

Short Commentary on the Whistleblowers Bill in context of Mining

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Background:

Absence of protection of human rights and human rights defenders in a society is a symbol of absence of democracy. Supporting and protecting human rights defender is a significant aspect of strengthening democracy-building efforts. Investments involved in extractive industries, such as mining industries, are often involved in abuses of the rights of indigenous peoples to their lands, territories and resources, their civil and political rights and their right to development.

But there have also been continuous and consistent efforts made by the human rights defenders in promoting and protecting human rights of the voiceless and marginalized and their irreplaceable role of human rights has been acknowledged and recognized widely in general and by UN general Assembly in particular. Sometimes, protecting human rights (e.g., exposing manipulation of different laws and wrongdoing of govt. officials and corporate in mining areas) can pose a threat to vested interests (corrupted bureaucrats and profit-monger corporate). And, there is, always a possible threat to human rights defenders working on RTI, environment, land rights, economic rights, cultural rights, Forest Right Act.

It is important to understand that defenders bring issues of non-compliance and lop sided decision making which is to understand and not rule out their say, they are effective mediums to promote democratic means and thus better governance. Many Right To Information activists, environmental, social activist have been harassed and even murdered for seeking information to “promote transparency and accountability in the working of every public authority” in India. People seeking information from local administration also face social ostracism. Sadly, often many threats and attacks (including murder) don’t get reported by the media. For the most part, human rights defenders receive media attention only when killed or seriously injured.

UN Declaration on Human Rights Defenders

To recognize the important of human rights defenders and their work and to protect defenders, after 14 years of debate, discussion and long negotiations, in 1998 the UN General Assembly adopted the Declaration on Human Rights Defenders and has formed the normative basis for our support for human rights defenders. The declaration establishes that the states have a particular responsibility to protect human rights defenders, including from attacks non-state actors. It underscores that states have an obligation to promote and respect rights that are of key importance to human rights defenders and their work, such as freedom of expression, the right to receive and impart information, and the right to assemble peacefully, and to form associations and non-governmental organizations. The international frame work on human rights defender states “Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”(Article 1of the UN Declaration on Human Rights Defenders).

In short, anyone, from any profession and background, acting independently or as part of an organisation, can be protected under the Declaration if (s)he is acting for the promotion and protection of human rights with peaceful means and accepts the principle of universality of human rights.

The main purpose of the Declaration is to protect human rights defenders and their activities. It clarifies defenders' rights as well as States' obligations to protect these rights. The Declaration legitimises human rights activism and recognises that individuals and groups are entitled to carry out human rights work without fear of reprisals.

Protection of Whistleblowers, Human Rights Defenders – A need for highlighting importance of issues and passing of the Bill

1. Mining¹ and human rights have increasingly become inseparable and this is for no good reason in the recent times. Despite international mechanisms created to respect the human values, law of land and constitutional provisions, violation of human rights of those who are affected by mining or living in the mining region (Article 19, 21) is taking place unabatedly; the other is of those who are defending the rights within the constitutional and legal terms. As the three arms i.e. Judiciary, Legislature and Executive try to promote a democratic society by performing roles provided for them in the Constitution, the outreach remains an issue whereas human rights defenders fill a part of this gap by acting as stakeholders or medium to express gaps in this promotion and thus become an essential part of the larger framework of governance. The recognition of these stakeholders in restoring democracy is vital but misplaced in the current development context. These stakeholders become the most vulnerable while challenging the actions and decisions that are not likely to remain human rights compliant.
2. There are legislations and frameworks to protect the human rights and the human rights defenders but this doesn't seem to be even an effective stop gap arrangement. The bill [Mines and Minerals (Development & Regulation) Bill] while amending the 1957 Act in totality, sees minerals as an economic opportunity and for which rapid expansion is very likely but it makes a cursory provision 'to reward the whistleblower' under sec. 53(4)(g) which reads as follows:

(g) prevention and detection of illegal mining, including expenditures incidental to enforcement of the provisions of section 114 of this Act and to reward whistleblowers on illegal mining;

Explanation.—For the purposes of this section a whistle-blower is a person who provides credible information of illegal mining;

3. There is nothing towards secrecy and protection of the whistleblower in this context. Several examples underline the need for this, failure of which has resulted in loss of lives. The European Court of Human Rights ruled in 2008 that whistleblowing was protected as freedom of expression¹. The standing committee in its report on the Bill had suggested to widen the scope of bill to include human rights violation as one of the offences for which complaints can be filed but the bill is silent on this aspect.

¹ Refer Part III of Constitution of India, Fundamental Rights – Right to Freedom under 19 (1) (a)

4. Now the government has, published amendment rules (Mineral Concession Rules) and a definition² for illegal mining has been introduced putting more onus on the state to combat the situation and take appropriate actions. Any person providing credible information about illegal mining in context of MMDR bill contradicts the provisions of Whistleblower Bill as there is no such provision and giving a reward may also expose the identity of the person or whistleblower. It needs to be integrated well. It may be noted here that in 2010, the number of illegal mining cases were around 73,000 and an enquiry commission (M.B. Shah) was instituted last year. A human rights defender and a whistleblower have a commonality i.e. to check anything illegal being done which may range from illegal detention, torture, violation of mining and environmental laws, working without a proper concession etc. but there is hardly any protection provided to them resulting in widening gap of human rights violations and mining.

Giving it a Miss:

The whistleblower bill needs a wide range of aspects to be covered apart from corruption.

- Several defenders are implicated in false cases and since the matter comes under the directive principals of state, there is utmost chance of the issue being curbed at the state level, although the complaint mechanism exists before the NHRC but it is more towards ordering enquiry but action still rests with state. Several of the illegal detentions take place in the name of maintaining law and order situation which may be applied for a certain project where people have raised voice against non-compliance of laws and its procedures. This would be a huge gap area that may require a serious debate in the parliament to pass the bill.
- It is pertinent to note that with the enactment of RTI Act by which the citizens can obtain information has also brought illegal activities to the limelight, say, illegal mining, non-compliance. Although the decision making process to grant clearance may not have a corruption or wilful misuse of discretion intention. But it may have an implication of unforeseen impacts or negligence of local situations not reported in the impact assessment document or concealment of information to higher authorities about implementation of activities. A whistleblower may like to disclose such information or file a complaint with facts in hand. This has been grossly neglected in the provisions of the bill, it remains uncertain whether these kind of complaints will form part of disclosure under the definition provided so. If not, an inclusion to this extent is required. In several instances, mine safety becomes a hazard for environment as well as for people, there may be no corruption or other aspects but negligence should be a cause enough to entertain complaints to ensure actions for public safety. A whistleblower or defender, in the absence of this bill may feel a little hesitant to proceed.
- In some of the cases, as it was revealed in IPS Narendra Kumar's case who was following illegal mining in Morena of Madhya Pradesh, got killed as a tractor trailer

² Illegal mining means any reconnaissance or prospecting or mining operation undertaken by any person or a company in any area without holding a reconnaissance permit or a prospecting licence or, as the case may be, a mining lease, as required under sub section (1) of section 4 of the Act.

[\[http://www.mines.nic.in/writereaddata/filelinks/0e9799ff_Full%20page%20fax%20print.pdf\]](http://www.mines.nic.in/writereaddata/filelinks/0e9799ff_Full%20page%20fax%20print.pdf)

ran over him, there were different interpretations given for it. Here the timebound completion of inquiry, if so initiated, is relevant and it may need a tighter time frame and similarly the penalty as mentioned in section 15 is too minimal to avoid compromising the facts of the case, this should be upscaled taking the worst case scenario.

- It would be naïve to reveal the identification of the whistleblower even under consent of the whistleblower or defender as intimidation and harmful acts or victimisation of whistleblower could take place without much proof.
- In Chapter V of the bill, section 15 deals with safeguards against victimisation but the bill fails to define victimisation, this has been left undefined even after the recommendations³ of the standing committee. Recommendation 5.2 (ii) & (iii) specifically mentioned as follows;
 - (ii) Bill should provide for specific and exhaustive definition of the term “Victimisation”;
 - (iii) Protection against victimization should be more specific and exhaustive;
 - (iv) Clause 16 detailing punishment for frivolous disclosures ought to be removed. This clause is a clear deterrent to those making Public Interest Disclosures and the human rights defenders, specifically. The Bill does not provide an adequate definition of "frivolous disclosures" which leaves things open to manipulation;
- Section 19 i.e. offences by companies in the Bill and similarly section 115 in the Mines and Minerals (Development & Regulation) Bill 2011 complement each other. Clause (2) of Section 19 says that *“Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly”*. There is a need to define the strict penalty in such cases where the offence has been committed knowingly or due to neglect, an independent inquiry either by the competent authority or a body of expert members to arrive at a scientific conclusion to prove whether the offence is an outcome of wilful knowledge or failure of due diligence process. In either case, an objective decision should be taken and penalty imposed and prosecution conducted. Because in most of the cases, the works may be outsourced to various contractors and the factor of neglect may rest upon the contractor and the issue that who is the rightful accountable person or entity may get entangled in this debate or get delayed.

³ 5.2 of the Standing Committee Report, page 11

ⁱ NHRC on Human Rights in Mining Areas (Second Universal Periodic Review to UN):

Rapid growth, the development of infrastructure and the expansion of mining industries, have all led to massive displacements of populations, often without their informed consent. The NHRC's monitoring finds that usually those displaced are given neither adequate relief nor the means of rehabilitation.

- The denial or the abuse of, or the inability to access, their rights hit the most vulnerable the hardest – women, children, the scheduled castes and tribes, and the minorities.