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Partners in Change

[FACILITATING A CULTURE OF HUMAN RIGHTS AMONG BUSINESSES]

The document is a compilation of recommendations based on the study titled “Understanding functioning of companies’ response systems vis-à-vis key Human Rights violations available in Public Domain” undertaken with support of NHRC.

Facilitating a Culture of Human Rights among Businesses

An Indicative Outline for the National Action Plan on Business and Human Rights (NAP)

Based on the on the study titled “Understanding functioning of companies’ response systems vis-à-vis key Human Rights violations available in Public Domain” undertaken with support of NHRC

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An Indicative Outline for the proposed National Action Plan on Business and Human Rights

OBJECTIVES

The Ministry of Corporate Affairs is evolving a National Action Plan (NAP) on Business and Human Rights. The latest draft available from the Government of India is the zero draft dated December 10, 2018. It is more than two years now. The Government is expected to come with another draft in the first half of 2021. The Zero draft although merely sets a base line and has no action plan as such, it highlights certain issues such as the state-business nexus, collective bargaining and even leveraging public procurement to promote human rights. The [UN Guiding Principles on Business and Human rights](#) (UNGPR) envisages Protect–Respect–Remedy framework locating the state’s role primarily in the first pillar. However, it is also the role of the State to ensure that all three pillars (State, Business and Remedy institutions) are grounded in reality. The National Action Plan on Business and Human Rights (NAP-BHR), therefore, ideally, need to set clear targets for the Government on all the three pillars and prepare an activity plan, along with a financial memorandum to achieve the same.

In 2018, the Government came out with a zero draft. No doubt, it is a [zero draft](#) in the literal sense. It is, nevertheless, definitely, a welcome step from the Ministry of Corporate Affairs as it has embarked into certain domains, which are conventionally left out of the state agenda. As of now, the zero draft is primarily an amalgamation and update of what exists today in terms of legislations, schemes and programmes. However, for basically two reasons, one can say that the zero draft has shown eagerness to take on hard issues. First, the fact that public procurement has been discussed as an instrument to promote human rights is an important first measure. It acknowledges that it has a significant role in the business of business beyond being a regulator and enforcer of laws. Second, the zero draft is probably among the first instruments from the government that has acknowledged that the state–business nexus is a problem; and there is a need for an urgent action plan to be drafted on the issue. It is important that the discussion is extended to strengthening and protecting the whistle-blowers and human rights defenders.

Listing of a number of existing programmes in Zero draft, however, should not give a ‘feel good’ sense to the government—as if things are fine vis-à-vis the business and human rights agenda.

Setting Objectives

Firstly, there are attempts to narrow down the definition of human rights.

UNGPR states,

‘An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.’

It further adds,

“Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law”.

While the UNGPR tries to reclaim the broad definition of human rights, generally the challenge is that

- A. *The definition of human rights is often wedded to the presence of ‘normal local practices’.*
- B. *Many human rights violations have embedded in the cultural practices; and many new practices are being normalized.*

For example, (i) the absence of policy mention on menstruation issues or the reproduction of caste relations in business practices is just seen as normal practices that are not in the domain of business. Among new practices being normalized is not forming any collective bargaining institutions,

increasing proportion of contractual workforce or creating business corridors that do not require applicability of labour laws or companies labeling 'No added MSG' citing local practice. (ii) Many human rights violations are being legalized- from allowing child labour to work beyond eight hours a day.

Thus, in this scenario, the key challenge is to ensure that human rights mentioned here are not subject to presence of backsliding state laws or regressive local practices.

In fact, UNGP states,

"The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions".

However, this challenge is a huge challenge. Businesses prefer to come with statements such as. "Oh, we were not aware that these are human rights", "These are so common, every company here does it", "It is not our role to address it, it is the role of the government". There is a tendency among businesses to remain in this self-selected state of ignorance.

Secondly, there are attempts to narrow down the definition of business, as it means for a company.

Often a company tries to limit business as activities done directly by it through its regular permanent workforce. It tries to project a clean and human rights compliant island within its business operations and states that it is responsible for only that sub-set of activities performed in that island. The company takes the benefit of the provisions of existing laws to define its jurisdiction.

UNGP states, "For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services."

In this sense, the ground challenge is that there might be significant laws that acknowledge human rights and the best of the remedial systems, but if the business responsibility were not defined appropriately in alignment with UNGP, business would continue to be *business as usual*.

The National Action Plan ideally needs to have the following three objectives: -

1. Creating a Culture among businesses to organize **mandatory human rights due diligence**, and ensure its implementation.
2. Creating a **Culture of judicial and quasi-judicial remedies**, which proactively supports survivors and human rights defenders.
3. Institutionalising **human rights as a consideration in Government interface with Businesses**: Investment, Procurement, manufacturing and partnerships.

Objective 1

Creating a Culture among businesses to organize **mandatory human rights due diligence**, and ensure its implementation.

The Mandatory Human Rights Due diligence is a key demand from every constituency that is present in business and human rights domain. UNGP clearly stresses the significance of this mechanism in Pillar 2. However, the operationalizing the same needs a number of clarifications- from the very defining of human rights to conceptualising the term, mandatory. Does the term, mandatory, mean making a law with penalties or is it part of certain listing requirements in stock exchange or is that some sort of guidelines from NHRC? Is this going to be a single law, which would encompass all other laws of the land on human rights? Is this going to be central or state laws- given the division of powers? Or is this just going to detail out mandatory mechanisms in the companies, keeping the definition of human rights broad and open-ended? Clearly, a mandatory HRDD needs to define the following: -

- A. Defining Human Rights: The responsibility of business enterprises to respect human rights refers to internationally recognized human rights [at a minimum, those expressed in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.]
- B. Defining "Business as activity": "Own activities and those directly linked to their operations": The responsibility to respect human rights requires that business enterprises: (a) their own activities (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
- C. Defining Respect: Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- D. Defining "Whose Responsibility": Applicable to all enterprises, although responsibility according to severity: To all enterprises regardless of their size, sector, operational context, ownership and structure. Responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.
- E. Defining "Mandatory": Businesses need to have mandatory policy commitment, human rights due diligence system and processes to enable remediation.

A mandatory HRDD has to be defined very clearly in terms of the above. Further, the HRDD has to provide provisions under all the following four dimensions:

- a) Mechanisms to detect and address human rights violations
- b) Transparent Disclosures to survivors, Government and in Public domain
- c) Linking HRDD with grievance redress system, with elaborate remediation systems within businesses.
- d) Scope for community-led HRDD and Grievance Redress system

The NAP surely is not expected to provide the conceptual framework for the country's HRDD now, nor does it going to define any of the above. What is expected from NAP is to set a timeline detailing out the process, through which the goal of the mandatory HRDD can be achieved. Clearly, it is not about merely having legislation on the same, but facilitating a culture among businesses. Keeping this in mind, ideally an NAP should specify the following: -

PROPOSED ACTIONS OVER FOUR YEARS						
<u>Creating a Culture among businesses to organize mandatory human rights due diligence, and ensure its implementation.</u>						
	PHASES Phase I: Immediate (Months 0-6); Phase II: Legislations and Regulations (Months 7-18) Phase III: Creating and Strengthening Mechanisms (Months 18-36); Phase IV: Reflection, Expansion (Months 37-48)					
	ACTION PLAN	Led By	I	II	III	IV
1	Developing/Evolving/Building/Deliberating Models					
	ModelMechanisms					
a	Codifying Human Rights drawn from ILO, UN Conventions based on listing in NGRBC and beyond (By respective Ministries) Codified Human Rights may be vetted by NHRC, NCPCR and other such bodies for respective constituencies	Labour and other Ministries				
B	Model Human Rights Policies for Corporates Using NGRBC and other relevant UN and ILO conventions	MCA				
C	Model HRDD Systems, customised to different business sectors	MCA				
D	Model Grievance redress system, integrated with HRDD	MCA				
E	Model Disclosure templates (BRSR, Sector Supplements)	MCA				
	Models on Community Engagement					
F	Model policy on Community engagement, including displacement, resettlement, rehabilitation, environment and social harm survivors					
G	Model HRDD from the lens of Marginalisation, especially child rights, Gender, Tribal, Caste, disability, elderly, sexual, religious and linguistic minorities.	NCPCR, NWC, NCSC,ST, BC, Minorities				
H	Model labour Code for Corporates, mandatory guidelines that should inform supplier codes of the businesses	Labour				
I	Model Diversity Policy for Corporates	MCA				
J	Model on Community-led HRDD	MCA				
2	Immediate Notifications under the Existing Acts					
a	Legal sanctity to NGRBC, BRSR, disclosures	MCA				
b	Notifications to Business Chambers and Companies to evolve disclosure templates	MCA				
c	Notifications to MSMEs on customised responsibility reporting templates	MCA				
d	Making changes in CSR guidelines, including the need to view CSR from the lens of Human Rights	MCA				
e	Creation of Sectoral Independent Human rights Ombudsman for Businesses	MCA				
f	Companies to be mandated to define, address diversity and conduct a diversity audit on an annual basis.	MCA				
3	Strengthening Monitoring System					

A	Evolving and Finalisation of NGRBC Index, including on Disclosure Quality (Ranking companies on compliance with NGRBC as well as on quality of disclosure)	MCA				
B	Mechanisms to analyse all BRRs periodically and informing businesses on potential changes	MCA				
4	Facilitating Legislative Agenda					
A	Making HRDD mechanisms mandatory	MCA				
b	Making Grievance redressal system at Business and Business Associations level mandatory	MCA				
c	Amending Right to Information Act to include Business disclosure, especially for those in essential commodities and services	MHA				
d	Review of Labour Codes, existing laws and mechanisms:	Labour				

Objective 2

Creating a **Culture of judicial and quasi-judicial remedies** on business and human rights, which proactively supports survivors and human rights defenders.

The zero draft refers to the presence of the provisions in Whistle Blowers Protection Act, 2011, Companies Act 2013, regulations of Securities Exchange Board of India (SEBI). It lists the institutions of the National Human Rights Commission (NHRC), 26 State Human Rights Commissions (SHRCs), the Legal Services Authorities, constituted pursuant to the LSA Act, and such Guidelines issued by the Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises (DPE) in relation to various corporate governance aspects of CPSEs (CPSE Guidelines), which contains a model of code of conduct. However, the Whistle-Blowers Protection Act, 2011, now 2014, although notified on May 12, 2014, has not been operationalized so far, as certain amendments are pre-requisite. The National Human Rights Commission of India (NHRC) has not evolved any separate mechanism to deal with cases on attack on HRDs; and provision of the Protection of Human Rights Act as of now restricts NHRC to take act only vis-à-vis state actors and this has lead to ambiguity in dealing with Business and human rights related cases.

The challenge is not merely having a mandatory legislation but a culture of business and human rights jurisprudence among authorities and institutions. Clearly such a culture would involve

- A. Survivors standing up for their human rights;
- B. Human rights defenders fighting for the cause of human rights for such victims who are not able to access remedies directly;
- C. State and society protecting human rights defenders and their struggles; and definitely not victimising them; and
- D. Judicial and quasi-judicial authorities engaging on business and human rights issues with urgency and pro-activeness.

The expected goals for an action plan would be to

- 1) Making the Whistle-blower Protection Act, 2014 operational at the earliest. Enact a strong Human Rights Defenders protection legislation with State and Regional level Tribunals
- 2) The NHRC and SHRCs should be mandated to take up cases pertaining to business and human rights. Various other quasi-judicial commissions, tribunals should develop a comprehensive guideline for promoting enhanced protection against corporate-related human rights abuse.
- 3) Capacity building of Legal Machinery on Business and Human Rights
- 4) Mandatory Guidelines against nexus and complicity between State and Business.

PROPOSED ACTIONS OVER FOUR YEARS						
<u>2. Creating a Culture of judicial and quasi-judicial remedies on business and human rights, which proactively supports survivors and human rights defenders.</u>						
PHASES						
Phase I: Immediate (Months 0-6); Phase II: Legislations and Regulations (Months 7-18) Phase III: Creating and Strengthening Mechanisms (Months 18-36); Phase IV: Reflection, Expansion (Months 37-48)						
ACTION PLAN		Led By	I	II	III	IV
1	Evolving/Building/Deliberating Models					
a	Model Grievance redress system, integrated with HRDD: and its disclosure and integration with wider remedy system.	MCA				
b	Codifying Human Rights drawn from ILO, UN Conventions based on listing in NGRBC and beyond (By respective Ministries) Codified Human Rights may be vetted by NHRC, NCPDR and other such bodies for respective constituencies	Labour and other Ministries				
c	NHRC analyses all the complaints it has received in the last ten years from Business and Human Rights Lens; and evolves a facilitating model of remedies on business and human rights; builds case for expanding its jurisdiction	NHRC				
2	Proposed Notifications under the Existing Laws					
A	Creation of Sectoral Independent Human rights Ombudsman for Businesses	MCA				
B	Businesses create online platform where all grievances are consolidated and action reports are attached and updated regularly	MCA				
4	Facilitating Legislative Agenda					
b	Making Grievance redressal system at Business and Business Associations level mandatory	MCA				
c	Amending Right to Information Act to strengthen Information commissioners to mandate Business disclosure, especially for those in essential commodities and services	MHA				
D	The Law mandating NHRC and SHRCs to take up cases pertaining to business and human rights. (Section 2, 12 and 30 of Protection of Human Rights Act)	MHA/ NHRC				
F	Enact a strong Human Rights Defenders protection legislation, creating State and Regional level Tribunals	MHA				
	Capacity Building and Sensitising Agenda					
a	Training programme for Judges, Quasi authorities, tribunals	NHRC				
b	Detailed curriculum for Law students, Business Management students	NHRC				

Objective 3

Institutionalising *human rights as a consideration in Government interface with Businesses:* **Investment, Procurement, manufacturing and partnerships.**

The Zero Draft, interestingly, has a section on Public procurement. It indicated the presence of sustainability consideration as well as adherence to various statutory provisions relating to human rights in the Manual for Procurement of Goods (2017) and The Manual for Procurement of Consultancy & Other Services (2017) The Government of India launched the Government e-Marketplace (GeM) that is the National Public Procurement Portal.

The National Action Plan on Business and Human Rights, ideally, needs to have a road map for making the Government Departments use its procurement process to be linked to the Human rights due diligence system and well as business disclosure to inform procurement decisions. Public Procurement can be used to incentivise legally mandated Human Rights Due Diligence system and mandated disclosure mechanisms, for they would be the basis for potentially many procurement decisions of the Government. The MCA needs to help create an Index on Responsible Business based on information through this disclosure mechanism; and use them to classify companies as champions. This classification could be proposed to be incentivised through public procurement system. Further, the NAP needs to indicate a process that could spell out the characteristics of 'Model Procurer' by making an in-principle commitment to addressing human rights violations in supply chain as a buyer and set timelines for the government to become the same.

The road map may include even a comprehensive Public Procurement law that links public procurement with human rights compliance so that the same may be made a statutory obligation. Incidentally, there was a bill on Public procurement that lapsed in 2014. The same may be revived with additional objective of inking the public procurement with UNGP. In the interim, General Financial Rules and Manual of procurement of Consultancy shall be amended to incorporate the clause of compliance with UNGP being mandatory for participating in public procurement tendering. GEM, (Government e-market place) could create "Superstar category" for such vendors, which certify that their products are free from human rights violations- thus incentivizing such vendors. NAP may also recommend the Competition Commission of India to review its Diagnostic tools from the lens of UNGP and thereby incentivize such vendors who certify that their supply chain is free from human rights violations. The aim is to redefine "competition" from the lens of human rights so that companies that violate human rights do not get advantage over those who are committed to eliminate violations in not only their workplace but also in their entire supply chain.

Further, Public sector enterprises are the business run by the Government. The aim should be to make Government businesses become "model human rights-respecting businesses", setting high standards of compliance and adherence.

Similarly, public investment is of major importance to the economy, and has considerable contribution to the development of the country. It is, therefore, the responsibility of financial organizations, dealing with investments and capital, to be held accountable for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development. It should consider and integrate, within its own operations and business. The National Action Plan needs to facilitate discussions to extend Human Rights discussions to the financial sector in India and attribute Human Rights obligation to them. Some key goals are:

1. Laws, legislations and rules governing public investment (from pensions, insurance and provident fund) in India, by government, should be amended to clearly spell out the need for financial institutions to respect human rights conventions, including those mentioned in Principle 12 of the UNGPs.
2. BRR templates of banks, should seek disclosure of banks investing in such companies, which do not adhere to Human Rights programme and the reasons thereof.
3. Mandatory diligence by the companies before making investment decisions, to ensure they do not infringe on the enjoyment of human rights, in accordance with HRDD framework.

PROPOSED ACTIONS OVER FOUR YEARS						
(3) Institutionalising <i>human rights as a consideration in Government interface with Businesses: Investment, Procurement, manufacturing and partnerships.</i>						
PHASES						
Phase I: Immediate (Months 0-6); Phase II: Legislations and Regulations (Months 7-18) Phase III: Creating and Strengthening Mechanisms (Months 18-36); Phase IV: Reflection, Expansion (Months 37-48)						
ACTION PLAN		Led By	I	II	III	IV
1	Evolving/Building/Deliberating Models					
a	Model Public Procurement and Investment Guidelines, providing incentives and disincentives related to practices that promote or violate human rights, drawn from global practices	MoF				
b	Model Certification System and Standards on Human Rights	BIS				
C	Encouraging CAG to evolve Human rights centric Auditing Standards for PSEs, Public procurement and Public investment	CAG				
2	Proposed Notifications under the Existing Laws					
A	Government adopting Public Procurement and Investment Guidelines linking to Human Rights	MCA				
B	Public Sector Enterprises provided mandatory guidelines on adopting NGRBC and BRSR; and submitting action taken reports	DPE				
	MCA coordinates with DoE, MoF to link the HRDD index with Public Procurement Guidelines					
	MCA coordinates with GeM to incorporate the elements of the Index in its system.					
d	Creating and building systems of verification/ certification on HR to inform procurement.	Finance				
g	Mandating BRSR templates of banks to disclose on investing in such companies, which do not adhere to Human Rights programme and the reasons thereof.	MCA				
4	Facilitating Legislative Agenda					
c	Conceptualising, framing and passage of Public Procurement legislation	Finance				
5	Capacity Building					
A	Training Public Procurement professionals on Business and Human rights					
B	Capacity Building of Bank Professionals on Business and Human Rights					
C	Organising training programmes of PSU professionals					

Monitoring the Progress in the implementation of the NAP

- (a) Nodal Ministries/Department: The Nodal Ministry will be the key ministry to anchor the entire process. As of now, there are roles for MCA, MEA and NHRC. One of these authorities should take up the role of anchor.
- (b) NAP ideally would have role, which are inter ministerial as well as inter-governmental. Each Ministry should identify activities and roles in the NAP. Similarly, State Action Plans need to be developed for each state government. There requires a nodal ministry with regards to each state Government.
- (c) Multi-stakeholder platforms to ensure participation of regulators, investors, banks, businesses, MSMEs, Trade unions, workers, citizens and communities in the monitoring process.
- (e) Integrating with global and national reporting systems, including to Parliament and Parliament Committees.
- (f) Creation of Knowledge Hubs located within the Government affiliated institutions, with business associations and with autonomous academic institutions to provide independent monitoring in parallel to the Government monitoring.
- (g) Providing a detailed Financial Memorandum with the NAP to ensure there are budgetary allocations for implementing NAP, including organising studies and research around model development.