking feature of this Report was that a large share of Muslim population was self-employed, which clearly shows a bias or prejudice of the employers against them.

³⁰Definition of Ghetto: A ghetto is a part of a city in which members of a minority group live, especially because of social, legal, or economic pressure. The term was originally used in Venice to describe the part of a city to which Jews were restricted and segregated. OXFORD ADVANCED LEARNERS DICTIONARY (2010).

from the rest of the society and often they are viewed with suspicion. Sachar Commission has recognized this aspect as a major cause of their backwardness, and also a major cause for communal violence. The minority community tends to develop a sense of collective belonging or solidarity which can be harnessed and channelized by unprincipled and unscrupulous elements for destructive purposes.

Rumors play a significant role in instigating communal violence. Mostly, instances of communal violence have been instigated over trivial issues which were blown out of proportion, and led to massive riots. Rumors are used as an instrument to flare the communal passions by appealing to religious sentiments of various communities. The infamous and brutal Noakhali Riots in 1946-47 were sparked by rumors of the alleged ill-treatment of Hindus in certain districts of the erstwhile East Bengal. Bhagalpur Riot of 1989 (considered to be one of the worst since independence)³¹ was also a result of rumors that around 200 Hindu students had been killed by Muslim a mob; another rumor was spread that 31 students had been mercilessly murdered and dumped in the compound of a College.

(This part has discussed the various socio-political and economic aspects which are responsible for this phenomenon. It is essential to have a thorough understanding of these aspects to examine the effectiveness and efficacy of the various Communal Violence legislations that the Government introduced in the years 2005, 2011 and 2013. The next part shall analyze these legislations and their significance in tackling communal frenzy in light of the causes mentioned above.)

³¹Asghar Ali Engineer, *Bhagalpur Riot Inquiry Commission Report*, 30 ECON. AND POL. WEEKLY 28 (1995).

IV. CRITICAL ASSESSMENT OF BILLS AGAINST COMMUNAL VIOLENCE

*“All violence is the result of people tricking themselves into believing that their pain derives from other people and that consequently those people deserve to be punished”.*³²

The Unity, integrity and the secular fabric of our country has been constantly threatened by Communal violence since Independence.³³ The problem of communal riots arises when two or more communally identified groups clash with one another. The inception of this problem can be traced back to the late 18th century riots in the modern day Ahmedabad³⁴. Communal tension and riots began in India only during the last quarter of 18th Century³⁵. As already discussed, communal violence is very seldom the result of immediate actions or religious animosity; in fact they are the result of the conflicting political and economic interests.

An event is identified as a communal riot if there is violence and two or more communally identified groups confront each other or members of the other group at some point during the violence³⁶.

Since independence, riots arising out of communal tensions have claimed approximately 20,000 lives and have resulted in umpteen causalities. The Indian procedural and substantive laws have

³²Marshall Rosenberg: He is a well-known American Psychologist and Author and is known for his remarkably work titled Nonviolent Communication (NVC) which helps to resolve differences and conflicts between the parties peacefully.

³³B. Rajeshwari, *Communal Riots In India-A Chronology*, 1 INST. OF PEACE AND CONFLICT STUDIES (2004).

³⁴*Id.*

³⁵BIPAN CHANDRA, *COMMUNALISM IN MODERN INDIA* 4 (Vikas Publishing Home, 1984).

³⁶Ashtosh Varshney, *Ethnic Violence And Civic Life* 309 (Yale University Press, 2002).

provisions dealing with Offences Relating to Religion³⁷, but they have been found to be inadequate. The psyche of the nation has been scarred by the Godhra riots in 2002, 17 other riots of varying magnitudes and the more recent Muzaffarnagar riots. In light of these developments, there is a need for effective laws dealing with communal violence. It was only after the barbarous Godhra riots of Gujarat that the human right activists' demanded for a separate legislation which could comprehensively discuss and redress the menace of Communal Violence. There was a demand to add teeth to the laws dealing with this issue and they should be able to provide proper justice and rehabilitation to the victim. It was only then that the Central Government came up with the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, followed by the Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2011 and finally the Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2013.

Unfortunately, none of these Bills assumed the force of law as they were not approved by the Parliament. It has also been alleged that the bills were introduced by the government in specific time-frames so as to hide its incompetence to fight the menace of Communal violence and at the same time targeting the religion based vote-bank politics. The government was even blamed that through these bills they are attempting to complicate the issue of communalism and concentrating on the politics of Communal Polarization.

*A. Communal Violence (Prevention, Control And
Rehabilitation Of Victims) Bill, 2005*

The very first bill i.e. the Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 was questioned and

³⁷The Indian Penal Code, 1860, Chapter XV.

criticized on the primary ground of its comprehensiveness and effectiveness.

It was perceived to be inadequate to address the root causes of Communal violence by the Rajya Sabha³⁸. Clause 55 of the Draft Bill was criticized by the States³⁹, as it provided that ‘if the state is unresponsive or inactive, then the center shall have the power to take all immediate measures to suppress and control the situation to prevent violence’. The “power to take all immediate” action was so open to interpretation and that it would have opened a Pandora’s Box. Thus, this clause could very conveniently be used as a tool by the Central Government to belittle the autonomy of the States.

The Bill laid down the procedure for payment of immediate compensation to the victims. But it failed to address the very fundamental questions like *when*, *by whom* and *how* would the compensation be paid⁴⁰. Such incoherent and inconsistent provisions lay scattered throughout the Bill, as a result of which it was never passed. After a gap of five years the government proposed another bill with a number of modifications and it was introduced as the Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2011.

³⁸122nd Standing Committee report on The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005.

³⁹*Id*; In all, 12 states responded to the inclusion of Clause 55. Gujarat, Jharkhand, Mizoram, Rajasthan, Uttar Pradesh, Tamil Nadu, Madhya Pradesh and Maharashtra were among the major states who openly opposed the inclusion of clause 55 in the bill whereas, states like Arunachal Pradesh and Punjab refrained from commenting upon it. Himachal Pradesh was the only State to have accepted it.

⁴⁰Parliamentary Research Service, Legislative Brief, Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, (Jan. 17, 2014), http://www.prsindia.org/uploads/media/1167470057/legis1167477972_legislative_brief_communal_violence_bill_2005_FINAL.pdf.

*B. Prevention Of Communal And Targeted Violence (Access To
Justice And Reparation) Bill, 2011*

The explanatory note of the draft bill aims to enhance the State accountability and attempts to correct discriminatory exercise of State power in the context of identity-based violence. The bill received staunch criticism since it was alleged that it included several clauses which could exacerbate the problem of communal violence in our country.

There were certain clauses in the draft bill which were subject to severe criticism and condemnation. One such clause was Clause 3(c), which defines “communal and targeted violence” which is dependent upon the definition of “group”. As per the definition of “group” in clause 3(e)⁴¹ of the Bill, “group” would include only religious and linguistic minorities. This was widely criticized as an outcome of poor draftsmanship. Clauses 3(e) when read along with clause 3(k)⁴², which defines a “victim”, would mean that only a person belonging to religious and linguistic minorities could technically be the ‘victim’ of a riot. The use of terms like ‘psychological harm’ in clause 3(k) and 101(f)⁴³ has made the provisos of the clauses very subjective and has opened flood gates of people claiming compensation. This can be explained with a help of a simple example

⁴¹Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 3(e): “group” means a religious or linguistic minority, in any State in the Union of India, or Scheduled Castes and Scheduled Tribes within the meaning of clauses (24) and (25) of Article 366 of the Constitution of India.

⁴²Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 3(k): “victim” means any person belonging to a group as defined under this Act, who has suffered physical, mental, psychological or monetary harm or harm to his or her property as a result of the commission of any offence under this Act, and includes his or her relatives, legal guardian and legal heirs, wherever appropriate.

⁴³Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 101(f): psychological injury caused to such person.

Scenario 1: A teacher in a class gives an example of the serial blasts in Bombay in the year 1992, and highlights the role of the alleged terrorists who belonged to a particular religious group, A student belonging to that minority group might consider it to be the cause of psychological harm and the teacher would be booked under this Clause

1. For making the environment hostile and offensive (under clause 3(f) (v))⁴⁴ and
2. Causing mental and psychological harm to the student (under clause 3(k))
3. The student would be entitled to claim compensation under clause 101(f).

Therefore such provisions and their provisos in the draft bill might lead to its misuse by a minority (non-dominant) group.

Clause 3(f)(v) provided that any act, whether or not it is an offence ,according to the bill would be considered an offence, if in any manner it might add to the making of a "hostile environment". This proviso is vague in nature and it seems that the intention here was to bring anything and everything under the ambit of an offence.

Modesty of a woman is not contingent upon her religion. This was the major question which was raised against the draft bill of 2011 with reference to clause 7 which defines 'sexual assault'. The clause provided a very strong and comprehensive definition of sexual assault. But it covered only women belonging to minority group and no possible means of redressal was provided for the victims of sexual

⁴⁴Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005, Clause 3(f) (V): any other act, whether or not it amounts to an offence under this act that has the purpose or effect of creating an intimidating, hostile or offensive environment.

assault belonging to the majority community. It was condemned by the National Commission for Women and other feminist institutions and activists. It increased the possibility of false allegations of rape and frivolous charges of sexual assault by women belonging to minority (non-dominant) groups.

This bill was not only criticized by eminent legal jurists⁴⁵, state governments⁴⁶ and opposition parties⁴⁷, but also by army men and public servants. Clause 13 along with clause 14 talks about ‘dereliction of duty’ and ‘offence by public servant on breach of command responsibility’; it aims to punish the officials including the policemen and army men if they fail to prevent the communal disturbance. Under clause 15 of the bill an officer would be vicariously liable for an act done by his or her subordinate, if there was a breach of command responsibility. Presence of such clauses would disillusion the officers, as it effectively leaves no room for them to make an error in judgment. Under this Clause, they can be punished for the same. As a result, they would be hesitant or reluctant to either give, or even take orders from their seniors. Thus, a situation which demands immediate and effective remedial action may be left unattended for the fear of a penalty. The Government

⁴⁵Justice J.S. Verma and Srikrishna were among the key eminent jurists who disapproved for the draft bill against Communal Violence; Seema Chishti, Justices Verma and Srikrishna red-flag NAC draft anti-communal violence Bill, INDIAN EXPRESS (Jan. 23, 2014), <http://archive.indianexpress.com/news/justices-verma-and-srikrishna-redflag-nac-draft-anticommunal-violence-bill/808751/0>.

⁴⁶State Government of Gujarat, Uttar Pradesh, Odisha, and Tamil Nadu were some of the major states who disapproved the bill. There were many other states who considered that the legislation was a subject of state list and my making legislation on such a subject the central government tried to infringe the matters under the state list; Vinay Kumar, Cabinet clears Communal Violence Bill, THE HINDU, Dec. 17, 2013.

⁴⁷Bhartiya Janta Party (BJP) and other state parties registered their dissent in relation to the draft bill against Communal violence; *BJP to oppose communal violence Bill in Parliament*, THE HINDU (Jan. 20, 2014), <http://www.thehindu.com/news/national/bjp-to-oppose-communal-violence-bill-in-parliament/article5418405.ece>.

should have focused upon empowering the officials to tackle instances of communal frenzy, instead of curtailing their powers. Thus, this Clause which was intended to be a panacea to the menace of communal violence would in effect, indirectly inflame it.

Clause 20 of the bill states that the government should establish a National Authority of Communal Harmony Justice and Reparations (NACHJR). The NACHJR was proposed to have seven members out of which four of them would belong to the non-dominant (minority) group. The powers of the NACHJR were laid down from clause 31 to 36. These clauses empowered the NACHJR to conduct an independent inquiry⁴⁸ and for that matter it can engage any national or state agency for its investigation. It even shared the status of a civil court⁴⁹ and also has a power of issuing summons; receiving evidence on affidavits and other powers which may relate to the incident and can be prescribed⁵⁰. Clause 36 of the draft bill empowered the NACHJR to consider the complaints against the armed forces of its own accord. They were not required to intimate the Government of any such action being taken by them. Thus, the Government created a body with both judicial as well as administrative functions. Detractors have questioned this aspect of the Bill as a gross deviation from the principle of separation of powers, which forms a basic structure of our Constitution. However, this is a very feeble argument and does not hold good as special powers are required to tackle emergency situations. Contrary to the popular perception, a major flaw in this Clause was the composition of the Committee and the manner of decision making. The Committee would consist of 7 members, out of

⁴⁸Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill, 2011, Clause 32.

⁴⁹As mentioned in Clause 31(5) of the draft bill, NACHJR would act as a civil court when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code, 1860 is committed.

⁵⁰Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill 2011, Clause 31(2) (a) to (e).

which 4 would belong to the minority community. The decisions would be made on a majority basis. Thus, there is a possibility of such decisions being biased, and an inclination towards favoring the minority community cannot be ruled out. The Government should have refrained from imparting a "communal" character to a Commission whose primary task was to tackle communalism itself.

The nominal rights which are endowed to an accused by the Indian justice system were also ignored and overlooked in the draft bill of 2011. The basic structure of our constitution includes the application of the principles of natural justice like 'Innocent until proven guilty'. But, Chapter VI⁵¹ of the draft bill of 2011 reverses this principle, and gives preference to the illogical and absurd sounding principle 'Guilty unless proven otherwise'. This was not only ultra-vires the constitution as violative of the basic structure, but was also found to be against the fundamental human rights, to which every accused is rightfully entitled.

This Bill would further render the functioning of the Police ineffective. Clause 58 of the draft bill deals with the procedure and remedies which a complainant can seek if his complain is not registered accurately. However, the use of words like 'if satisfied'⁵² has made the provision very subjective and open ended. Chances of misuse of such power and attempts made to hamper and mislead the investigation would increase. Instead making an official as high as a Superintendent of Police duty bound to the complainant, the Parliament should have opted for a scrutinizing mechanism so that the

⁵¹Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill 2011, Clause 71, 72 and 73.

⁵²Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill 2011, Clause 58 provides that if a complainant is not fully convinced that his complaint is accurately then he can approach the officials as high as the Superintendent of Police and register his complaint there and the officer in-charge his bound to conduct the enquiry either by himself or should order his junior to do the same.

complaint gets duly registered, and the police or any other competent agency may proceed with the investigation. Prima facie, this Clause appears to be of great utility to a victim and gives him a wide range of powers. But on closer examination, it seems to a populist move to create an impression of increased accountability. Such provisions would seriously impair the functioning of the Police. This provision was another instance of poor draftsmanship.

Clause 72 of the bill deals with the presumption of evidence against the accused. The said clause presumes the existence of evidence unless the otherwise is proved. This provision takes into consideration the mayhem caused during a communal violence and imposes the liability merely on the basis of suspicion. This is a blatant abuse of the process of law and would certainly shatter the faith of the masses in the judicial process.

The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011 not only discriminates between groups of people by distinguishing them as majority and minority, but its provisions are also ultra-vires and in direct conflict with the basic structure⁵³ of the Constitution. The Bill was full of loopholes and inconsistencies as a result of which it would not have been able to fulfill the object of its enactment effectively.

C. Prevention Of Communal And Targeted Violence (Access To Justice And Reparation) Bill, 2013

The central government was under hibernation for a year and yet again in 2013, another Bill was introduced with minor changes. The

⁵³‘Basic structure’ is not explicitly defined in the Indian Constitution nor does the Supreme Court of India laid down a strict definition of the same but in the case of Kesavananda Bharti v. State of Kerala, the Constitutional bench of Supreme Court has enlisted the subjects which form the basic structure of the Indian quasi federal system.

opposition parties and many political thinkers are of the opinion that it was after the recent Muzaffarnagar (U.P.) riots⁵⁴ which galvanized the Government to table the new Prevention of Communal and Targeted Violence (Access to justice and Reparation) Bill, 2013. The two Bills tabled previously had to face a lot of criticism and were not accepted by the Parliament. The recent attempt to come up with a comprehensive legislation was also scrutinized and frowned upon by the opposition parties, legal scholars and the state governments. Chief Ministers of many Indian states have voiced their dissent and termed the Bill as a 'recipe of disaster'.

There are certain improvements in the Bill, but it is still not free from anomalies. The ambiguity with respect to clause 3(f) (v) remains and this clause has been in the line of fire yet again. On the very same lines clause 3(e) when read with clause 4⁵⁵ can easily be misused by any person belonging to a minority (non-dominant) group. Under this section, any act of a person against another person belonging to the non-dominant group can be given a communal color irrespective of the fact whether the said act was done with or without the intention to cause communal violence. Thus, such a clause would become a potent instrument in the hands of certain people to add a communal connotation to any trivial matter.

Clause 10(b) of the new bill elaborates on the breach of command responsibility and on a similar line like that of the 2011 bill, it has

⁵⁴Ajoy Ashirwad Mahaprashasta, *The Riot Route*, FRONTLINE, Oct. 4, 2013.

⁵⁵Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2013, Clause 4, Knowledge.- A person is said to knowingly direct any act against a person belonging to a group by virtue of such person's membership of that group where:

(a) he or she means to engage in the conduct against a person he or she knows belongs to that group; or,

(b) With the knowledge that the person belongs to a group, he or she means to cause injury or harm to such person because of the membership of such person to that group.

made public servants, police and security agencies criminally liable if they fail to prevent the communal riots. It is contended that such laws would make the security agencies, public servants reluctant to take any drastic measures, and leave them vulnerable to political victimization. They may be made scapegoats to shield the incapability or malicious motives of the political class. This would seriously retard the effective functioning of these public servants. Many States were of the opinion that by making such a law, the Centre in trying to infringe the subject ambit which is provided in the state list in the seventh schedule⁵⁶ of the Indian constitution. Subject matters like 'law and order' and 'public order' are a part of the State list, therefore making such laws is not only equivalent to offending the Indian constitution but is also against the principle of separation of powers between the Centre and the State.

Certain points of criticism remain unchanged even in the 2013 bill. The inclusion of clause 3(k) and 101(f) from the 2011 bill to the new draft bill of 2013 has been subject to tremendous criticism as it provides for an immeasurable and subjective ground⁵⁷ for classifying an individual as a victim and making him eligible for compensation.

There are definitely some key additions to the new bill of 2013. Clause 6 of the draft bill defines 'Hate propaganda'⁵⁸. The government attempts to control the spread of communal violence by restricting the publication of articles which might hurt the religious

⁵⁶DR. J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA (44th ed. 2010); State List includes 66 different subjects but entry 19, 20, 29 and 36 has been deleted by constitutional amendments. These include the subjects on which the state has exclusive power to make laws on subjects mentioned in the list.

⁵⁷The said ground is of 'psychological harm' which would have opened the flood gates of victims claiming compensation.

⁵⁸Prevention of Communal and targeted violence (Access to justice and Reparation) Bill, 2013, Clause 6, "whoever publishes, communicates or disseminates by words, or signs inciting hatred causing clear danger of violence against persons having a particular religious or linguistic identity"

sentiments of a community. But it may potentially infringe article 19(1) (a) of the Indian constitution. The clause starts with a non-obstante clause⁵⁹ which itself was questioned and criticised. Hate propaganda includes anything published or communicated or is made visible through sign or graphic representation which may incite or has potential to incite the communal violence. Clause 6 ends by stating that anything done in promotion of the fundamental right of speech and expression⁶⁰ and freedom of press⁶¹ would not be included in 'hate propaganda'. However, there exists a very thin line between content published while exercising the fundamental right and content inciting hatred, so there should be a proper examination of content before fixing its category. But the draft bill does not provide for any mechanism or standard for the same. Leaving it solely to the government to decide the category in which certain content would lie not only restricts the freedom of press but would also lead to the victimization of press and the general public as well. A similar provision under the Indian Penal Code, Section 153A also exists with the same penal provision and punishment as that of the above mentioned clause. The existence and requirement of clause 6 is questioned on that ground as well.

Thus, even the draft bill of 2013 did not get enough support in the parliament to become in-effect law. Due to the above mentioned drawbacks in the 2005, 2011 and 2013 bills the dream of a comprehensive law against communal violence in India is still a utopia. The criticism, timing of introduction and the provisions of the above mentioned bills questions the 'political will' of the parties to remove the cancer of communal violence. The need of the hour

⁵⁹The non-obstante clause in a statue makes the provision independent of other provisions contained in the law, even if the other provisions provide to the contrary. See *Brij Raj v. S.K. Shah*, (1951) AIR SC 115.

⁶⁰*Dr. Ambedkar's Speech in Constituent Assembly Debates*, VII 980 (Dec. 1, 1948).

⁶¹*Indian Express Newspaper v. Union of India*, (1985) 1 SCC 641.

should be to bring up an unbiased and comprehensive law against Communal violence and this can only be achieved when all the political 'agendas' and motives of the political parties to make against by exploiting the communities would be set aside.

V. RECOMMENDATIONS & CONCLUSION

The above discussion deals with the fallacies in the proposed legislations and their inadequacy in dealing with the anti-social and unscrupulous elements, which fan the communal sentiments to fulfill their evil designs. The Government should avoid imparting a communal character to a legislation which was enacted to tackle communal violence itself. Various provisions of the Bills have been discussed, which would aid in furthering the communal propaganda instead of tackling it.

The time of introduction of these Bills these in the Parliament was sufficient to raise a suspicion over the motives of the Central Government. The popular perception is that the Government is using this Bill as an instrument to appease the minority to acquire an upper hand in the General Election scheduled to be held in 2014. Exploiting religious differences for vote-bank politics may have disastrous consequences, like the Shah Bano Controversy. Unscrupulous and power hungry politicians must be deterred from indulging in such petty tactics for electoral gains. Such acts threaten the unity of the nation, and undermine its integrity. These acts mount a direct attack on the very idea of an India based on egalitarian principles like Secularism. We propose that persons against whom charges of inciting communal violence are proven should be punished under Chapter VI of IPC, which covers Offences against the State or similar provisions under the new legislation which is likely resurface in some time. The forthcoming bills should include proper provisions

including the penalization of the anti-social and unscrupulous elements of the society. Such provisions would have a deterrent effect on those who use the existing communal divide of our society as a staircase to fulfill their political ambitions.

The fact that India still lacks proper education and awareness mechanism cannot be denied. The tendency of educated people getting involved communal violence is comparatively lower than that of uneducated people. The uneducated section of our society lacks economic opportunities. Therefore, they are an easy catch for the perpetrators of communal violence, as they can be easily brainwashed and used against one another spreading communal violence. Awareness is required to sensitize people to the cultural and religious differences. We need to perceive our historical past from a secular perspective. Misrepresentation has created such a deep gulf between various communities that reconciliation becomes very difficult. A narrow-minded approach would leave us vulnerable to everlasting conflicts and violence.

Further, the Indian definition of secularism also needs a reassessment. Communalism on such a large scale is considered to be specifically an Indian phenomenon, where the cause of each religious group is perceived to be essentially in conflict with the other group. Such a conception of Secularism indirectly promotes the Communal propaganda, and renders Indian Secularism fragile. Thus, there exists a communalism-secularism dichotomy which is the basic reason for widespread communal violence in the country.

It is pertinent to note that these legislations will merely help in mitigating the effects of a communally charged incident or communal riot. Policy makers need to take into account the various underlying factors responsible for endemic communal incidents. An attempt should be made to eliminate such instances in the first place, so that a legislation would not be needed to tackle the same. This is in line with the age old saying 'Prevention is better than cure'. The

government may set up a Special Commission to identify the possible reasons and try to curtail such instances. This would require assistance and active involvement of experts along with adequate political backing.

The UNESCO constitution lies down that “Since wars begin in the minds of men, it is in the minds of men that defences of peace must be constructed”. We know that cultural identity plays a major role in shaping up the personality of the individual and hence it is imperative that liberal approach to religious and cultural issues is inculcated in the people right from the start. It is but obvious that different people have different mind-sets and societies as a whole also have their own temperaments, so the idea is not to homogenize but to create an attitude of accommodating the other. The concept of respecting “*plurality and diversity*” would act as glue that would bind societies and make them tolerant towards other faiths.