

NAP FROM THE MARGINS: MAINSTREAMING HUMAN RIGHTS IN BUSINESS

Submission to the Ministry of Corporate Affairs, Government of India

By

Partners in Change, Praxis Institute for Participatory Practices and
Corporate Responsibility Watch

On

March 20, 2020



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FOREWORD

A decade ago, businesses were scared of the term Human Rights. And then, the institution of Business Responsibility Reports, a reporting system mandated by the Securities and Exchange Board of India (SEBI), based on the National Guidelines on Responsible Business Conduct (NGBRC), brought human rights into the board rooms. 93 per cent of the top 150 companies listed on the Bombay Stock Exchange claim that they have policies on human rights. But the fear is that in a few years, there would be continued busting of trade unions, denying workers minimum wage and children employed in supply chain, while there would also, in parallel, be well organised seminars on human rights by businesses displaying beautifully drafted policies and mechanisms on paper. The challenge now is to protect the human rights discourse from getting sanitised, by ensuring and strengthening state and civil society monitored systems of protection of human rights of those at margins.

The Ministry of Corporate Affairs is evolving a National Action Plan (NAP) on Business and Human Rights. The obligation to draft an NAP stems from India's endorsement of the United Nations Guiding Principles (UNGPs) on Business and Human Rights adopted in the UN Human Rights Council (UNHRC). The Principles are articulated as three pillars: State Duty to Protect, Corporate Responsibility to Respect and Access to Remedy. In December 2018 the Indian Government presented the 'Zero Draft' of a National Action Plan (NAP) on Business & Human Rights, thereby kick-starting a national dialogue within Government and with stakeholders – including businesses – to develop a NAP by 2020. Although the zero drafts of the plan merely list all laws and provisions, the draft highlights the state-business nexus, collective bargaining and even leveraging public procurement.

In 2008, the country finalised the National Action Plan on climate change. When Praxis organised a review of the same in 2013, not many groups or government officials were even aware of existence of the plan, let alone monitoring them. Further, the communities, most affected by climate change, such as agricultural labourers, were not even consulted. The NAP largely ignores their rights and entitlements. There are fears and reservations across multiple quarters that the NAP on BHR would also be a non-starter. It is in this background, that we organised extensive consultations, meeting human rights defenders, workers, trade unions, communities affected by business operations, petty contractors, students, youth, dalit organisations and big businesses, so that their views find place in the discussion tables of the Government.

Primarily, there are five areas which are very strongly pushed by communities at the margins. Firstly, there is a need for a strong law that mandates human rights due diligence and grievance redressal systems in businesses and make them functional. Secondly, there is a need for an elaborate legislation on the protection of whistleblowers and human right defenders so that the violations surface into the system to attract remediation. Thirdly, there is a consensus that the top leadership of businesses lack diversity from the lens of gender, caste, tribe, minorities and disabilities. Nothing short of clear affirmative action mechanisms could address the issue. Fourthly, the right to association of workers - contractual and those unorganised in the supply chain - is not only being ignored but also being actively denied. Finally, the government needs to align its policies around public procurement, public investment and CSR with human rights centred processes - not only addressing corruption and nexus, but also creating incentives for companies to promote human rights in their supply chain.

Given that the Ministry of Corporate Affairs is planning to incorporate suggestions from all stakeholders to finalise the document at the earliest, we hope that these inputs will help NAP convey to businesses that ensuring human rights of different stakeholders has a cost and that cost has to be borne by the top businesses.

Tom Thomas
Convenor,
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AUTHORS' NOTE

In November 2018, the Ministry of Corporate Affairs (MCA) announced its commitment towards formulating a National Action Plan on Business and Human Rights at Business and Human Rights Forum in Geneva. Subsequently, MCA published the zero draft of the proposed NAP-BHR in February 2019 and it was published on MCA website. We organised a number of consultations coinciding with these announcements with an aim to reach out to various civil society organisations, trade unions, human rights defenders, researchers and workers etc to communicate about the proposed plan to formulate the National Action Plan and seek their inputs based on their direct experience of working with the respective constituencies. After the release of the zero draft, there were limited attempts by the Ministry to reach out to different constituencies. A notification was released in mid-February 2020 seeking recommendations from the public with regard to the proposed NAP BHR. We carried out 21 consultations across 11 cities, which saw participation of more than 600 participants from more than 250 organisations. These deliberations had presence of Civil Society Organisations (CSOs), small businesses, petty contractors, workers and trade unions (TUs) in addition to more than 50 independent researchers, experts and lawyers. These consultations were conducted over the period of two years in a phased manner and did not follow a particular structured sequence. To that extent, many constituencies and their voices remain unrepresented in this document. Hence, these consultations are not representative of the voices from the margins in totality.

Through this document, we also seek to call for the need to have a comprehensive public consultation for creating a well informed and inclusive NAP-BHR which addresses the challenges faced by those directly affected by business actions. The recommendations from the ground have been further analysed in the context of the COVID-19 pandemic and the findings from the Economic Survey 2020-21. This document is a revised version of the formal submission made to the Government of India in March 2020.

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Each person interviewed, interacted and consulted with, as part of the process, has been instrumental in the completion of this project. We would deeply like to thank them who, during the several months in which this endeavour lasted, provided us with their useful assistance and guidance. This report is based on our inferences drawn from these conversations. Their names are mentioned at the end of the report. However, the report does not necessarily reflect the view of any or all of these individuals in entirety.

ABBREVIATIONS

BHR	Business and Human Rights
BRR	Business Responsibility Report
COTPA	Cigarettes and Other Tobacco Products Act, 2003
CPSEs	Central Public Sector Enterprises
CSO	Civil Society Organizations
CSR	Corporate Social Responsibility
DICCI	Dalit Indian Chamber of Commerce & Industry
DoE	Department of Enterprises
EoDB	Ease of Doing Business
ESG	Environmental Social and Governance
FCTC	Framework Convention on Tobacco Control
GeM	Government E-Marketplace
GRS	Grievance Redressal Systems
HRDD	Human Rights Due Diligence
HRDs	Human Rights Defenders
IRBI	India Responsible Business Index
LGBT	Lesbian, Gay, Bi-sexual, Transgender
MCA	Ministry of Corporate Affairs
MLA	Member of Legislative Assembly
MoF	Ministry of Finance
MP	Member of Parliament
MSME	Micro, Small, Medium Enterprises
NAP	National Action Plan
NGRBC	National Guidelines on Responsible Business Conduct
NHRC	National Human Rights Commission
OECD	Organisation for Economic Co-operation and Development
OSH	Occupational Health and Safety
PSU	Public Sector Units
SC, ST, DNT	Scheduled Caste, Scheduled Tribe and Denotified and Nomadic Tribes
UCPMP	Uniform Code of Pharmaceutical Marketing Practices
UNEP	United Nations Environment Programme
UNGP	United Nation Guidelines Principle on Business and Human Rights
US FDA	United States Food and Drug Administration
WHO	World Health Organisation

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CHAPTER 1: INTRODUCTION

What is National Action Plan on Business and Human Rights?

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 out 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 (UNGPs) envisages the 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.

What is the significance of the zero draft?

In 2018, the Government came out with a zero draft. It is 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. 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 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. However, as of now, the zero draft is primarily an amalgamation and update of what exists today in terms of legislations, schemes and programmes. Listing of a number of existing programmes should not give a 'feel good' sense to the government—as if things are fine vis-à-vis the business and human rights agenda. The gruesome corporate murder of 15 citizens protesting against violations by the Sterlite Plant or deaths of 32 workers owing to an explosion in the NTPC plant or 377 miners' deaths in the last three years or India continuing to use 350,000 tonnes of asbestos annually — there is clearly a lot wanting in terms of implementing the human rights agenda by businesses.

What are the expectations of CSOs and Human Rights Defenders from NAP?

Partners in Change (PiC) and Praxis Institute for Participatory Practices, in alliance with various networks, including Corporate Responsibility Watch (CRW), organised a series of consultations with NGOs, CSOs, trade unions, academic universities and human rights defenders in early 2020. A set of recommendations was presented to the Ministry of Corporate Affairs based on those consultations. As we were consulting with organisations, the feeling was certainly not of hope. Most experts felt that NAP would be a non-starter. Having read the zero draft, some felt that it would just list the existing legislation and refrain from setting any legislative agenda that would harm the interests of investors. The Labour code provisions certainly made them think whether NAP could reverse the direction of these laws? A few others felt that MCA would take the route of National Guidelines on Responsible Business Conduct and satisfied with a non-regulatory system, while stressing upon the need to creating awareness among businesses on the need to integrate human rights. The key question in their mind is whether NAP would propose creating a legally mandated

human rights due-diligence system in the supply chain. There were still others from CSOs who felt that none of these provisions would help unless there was a recognition that businesses are in strangle-hold of patriarchy and caste system; and unless the diversity in Board and corporate decision-making spaces is focus, the rest would just be optics. Human rights defenders of course see the weakest link in the remedy system. Their ask is: Will the NAP would propose a responsive remedy system, mandatorily, both within the company eco-system and the State?

What are the key recommendations?

The Report has three sections. Section 1 has two chapters: one on a plan to evolve mandatory Human Rights Due Diligence (HRDD) mechanisms and the second chapter is a review on existing disclosure mechanisms and a proposed plan of action. Section 2 is on Strengthening of Remedial System, which has one chapter that describes the gaps in the current business and human rights jurisprudence and proposes measures to strengthen the same. Section 3 is on recognition of human rights of workers and communities. It has two chapters: one explains the existing mechanisms recognising the rights of workers and of communities; challenges they face in realising the same; and a proposed set of measures to strengthen mechanisms to promote their rights; and the other chapter is on promoting diversity in decision-making spaces of the corporates, especially from the lens of gender, caste, adivasi, minorities, sexual orientation and disability. The last section is Section 4, which is primarily on leveraging the existing processes to promote human rights in business. It stresses on the need for the Government to build itself as a model market guardian as model procurer and investor. There is a need to strengthen the existing Government guidelines, wherein the Government starts looking at human rights compliance as an important consideration in its decision-making process related to procurement and investment. This section has three chapters: one on public procurement, the second is on public investment on businesses; and the last chapter is on the current CSR responsibilities of businesses under the Company Act, 2013.

SECTION 1

MANDATORY HUMAN RIGHTS DUE DILIGENCE AND DISCLOSURE FROM BUSINESSES

CHAPTER 2:

MANDATORY HUMAN RIGHTS DUE DILIGENCE ACROSS THE VALUE CHAIN

The UN Guiding Principles on Business and Human Rights (UNGPs) elaborates the importance and details of Human Rights due diligence. Principles 17 to 21 define the processes that need to be incorporated in the Human Rights Due Diligence systems.

Principle 17 states: *“In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”*

Similarly, Principle 5 of the National Guidelines on Responsible Business Conduct released by the Ministry of Corporate Affairs states, *“Businesses should respect and promote human rights.” One of the core elements states, “Carrying out human rights due diligence to identify, prevent, mitigate and account for how they address adverse human rights impacts.”*

Businesses are being encouraged to evolve policies on human rights and create systems to realise the same.

What is the Current Status on Commitments by Companies on Human Rights?

Top 1,000 companies based on market capitalisation mandatorily submit Business Responsibility Reports to SEBI as part of the listing requirements. Corporate Responsibility Watch has independently been analysing the policies of the top 150 companies. The Table 2.1 below provides a description of top companies reporting on their commitment to Principle 5 of the National Guidelines. 93% claim they have policies on human rights. 91% say their policies conform to international standards and that they have in-house structure to implement the policies. 71% even claim that they organise independent evaluations of the working of the human rights policies.

Table 2.1. Percentage of companies reporting in affirmative about the status of implementation mechanisms related to National Voluntary Guideline Principle 5 on Human Rights (2017-18)

S.No	Indicator	Percentage of companies (n=150)
1	Existence of Policy	93
2	Formulation in consultation with Stakeholders	93
3	Conforms to international standards	91
4	Policy approved by Board	85
5	Systems to oversee the implementation	91
6	Link provided to view policy online	90
7	Communicated to all relevant stakeholders	91
8	In-house structure to implement the policy	91
9	Existence of grievance redressal system	91
10	Carried out independent evaluation of working of policy	71

Source: Status of Corporate Responsibility in India, 2019; Praxis (2019). Accessed at: http://www.corporatewatch.in/images/Status_of_CR_Report_2019.pdf

From the Table 2.1, it is clear that most of the top companies ‘theoretically’ have policies related to the principle 5 on human rights. However, the Table 2.2 provides insights into what human rights issues these policies engage with. The analysis ¹ from India Responsible Business Index 2018 shows that the policies of most of the companies, although called human rights policy, do not have commitments to many significant human rights. Moreover, only six companies disclose in public domain that they extend their employment policies and standards to the supply chain.

Table 2.2: Policy commitment of companies vis-à-vis some key aspects of Human Rights; IRBI 2016-17 (top 100, n=99)

S.No	Human Rights aspects	Companies disclosing commitment in the Public domain
1	Existence of Anti-Sexual Harassment Policy	95
2	Identifying marginalised community to be targeted for CSR as part of policy	86
3	Respecting freedom of association	68
4	Commitment to inclusion of people with disability in recruitment as well as career advancement	56
5	Promoting diversity in Board	27
6	Extending employment policy to supply chain	22
7	Providing fair living wage	6
8	Providing social security benefits to contractual employees	6
9	Provision of similar or better living conditions for project affected people	5
10	Free, Prior and Informed Consent (FPIC) of communities through discussions for land acquisition or displacement	2

Source: India Responsible Business Index, 2018

Do Companies have Strong Grievance Redress Systems?

Various analyses of BRRs by CRW indicates that 91% of companies claim that they have grievance redressal systems on human rights issues. Of them, 75% have, in their BRRs, provided certain information on complaints received by them. While 51% of companies have reported ‘at least one complaint received during the year’ on sexual harassments, only 10% of companies reported that they have received complaints regarding violation of human rights. Incidentally, no company has reported that they received complaints on child labour or bonded labour. Does Zero reporting of complaints in human rights mean the workspaces are safe for women and workers? Or does it mean that grievance systems are not encouraging enough for victims to report? Interestingly, between 2004-15 and 2017-18, there is a rise in companies reporting complaints on sexual harassment from 28 to 50. This jump can possibly be attributed to the presence of the law against sexual harassment at the workplace. So, an important take-away is that a legal mandate would enhance the functioning of the grievance system as well as reporting. In other words, unless the system to address human rights violations has the backing of law, the things would not improve easily.

¹ Status of Corporate Responsibility in India, 2018; Praxis (2018) Accessed at: https://f24d3537-7c44-4115-99c5-1dc6513ca46c.filesusr.com/ugd/8a8dda_973c28a146cd4a219f2a3333fb08263f.pdf

Table 2.3 Companies recognising particular aspect in their policies disclosed in the public domain

S.No	Policy Domain	2015-16 (n=100)	2016-17 (n=99)	2017-18 (n=99)
1	Equal opportunity in recruitment	77	75	78
2	Disabled friendly workspace	18	19	19
3	Mentioning sexual minorities in recruitment policy	36	32	32
4	Freedom of association	66	68	70
5	Ensuring health and safety of workers	90	91	93
6	Identifying specific vulnerable groups in CSR policy	81	86	86
7	Priority to local suppliers	50	57	59
8	Supplier code prohibits child labour	31	29	31

Do companies have human rights due diligence systems?

Partners in Change (PiC) organised review of Human Rights policy of nine companies. Of the nine companies, only two have detailed HRDD systems mandated by their own policies. Both happen to be multi-national corporations (MNC). However, even these two MNCs, in their policies, do not mandate public disclosure of information about the incidences once the allegations of human rights surface. (Table 2.4)

Table 2.4: Analysis of Policies on Human Rights Policy of 9 Companies (2019)

Name of the Company	Category	Do they have Human Rights Policy?	Do they provide details of HRDD?	Do they have Response and remediation mechanisms?	4. Do they make disclosure mandatory?
Nestle	MNC	Yes	Yes	Yes	
Pepsico	MNC	Yes	Yes	Yes	
NTPC	PSE	Yes			
NHPC	PSE	Yes			
NHPC	PSE	Yes			
POWERGRID	PSE	Yes			
LIC	PSE				
Tata Tea	Private	Yes			
Everest	Private	Yes			
Sterlite Copper	Private	Yes			

Some of the key criteria's for the selection of these company cases included: availability of data, diversity in the conditions and nature of violation and diversity in company operations.

In most of these cases, the victims of human rights violations do not see grievance redressal system within the company as a system to resolve their grievances. In fact, the primary challenge for the victims is to convince the companies that the adverse impact on them is in the domain of human rights. There have been at least two instances where the companies, rather than seeing themselves as perpetrators, located themselves as victims of the violations by communities, or of wrong actions of the regulators. (Table 2.5)

Table 2.5: Functioning of Human Rights Due Diligence system in select companies, 2019

	Nestle	Pepsico	NHPC	LIC	Tata Tea
Violations	Presence of Lead, MSG in Noodle.	Filing case against farmers	Displacement of community	Public Investment on Tobacco	Denial of living wage to workers
Human Rights	Health	Seed sovereignty			
Livelihood	Rehabilitation; Livelihood	Health	Wage		
How Violations Surfaced?	FSSAI took action against Nestle.	Pepsico went to court against farmers	Displaced community reported	Victims of cancer gone to court.	Aggrieved workers
Company's Reaction	No such incident occurred, Located itself as victim of poor testing.	No violation, Company felt victimised, filed case against farmers ignoring their Rights.	Violation occurred, but not "in the control domain" of the company	Violation occurred but in alignment with law of the land	Denial of violation
Did Remedy system function?	HRDD did not detect on own; company's GRS not used	Company did not detect this as violation.	Community used GRS but negative response	Issue filed in the court	Used GRS, no response

In almost all cases, the human rights due diligence systems did not detect the risk, or even if detected, the companies did not find it important to disclose this in public domain. Nestle and Pepsico, which claim that they have a human rights due diligence system in place, have not disclosed their due-diligence reports or the fact whether their system identified these incidents as potential risks or not - before they began their operations.

What is the overall current status?

The good thing is that the term, human rights, is no longer a taboo word among companies. Most of the top companies now have a policy that is named 'Human Rights' policy. The challenge is that these policies do not necessarily refer to significant progressive human rights enshrined in the national legislation or global conventions. They are toothless, for most of them do not detail out systems and mechanisms of detection, response and remediation. In fact, it is often challenging for victims to even 'convince' companies that they are victims, not perpetrators. Further, even if policies detail out the system, none of these policies makes the disclosure mandatory. Therefore, there is little chance that the victims would be able to know what is happening to their grievances.

Many companies do have the following two systems:

- Grievance redressal system, but they are largely non-transparent, with poor disclosure. The grievance redressal system is not linked to Human Rights Due Diligence. Grievance redressal is largely related to consumers - and about price and quality, with a very limited focus on human rights risks.
- Social Impact Assessments and Environment Impact Assessments. These are generally driven by the need for financing of their proposal. However, in these cases, the participation of vulnerable communities is minimal; and there is almost an "industry" that does these assessments, which follow a check-list and templated approach. The pressure is to get the proposal passed than to make sincere attempts to identify human rights risks.

The presence of these two systems does not necessarily mean the companies have human rights due diligence system. Further, now top 1,000 listed companies report in their BRRs the following information disclosed: Complaints from consumers; from victims of human rights violations, child labour and bonded labour; and from victims of sexual harassment. However, there are very limited details in the BRRs about these cases. Most companies, in fact, provide nil reporting on complaints related to human rights. Nil data could mean an absence of human rights violation OR the absence of an approachable system. **Therefore, the disclosure in BRRs, the presence of Grievance redressal system or the mention of the mechanisms of social and environment impact assessments do not mean that these companies have human rights due diligence system.**

What are the recommendations?

The National Action Plan on Business and Human Rights should have a road map for making the Human Rights Due diligence (HRDD) a mandatory mechanism for all companies. With Ministry of Corporate Affairs anchored NGRBC embodying UNGP and more, there needs a legally mandated Human Rights Due Diligence system that is aligning with UNGP and NGRBC. There is no reason that HRDD system is not to be linked with the Company Act, for NGRBC is key to pushing the businesses to comprehensively look at integrating mechanisms to address human rights issues as well as those related to all nine principles discussed in the NGRBC. The proposed timeline is in Table 2.6 below.

Table 2.6 Proposed timeline for NAP road map on making Human Rights Due diligence mandatory

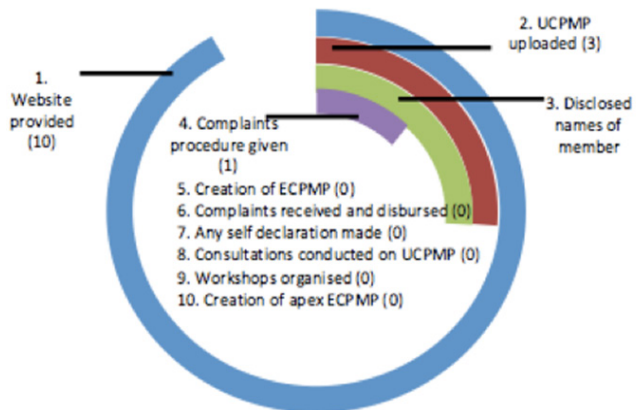
Activities	PHASES I: Months 0-6; II: Months 6-18; III: Months 19-36 months; IV: Months 37-48			
	I	II	III	IV
Interim notifications from MCA for complying with NGRBC				
Codifying Human Rights from list of global conventions				
Evolving of Model HRDD system				
Drafting regulations and legislation				
Consultations and expert group processes				
Framing and passing legislation				
Creating Institutions and mechanisms				
Implementing the law				
Periodic Assessment of functioning of HRDD and reflection				

Why mandatory provisions?

The experience of the Government of India in operationalising the guidelines envisaged in the Uniform Code of Pharmaceutical Marketing Practices (UCPMP) will be very relevant here. The UCPMP, issued by the Department of Pharmaceuticals, Government of India, provides for certain provisions that govern the activities of the companies and other related bodies, with regard to product-related claims and comparisons, free samples, promotional materials, medical representatives, gifts provided to health care professionals, relationships with health care professionals, complaint redress mechanisms, etc. The draft UCPMP was issued by the Department of Pharmaceuticals in the year 2012; it became effective from 1st January 2015. The UCPMP first became effective for a period of six months and which was further up for extension until further notice. The Department issued a notification on 9 March 2015 for including the medical devices industry as well under the ambit of UCPMP. Since then, there have been number of extensions provided to UCPMP. In the last notification dated 4th February 2020, the Department of Pharmaceuticals stated, "Pharma associations are requested to make sure that the Pharma companies

adhere to the provisions of the Uniform Code for Pharmaceutical Marketing Practices (UCPMP) and no unethical promotion of pharma products is done during such conferences". This explains that non-mandatory nature of codes had provided scope for industry association to shy away from taking concrete steps to ensure to the provisions of the code. The Government's attempt to make the codes effective by imposing certain responsibilities on the "Eleven Associations" mentioned below to ensure that the member companies adhere to the code also failed. The status of implementation as analysed from publicly available information presents a dismal state of implementation of UCPMP by eleven associations as seen in the image below:

Pharmaceutical Associations and Companies are not implementing UCPMP. The experience from UCPMP indicates that even the Government notifications are not sufficient. They need to be backed by law. Further, taking the route of business associations and chambers are also not working, without the mandatory provisions.



Similarly, UNGP or NGRBC in the form of guidelines are not sufficient to ensure that businesses have strong systems and mechanisms to address human rights risk. The institution of reporting on these principles through BRR has become mandatory for top 1,000 companies: that is the only reason these companies are still reporting. But as guidelines are voluntary, they have not ensured the strong presence of mechanisms in the companies. Companies have been minimalist and ensured they have policies, without teeth and mechanisms- so that their reporting looks good, without really making any change in human rights eco system.

The 'mandatory' HRDD system means: (a) There is a legal backing for NGRBC, either through regulations from the Company Act or framing an independent legislation with respect to these; and (b) There should be an appropriate penalty model for non-adherence of these provisions so that there is a cost attached to the failure – in terms of money, reputation as well as the licence to operate.

What does Human Rights Due Diligence systems include?

The real challenge is that the companies might claim that they have the system, but the system would be non-functional or would not have the key characteristics. Hence, the system should be comprehensively defined. In other words, there is a requirement of a process to evolve the same. The following five activities need to be done: -

- a. Evolving a Model Human Rights Policy: Every Company should have a detailed Human Rights Policy. It will be good if Business Associations come out with sector specific model human rights policies that list relevant human rights conventions. Further, the policy should make HRDD mandatory. Globally, HRDD is becoming mandatory. (France, Australia and Holland has made it mandatory in respect of child labour and is being considered in other countries such as the United Kingdom.).
- b. Codifying Human Rights: Recognition of all Human Rights by the Companies; With respect to global conventions, the following categorisation is possible:

Category 1: India has signed, ratified conventions and has made enabling laws to make them justiciable.

Category 2: India has signed and ratified conventions but has not made laws yet.

Category 3: India has signed conventions but not yet ratified.

Category 4: India has not signed conventions.

The HRDD framework should be made applicable to all four categories. Not having a law or not signing a convention by the Government does not alter the characteristics of human rights abuse.

In this regard,

- The Ministry of Corporate Affairs, Affairs and or NHRC may call upon /consult with various related ministries such as Labour, Social Justice and Empowerment, Women and Child Development should codify all provisions under various global Human Rights and Labour conventions and the same be used by the businesses to be made applicable in HRDD.
- Each Ministry should be mandated to move from category 4 to category 1 for relevant conventions, over a time period of five years - to ensure all global conventions are justiciable. The Ministry of Corporate Affairs should come out with a plan within the first six months of NAP.
- c. Evolving of Model HRDD system: Each Company should prescribe a Human Rights Due Diligence system (HRDD) that is disclosed in the public domain. The Ministry of Corporate Affairs (MCA) needs to come out with a model HRDD system that aligns with UNGP.
 - Business Associations be asked to have sectoral consultations to evolve model HRDD system, in which the role of companies as well as associations are clearly specified. The participation of workers and communities at margins and their representatives from trade unions need to be ensured.
 - HRDD system includes not only detection and remediation but also prevention measures. Invariably the cost is not merely on systems, but also for measures of remediation. There is going to be a cost. It is important that the model HRDD specifies the mechanisms of bearing of the costs. The key questions would be whether the bearing of costs is made mandatory to all companies, irrespective of size? These questions need to be specifically addressed by the model. Some key principles are: -
 - All companies beyond a turnover threshold should be made liable for organising the due-diligence.
 - All top 1000 listed and unlisted companies, as per market capitalisation.
 - Supply chain liability: All companies beyond a certain threshold or market share should be made liable.
- d. Promoting Stakeholder Participation within the Model: Certain stakeholders are significant because of their vulnerability. Workers/ labourers, supply chain members, communities displaced or potentially to be displaced by the project, communities affected due to operations (such as right to health or livelihood), consumers are all significant for they have potential to be excluded from the decision-making system. Further, certain community identities- SC, ST, DNT, women, disabled persons, minorities, migrant, mental health affected persons, LGBT – are potentially subjected to exclusion. Special consideration for their inclusion in HRDD is must.
- e. Creating Quality Certification system: The challenge would be to create a certification model. Any HRDD system would be dependent on a certification system, which could be Self-Certification by companies or external certification, by either Government or a private entity. There have been multiple views on the same like certification itself becoming industry and the corrupt nexus' that are being formed around the system. Some key questions that require solutions are:
 - Clear understanding of where certification would work and where it would not, including how to link the certification system with public and private procurement processes.
 - Clarity on relative significance and presence of government-based and private certification.
 - Clarity of how to make the system owned by community, workers and trade unions.

It is important that MCA with Bureau of Indian Standards (BIS) along with NHRC creates a working group that evolves guidelines on the above in the first year of NAP:

Should top brands be made accountable for human rights violations in the supply chain?

The key question is who would bear the expenses of ensuring human rights compliance in the supply chain, especially in the informal supply chain. If the answer to this question is that the liability would be with the 'respective entity' in the value chain, the entire burden often would be on the small vendors at the extreme end of the supply chain, many of which could even be unregistered. The burden of keeping supply chains free from human rights violations would be passed on to the small vendors, who are already at the mercy of the current product-pricing system, which is heavily in favour of the bigger brands. Hence, the need is to make the top brands at the apex of the value chain liable for any incidence of human rights violation in the supply chain. Otherwise, the top brands would just keep their own formal workspace clean. Now, if top brands are made liable, they see this as a heavy burden on them and also impractical for one, they do not have control over their supply chain, as each entity would be an independent entity; and two, the supply chain at the third tier is often common to many companies and the supply chains intersect in multiple sectors. For example, the garment supply chain would include the supply chain of clothes as well as of buttons. In this context, for example, if a company has a market share of more than 20%, there is no reason that it should not be made responsible for the violations in the supply chain. (The threshold percentage may be arrived after a sectoral/product study to identify the value).

Some other possibilities are:

- All companies beyond a turnover threshold should be made liable for the company itself and its vendors.
- Top 1000 companies in terms of market share should be responsible for the entire value chain.
- When companies procure more than a threshold percentage of their sales from one vendor, then the company would be liable for the value chain of that vendor as well.

Further, all companies of characteristics listed above should be made to disclose the entire supply chain with specific details to certain entity authorised by the Government. Companies should be asked to self-certify to what level they have done due diligence and they have ensured that there is no violation. International companies are already responsible for such reporting under legislation in the UK, Australia, California and France (with other countries following suit). Finally, it is also important to making companies liable in forward linkage with regard to product.

What about product misuse in the value chain?

While there are demands to make companies held accountable for product productions and processes involved therein, there are limited examples of creating liability for products after they are made. This leads to product misuse and the ensuing violations therein. It is therefore important that the HRDD system in companies includes within its scope the entire lifecycle of the product from manufacturing to usage. For example, there is a clear need to ensure that there is control on tobacco, alcohol and other addictive substances, including aerated drinks; and how their promotion influence the consumer behaviour, especially of young people. Similarly, children while engaging in online space are exposed to risks such as digital misinformation, cyber-bullying, online grooming, technology addiction, privacy invasion and hacking, exposure to violent and inappropriate contents/contacts and trafficking. It is pertinent that companies in social media and online gaming space acknowledge and take steps towards mitigating these risks ². Similarly, the unregulated and excessive use of pesticides by farmers without any safety measures leads to the death of large number of farmers in India every year. Companies producing these pesticides and distributing the same through their distribution and retail channels need to recognise and act to ensure safe and prescribed dosage of pesticides at the level of the farmer.³ Moreover, there has been misuse of medicines in executions. As none of the US FDA-approved manufacturers are willing to allow their medicines to be used for executions, US states have recently looked to import execution drugs from India.

2 http://www.corporatewatch.in/images/CR_Report_2019__CH_6.pdf

3 <https://www.deccanherald.com/specials/insight/farmers-consumers-and-ecology-fall-prey-to-pesticides-774954.html>

In so doing, state officials have made disparaging references to Indian pharmaceutical suppliers, stating that they have sought medicines from "seedy individuals" on the "back streets of the Indian subcontinent."⁴ This development puts the Indian pharmaceutical industry at great risk, both from a reputational and human rights perspective⁵.

Do existing grievance redress systems require to be linked to human rights?

Companies need to review their existing grievance procedures to ensure they are fair, transparent, understandable, well-publicised and accessible by all, and provide for grievances to be resolved effectively without fear of victimisation. It is also important for businesses to require similar good practice of their supply chains, especially in areas where abuses of rights have been identified.

First, the Ministry of Corporate Affairs should prescribe uniform mandatory guidelines on the grievance redressing system for each company and the role of business chambers and associations. The notification could be issued using the Company Act or Consumer Protection Act. Second, the Business Chambers/Associations should have independent complaint mechanism. Once allegations surface to them or in media, the onus is on association to seek response from the company basis the report. The association should disclose in the public domain the details of such complaints and action taken by them, within a specified time frame of not more than three months. Third, companies should have effective whistle-blower protection mechanisms as well as provision of legal aid to support victims of human rights violations. Again, these necessarily be part of mandatory guidelines for companies of specified turnover, which could be the same as stated from those need to comply on CSR. There is also a suggestion that companies be allowed to use 10% of their CSR funds on supporting legal aid for victims of human rights violations. However, the compensation should not be taken from CSR funds. NLSA (National Legal Services Authority) can be mandated to give support where required to the affected persons. Finally, there is a need to create a Human Rights Ombudsman to oversee monitoring of HRDD and GRS at the levels of Companies and Business Associations.

Who would monitor whether companies have functional HRDD systems?

The key challenge is about where to place the monitoring responsibility. With MCA suggested as the owner of the parent legislation on HRDD, the primary responsibility of monitoring would be with the Ministry of Corporate Affairs, Government of India. Other institutions relevant to monitoring would be Regulatory bodies, such as SEBI. Further, the role of Business Chambers/Associations, Trade Union and Certification agencies need to be well demarcated. However, it is recommended that the Ministry of Corporate Affairs be made the nodal ministry to monitor the same, which should ideally create a Human Rights Ombudsperson who would oversee the monitoring, through the above listed entities. The Ombudsperson institution should have a statutory status.

⁴ <https://www.theguardian.com/us-news/2018/mar/14/oklahoma-death-penalty-nitrogen-gas-lethal-injection>

⁵ The Misuse of Indian Medicines in US Executions: A Business and Human Rights Concern; Lethal Injection Information Center; March 2020

CHAPTER 3:

MANDATING RESPONSIBLE BUSINESS DISCLOSURES ON RESPONSIBLE BUSINESS

What is the scope of Right to Information Act?

The Government of India promulgated the historic Right to Information Act (RTI) 2005, to 'provide for setting out a practical regime of right to information for citizens to secure access to information under the control of public authorities, order to promote transparency and accountability in the work of every public authority...' The RTI Act did bring companies, which are being directly run by government as in case of Department of Public Enterprises, entities, which are aided by government, and companies that are being regulated by respective regulators under its ambit. This has, in a way, extended right to information in to a large number of companies though business competitive information is largely outside these provisions. However, the private sector businesses are not bound to disclose information under the law. Further, the companies are largely disclosing their financial information in public domain, through their annual reports, primarily for the investor audience.

What is the Business Responsibility Reports Mechanism?

The turning point in India on non-financial disclosures by businesses was the year 2011-12. Based on the National Voluntary Guidelines for Economic, Social and Governance related responsible conduct of Businesses (NVGs), the Securities and Exchange Board of India (SEBI), mandated the top 100 listed companies to report on their Economic, Social and Governance (ESG) performance through a Business Responsibility Report (BRR), which would then form a part of their annual report/ filings. In 2015, this was extended to the top 500 listed companies and in a recent circular SEBI has extended it to top 1,000 listed companies. SEBI, while mandating these disclosures, has also gone a step further and redefined the traditional understanding of stakeholders which emanated from the profit motive and safeguarding on interests of investors and shareholders sense in which business stakeholders are recognized. The circular dated 13 August 2012 clearly stated, 'enterprises are increasingly seen as critical components of the social system, they are accountable not merely to their shareholders from a revenue and profitability perspective but also to the larger society, which also happens to be its stakeholder. Hence, the adoption of responsible business practices in the interest of the social set-up and the environment is as vital as their financial and operational performance. This is all the more relevant for listed entities which, considering the fact that they have accessed funds from the public, have an element of public interest involved, and are obligated to make exhaustive continuous disclosures on a regular basis.

The very fact that BRRs were based on the soft law or voluntary approach of the NVGS but were mandated by SEBI to be disclosed as part of the Annual Report disclosures with well-defined fixation of responsibility adds credibility to the information provided to an extent that one can always complain if the said information is found to be false or manipulative. This is surely the first and necessary step, to make businesses relatively more accountable and open to scrutiny.

What is Business Responsibility and Sustainability Reporting mechanism?

The Ministry of Corporate Affairs constituted the Committee on Business Responsibility Reporting (BRR) to develop BRR formats for listed and unlisted companies. The Committee developed comprehensive yet simple formats situating the various stakeholders at the centre so as to not increase or duplicate reporting burden. The proposed formats are to reflect linkages to prevalent non-financial reporting formats, viz, Global Reporting Initiative (GRI), Integrated Reporting (IR) etc., and SDGs from a NGRBC perspective⁶.

⁶ <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1568750>

The new BRSR format as detailed in the NGRBC includes detailed question, which materially provide better scope for comparability compared to the current format with specific focus against all nine principles. BRSR incorporates question that can potentially detail out information related to risks, challenges and opportunities in context to ESG parameters. The information sought is categorised as "Essential" and "Leadership". While the Essential level is expected from every business that has adopted these Guidelines, the Leadership level is expected of businesses which aspire to progress to a higher level in their quest to be socially, environmentally, and ethically responsible.⁷

What are the current challenges in Business Disclosures?

Through various studies organised by Corporate Responsibility Watch, the gaps identified through analyses of disclosure are:

- Businesses avoid disclosing details of mechanisms and processes related to human rights policy, including the human rights due diligence system or details about the complaints received and acted upon.
- Even after the allegations surface, the companies do not disclose the information on specific cases.
- The quality of disclosure in business responsibility reports is low and is often generic, rather than getting into specifics. Most responses are like 'principle-statements' and less talk about actual cases.
- Most of the companies avoid disclosing due diligence reports and action taken reports.

What are the recommendations?

The National Action Plan on Business and Human Rights should have a road map for making the businesses disclose mandatorily all information related to human rights violations. Without proper disclosure, even a legally mandated Human Rights Due Diligence system would be non-functional, for the information is key to transparency and accountability. The Company Act should necessarily make disclosures on the company's compliance system around NGRBC mandatory.

Table 3.1 Timeline for roadmap on making disclosures related to human rights violations mandatory

Activities	PHASES I: Months 0-6; II: Months 6-18; III: Months 19-36 months; IV: Months 37-48			
	I	II	III	IV
1 Interim notifications from MCA on BRSR for consultations and strengthening.				
2 Notifications to Business Chambers and Associations to evolve Sectoral templates of BRSR.				
3 Drafting regulations under Company Law or necessary amendments				
4 Framing and passing legislation				
5 Strengthening disclosures from MSMEs through cluster and aggregate reporting				
6 Framing legislation under Right to Information Act for facilitating Business Disclosure				
7 Creating institutional mechanisms including integrating financial and non-financial reporting.				
8 Regular analysis of Disclosure by dedicated mechanism and Periodic Assessment of functioning of Business Disclosure				
9 Businesses create online platform where all grievances are consolidated and action reports are attached and updated regularly				

⁷ National Guidelines on Responsible Business Conduct, Ministry of Corporate affairs

SECTION 2

**STRENGTHENING OF
REMEDIAL SYSTEMS
AROUND HUMAN
RIGHTS AND BUSINESS**

CHAPTER 4:

STRENGTHENING REMEDIAL SYSTEM ON BUSINESS AND HUMAN RIGHTS

What are the existing State Mechanisms?

The zero draft of the National Action Plan on Business and Human Rights as released by the Ministry of Corporate Affairs refers to the presence of the Whistle Blowers Protection Act, 2011. Further, it details out provisions in the Companies Act 2013 as well as in the regulations of Securities Exchange Board of India (SEBI) requiring certain companies to have a policy framework for protection of whistle-blowers. (Refer Box A and B)

Box A: Companies Act, 2013

- According to section 177(9) read with Companies (Meetings of Board and its Powers) Rules, 2014, it is mandatory for all listed companies that accept deposits from the public to establish a vigil mechanism for directors and employees to report genuine concerns in such manners as may be prescribed
- According to section 177(10), the vigil mechanism under sub-section (9) shall provide for adequate safeguards against victimisation of persons, and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases
- It has further been provided that the details of establishment of such mechanism shall be disclosed by the company on its website, if any, and in the Board's annual report

Box B: SEBI Regulations

- Regulation 18 of SEBI (LODR) Regulations defines the agreement between stock exchanges and listed companies. The Listing Agreement makes it mandatory for all listed companies to establish a mechanism called whistleblower policy. It provides a platform for its employees to report any kind of misappropriation, fraud or actual and any unethical behaviour to the Board.

Further, it also indicates the presence of the National Human Rights Commission (NHRC) and 26 State Human Rights Commissions (SHRCs) operating in India. From April 1, 2017 to December 31, 2017, around 61,532 cases were registered for consideration of NHRC, and it had disposed of 66,248 cases, including those carried forward from previous years. Further, the Legal Services Authorities, constituted pursuant to the LSA Act, are also instrumental in providing "legal services". From April 2017 to March 2018, around 8,22,856 persons have benefitted through legal services provided under LSA Act, 1987. Interestingly, the zero draft has a section on State-business nexus, where it indicates the presence of the 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.

What is the current status of attacks on Human Rights Defenders?

The Business and Human Rights Resource Centre (BHRCC)⁸ has actually mapped around 110 cases of attacks on human rights defenders in India with focus on businesses. The mapping of types of groups being attacked shows that there is wide range including community groups or leaders, environmental concern

⁸ https://www.business-humanrights.org/search-human-rights-defenders/?keywords=&resulttype%5B%5D=defenders_incident&countries%5B%5D=3562

groups, acquaintances of the victim, human rights groups, indigenous peoples, lawyers and judges, press, religious groups, unions and workers. The acts of violation included disappearances, threats, restrictions on freedom of expression and association, killings, threats, lawsuits, etc. This points to the grave nature of threats faced by HRDs and the need for having robust systems for protection of Human rights of the defenders. The concerns of Human Rights Defender (HRDs) need to be understood and delved from a different perspective. Further, there has been rise in the whistle-blower complaints as per the disclosures made by companies in their annual report disclosures. As per the data⁹, about a third of the Nifty companies, that is around 17, revealed in their 2017-18 annual reports that they together received 3,508 whistle-blower complaints. Most common complaints are about corruption allegations and improper conduct at workplace.

Do current laws and institutions protect Human Rights defenders?

With respect to the law protecting whistle-blowers, the mention of the Whistle-Blowers Protection Act, 2011, now 2014, in the zero draft does not make real sense, for the Act, although notified on May 12, 2014, has not been operationalised so far, as certain amendments are pre-requisite. Further, though the National Human Rights Commission of India (NHRC) has a focal point for HRDs, the NHRC has not evolved any separate mechanism to deal with cases on attack on HRDs. It was found that in the cases that were intervened into by Human Rights Defenders Alert – India (HRDA) and taken up with the NHRC, “in not a single case did the NHRC intervene in an independent manner and uphold the constitutional right to protest freely”.¹⁰

HRDs observe that according to the Edinburgh Declaration on business and human rights to which NHRC is also a party, it should monitor and document human rights violations by corporations.¹¹ The NHRC has a double responsibility to ensure that businesses adhere to human rights and alongside protect the HRDs who work on issues of business and human rights. Also, 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 (Box C).

Box C: Business and Human Rights in The Protection of Human Rights Act, 1993

Section 12(a) in The Protection of Human Rights Act, 1993

- (a) Inquire, suo-motu or on a petition presented to it by a victim or any person on his behalf 1[or on a direction or order of any court], into complaint of
- (i) Violation of human rights or abetment thereof; or
 - (ii) Negligence in the prevention of such violation, by a public servant;

Section 2(d) of the Act defines Human rights in a limited sphere and need to expand it to include Business and Human Rights.

Section 2(1)(d) in The Protection of Human Rights Act, 1993

(d) “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India

9 <https://economictimes.indiatimes.com/news/company/corporate-trends/whistle-blower-complaints-on-the-rise-in-india-inc/articleshow/66540004.cms?from=mdr>

10 http://www.corporatewatch.in/images/CSR_Report_2018_CH_4.pdf

11 https://www.ohchr.org/documents/aboutus/nhri/edinburgh_declaration_en.pdf

It is pertinent to state here that the UN General Assembly adopted the resolution 53/144 known as UN Declaration on Human Rights Defenders¹² in March 1999. The Declaration provides for the support and protection of human rights defenders by articulating existing rights in the context of their work. (Box D)

Box D: UN Declaration on Human Rights Defenders, March 1999: Some critical rights in the context of Business and Human Rights

- To seek, obtain, receive and hold information relating to human rights
- To make complaints about official policies and acts relating to human rights and to have such complaints reviewed;
- To unhindered access to and communication with non-governmental and intergovernmental organisations;
- To benefit from an effective remedy;
- To solicit, receive and utilize resources for the purpose of protecting human rights (including the receipt of funds from abroad).

Also, State is expected to ensure:

- To provide an effective remedy for persons who claim to have been victims of a human rights violation;
- To conduct prompt and impartial investigations of alleged violations of human rights;
- To take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration;
- To ensure and support the creation and development of independent national institutions for the promotion and protection of human rights, such as ombudsmen or human rights commissions

What are the recommendations?

The National Human Rights Commission and other such independent institutions mandated to cover business and human rights and they take up such issues and proactively disclose their processes and outcomes. The enactment of Human Rights Defenders protection legislations, with clear definitions and also various processes including financial support are essential. Key recommendations are: -

1. The Whistle-blower Protection Act, 2014 needs to be made operational at the earliest.

- a. The law requires further provisions to encourage whistleblowing, and extend its jurisdiction to the private sector.
- b. The law itself requires protection from further dilution through amendments.

2. The NHRC and SHRCs should be mandated to take up cases pertaining to business and human rights

Expectations from the Government

- a. Amend Section 2 (d) of the Protection of Human Rights Act to extend and broaden the definition of 'human rights' in the context of business and human rights.
- b. Amend Section 12 of the Protection of Human Rights Act to extend the mandate of NHRC and SHRCs to intervene in acts of Businesses that violate human rights.

¹² <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

- c. Amend Section 30 of the Protection of Human Rights Act related to the Human Rights Courts to include cases of corporate-related human rights abuse.

Expectations from NHRC

- d. The NHRC should develop a framework and an implementation plan towards realisation of the Global Alliance of National Human Rights Institutions' 2010 Edinburgh Declaration on Business and Human Rights and roles and responsibilities of the National Human Rights Institutions.
- e. In addition to the NHRC, the deemed members of the NHRC which include National Commission for Women, National Commission for Protection of Child Rights, National Commission for Scheduled Castes, National Commission for Scheduled Tribes, National Commission for Minorities, Officer of the Chief Commissioner for Persons with Disabilities, and National Commission for Backward Classes, and the National Commission for Safai Karamcharis, should develop a comprehensive guideline for promoting enhanced protection against corporate-related human rights abuse, greater accountability and respect for human rights by business actors, access to justice for victims and establishing multi-stakeholder approaches for protection and promotion human rights vis-a-vis businesses with a time frame.

3. Enact a strong Human Rights Defenders protection legislation with State and Regional level Tribunals

A new legislation be enacted. It should respond to the cases of HRDs being harassed, threatened, false cases registered against them and in severe cases killed or disappeared. This law should also recognise defenders working towards business and human rights and will include workers and their unions, non-governmental organisations, academics, researchers, journalists, lawyers etc. This law should also mandate special courts and experienced special public prosecutors for trial of offences against HRDs arising as a result of their human rights work.

Increasing attacks on environmental defenders is directly linked to the undermining of democratic processes and human rights violations inflicted upon communities. Defenders who have raised their voices against unjust policies and violations are penalised, criminalised, face intimidation and attacks. Defenders are the watchdogs of democracy and human rights and hence, businesses and the State in collusion have a clear interest in attacking them to eliminate opposition to projects. As per the Global Witness Monitor, July 2019, report, India ranks third highest on killings of environmental defenders.¹³ Further, Civicus in its 2019 report has put India in the repressed category.¹⁴ There is an urgent need for legislation to protect Human Rights Defenders, apart from implementation of the Whistle-blowers Act.

4. Capacitating Legal Machinery on Business and Human Rights

- a. Training needs to be organised by the Ministry of Law and Justice to ensure that the Legal Service Authorities are trained and capacitated on aspects of business and human rights enabling them to provide legal services in cases of human rights violations by national and transnational corporations.
- b. For reaching out to the judiciary, the component on Business and Human Rights, including but not limited to the UNGP and NAP on BHR, to be included in the curriculum of judicial academies, the LBSNAA at Mussorie, all Business & Law Schools.

5: Mandatory Guidelines against nexus and complicity between State and Business

During the grievance redressal process, the businesses enter into government spaces inappropriately to influence the process. In accordance with Principle 7 of NGRBC, special Reporting Supplements, customised to different corporate sectors, be created for companies to mandatorily disclose their conflict of interest. In some cases, the government is bound by global conventions such as FCTC, wherein the Government is mandated to insulate its policy making from the lobbying by tobacco industry, asbestos, etc.

¹³ <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state>

¹⁴ <https://monitor.civicus.org/India.PeoplePowerUnderAttack.2019/>

6: Expectations from Business and Business Chambers and CSOs on Grievance Redress Systems

A. Grievance Redress within Businesses

Every company, respecting Principle 5 of NGBRC, which requires companies to have a dedicated grievance redressal system (GRS) on issues related to human rights; and principle 9, which requires the same for consumers, should:

- Disclose mechanisms and processes of GRS aligning with UNGP guidelines and NAP.
- Disclose on live basis the details of complaints received by the company and the status of resolution. This could be from the appellate level within the company.
- The complaints need to be disclosed in a categorised way - depending on stakeholders- investors, consumers, workers, displaced community, community affected with operations.
- The companies should publically disclose the whistle-blower protection policies of the company. The protection of whistle-blower should be the responsibility of a committee at the Board level.
- The grievance redressal system should have a special system of affirmative action for complaints from marginalized identities such as SC, ST, women, minorities, disabled persons and LGBT. Analysis of complaints done annually to go to the cause of its occurrence & ensure preventative measures.

B. Grievance redressal System at the level of Business Associations

- All business associations should have an advisory on business and human rights, aligning with the UNGP. CII has already issued the advisory. The business associations are bound to take action on any incidence that has come into notice wherein the company has been alleged to have violated any of the guidelines. The association should take cognizance of the same and form a committee to inquire and place an action taken report within a specified period.
- Capacity building of businesses on human rights and grievance redressal system should be the responsibility of business chambers. They should annually come with a report on business and human rights of its members- both good practices and the details of complaints received and action taken thereof.

C. Expectations from CSOs

- The CSOs who partner with businesses for CSR activities are required to support business processes on strengthening the human rights due diligence and grievance redressal system, especially vis-à-vis community that is potentially at risk of being affected by operations.
- The CSOs should support the whistle-blowers and victims through access to legal aid support either from the company itself or the state.
- CSOs need to document and analyse HR abuses & patterns, including nexus that facilitate it and such harassment of defenders and Whistleblowers.

CHAPTER 5: RECOGNISING, RESPECTING, PROTECTING AND PROMOTING RIGHTS OF LABOUR AND COMMUNITY AS BUSINESS STAKEHOLDER

Ease Of Doing Business Index (EODB) is focused exclusively on investors. The twelve indicators are starting a business: dealing with construction permits; getting electricity; registering property; getting credit; protecting minority investors; paying taxes; trading across borders; enforcing contracts; resolving insolvency; employing workers and contracting with the government. Only indicator having relation with worker is that of employing worker, which is explained as flexibility in employment regulation. In other words, the indicator ranks the country higher if the regulations are directed towards increasing the comfort of employers in recruiting, managing and dismissing workers. Thus, the entire EODB paradigm is definitely not centred on the necessity to respect and protect human rights of workers and of communities. If EODB is driving the policy agenda of the country, then there is a possibility of conflict with the rights of workers and communities, who provide labour, land and resources to the business. It is Ease of Investor Index or Ease of Employer Index, but if it is stated as Ease of Doing Business Index in such a narrow way, it means the role of workers in the supply chain and of communities, whose lands are dispossessed, is denied the space in doing business. Thus, the key perspective one needs to push for in any such index related to business is that workers and communities are integral to the definition of business. Human rights of workers and communities are non-negotiable. The section below follows from this paradigm.

What is the current status of human rights of workers?

Despite having over 40 central legal mechanisms segmented by Industry or type of work under labour legislation, and addressing issues such as working hours, wages, health and safety, and working conditions, the labour market has rampant violations across all the sectors. Even under these laws that regulate the organised sector, the workers function under abysmal working conditions with no provision of basic amenities. Studies recording poor working conditions of tea plantation workers¹⁵ and women workers from the mills of Tamil Nadu, shed light on the difficult conditions in which the labours work in gross violation of basic human rights abysmal working conditions, no surety of minimum wages and social security.¹⁶ The challenge is that the effective enforcement of these laws in India is abysmally poor for many reasons. The following are some significant reasons. Firstly, most workers are in the informal economy. More than 90% of India's labour force works in informal and unorganised sector falling beyond the protective realm of legislation. Secondly, there has been continued increase in sub-contracting, leading to exploitation, wage differential, asymmetric bargaining power. According to a CRW report in 2017-18, almost 21 top companies reported having employed more than 50% of their workforce as contractual workers.¹⁷

Thirdly, there has been continued presence of feminisation of labour and segmentation of child labour as companies are looking at paying low wages and deny security benefits. Several Indian companies in 2017 and 2018 have created anti-slavery and anti-human trafficking policy statements that even take cognizance of their supply chains. Despite this, in 2017, 14 of the top 100 companies surveyed on the India Responsible Business Index did not even disclose having knowledge systems on preventions of child labour, forced and involuntary labour. While 65 companies in 2017, disclosed extending child labour to supply chain, 49 companies disclosed extending human rights policy to supply chain and 22 companies disclosed extending employment policy to supply chain. It is significant that 49 companies still do not extend their human rights policies to their supply chain. It has gone down from 54 in 2016 to 49 in 2017.

15 <https://dokumen.tips/documents/chai-time-sustainable-livelihood-for-small-tea-growers-through-csr.html>

16 <http://www.picindia.org/wp-content/uploads/BusinessReinventServitude.pdf>

17 Analysing Disclosures: Are Businesses Paying Lip Service to Human Rights? In Status of Corporate Responsibility In India, 2019, p.15.

Finally, there have been continuing curb on trade unions and the rights to collective bargaining. According to IRBI 2018 data, 68 companies recognise freedom of association of employees as against 66 in IRBI 2016. 54 companies even recognise the principle of collective bargaining as compared to 52 in IRBI 2016. However, only 16 companies disclosed systems and mechanisms that they commit to with respect to the freedom of association. None of them extend the right to association explicitly to their contractual or temporary employees.¹⁸ The legal and policy incoherence and gaps in regulation in India and ineffective implementation has made the labour particularly vulnerable. The regulations formulated have focused largely on a small proportion of the total workforce, that is, the organised sector.

How workers, trade unions and CSOs have received the Labour Codes?

Some of their critical observations on different labour codes are: -

- **Labour Code on Wages:** Passed in the year 2019 and replacing four key labour laws: The Payment of Wages Act, 1936; The Minimum Wages Act, 1948; The Payment of Bonus Act, 1965 and the Equal Remuneration Act, 1976, it has omitted or diluted certain key provisions of the previous legislations that is going to have an adverse impact on labour wages. For example, the current Wage Code dismantles existing enforcement mechanism without replacing it with any better alternatives. In the new Wage Code, there is ambiguity in definitions of employer; there are clauses on recovery from workers in cases of losses or non-performance; increasing dependence in administrative discretions and more discretionary power to the Centre; lower involvement of workers in decision making committees; and most importantly dilutions in employer's accountability by converting criminal liability of employers to civil liability. Further, the Wage Code is also belittling the role of judicial pronouncements of living and decent wages by not linking the wages to components, which entails the measures on standard of living. Moreover, the Code is also silent on how to revise and fix the wages, which are unscheduled occupations/trades and do not appended in the Schedule List of Factories Act, 1948.
- **Labour Code on Occupation Safety and Health** is keeping 90% of workforce from unorganised sector, both on contract and home-based, out of its purview. It should be noted that presently the threshold for the applicability of the relevant laws varies from one or more employee to 20 or more. Moreover, contract workers are outside the scope of 'worker' and 'employee', a departure from the existing laws like the Factories Act, Beedi Workers' Act and the Plantation Labour's Act. This removes all the obligations (provision of basic amenities, payment of wages, contributions to provident fund) that the existing laws placed on the principal employer in respect of contract labour.
- **Labour Code on Industrial Relation** has a requirement of representation of 75% of workers as criteria for sole negotiating union. This is a very stiff benchmark that cannot be fulfilled by any union of the world. A notice period of 14 days is introduced for any strikes or lockouts in any establishment. The special immunities are proposed to be thinned to an extent that strikes and lockouts by workers are to be made illegal. Moreover, there are no provisions for justice under adversarial adjudication labour courts. Provides for a neutral third party for negotiation.
- **Labour Code on Social Security** has its impact on the principle of federalism. The centralisation of powers is visible since the orders of Central board will prevail over State and limits the scope of tripartite processes in determining the management of social security funds. Representation of workers is limited. Further, the Regular payment of a portion of wages as contribution to SSF between 12.5-20%; The SSC will completely rely on the contributions made by employers and the workers. Highest quantum of contributions from self-employed and again will pass on the burden on unorganised workers who can be clubbed into self-employed. The framework will be carried out by intermediate agencies and most likely other corporate houses will take up the role.

Do policies of Companies respect human rights of workers? The commitment to human rights of workers and communities is found lacking in most companies.

- **Trade union:** According to IRBI 2018 data, only 68, among top 100 companies recognise freedom

¹⁸ Status of Corporate Responsibility Report in India, 2019 p.17. http://www.corporatewatch.in/images/CR_2019_Final.pdf

of association of employees. 54 companies even recognise the principle of collective bargaining. Only 16 companies disclosed systems and mechanisms that they commit to with respect to the freedom of association. None of them extend the right to association explicitly to their contractual or temporary employees.

- **Free and Prior Consent (FPIC):** Businesses are both accountable and responsible to think and act in interest of larger community, apart from its shareholders and engage proactively with communities that are disadvantaged, vulnerable and marginalised. According to IRBI Data, while the number of companies assessing impact of business operations is increasing, although marginally, they are recognising the need for conducting impact assessment. However, very few, i.e. only three companies recognised the principle of Free, Prior and Informed Consent, but none reported having a system to enforce it.
- **Mandatory Social and Environment Impact Assessment with mandatory disclosure:** Businesses should recognise the need for impact assessment on environment and the community as part of both policy and practice. Only 44 companies, among top 100 companies, have reported existence of systems that promote judicious use of natural resources. What is dismal, however, is the lack of commitment from companies to work on locally relevant issues and the lack of responsibility among them to provide similar or better living conditions and services and access to Project Affected People. Majority of the companies, i.e. 90 and 95 respectively did not report a commitment both in policy and practice.
- **Child labour and Bonded labour free Supply chain:** Several Indian companies in 2017 and 2018 have created anti-slavery and anti-human trafficking policy statements that even take cognizance of their supply chains. Despite this, in 2017, 14 of the top 100 companies surveyed on the India Responsible Business Index did not even disclose having knowledge systems on preventions of child labour, forced and involuntary labour. While 65 companies disclosed extending child labour policies to supply chain, 49 companies disclosed extending human rights policy to supply chain and 22 companies disclosed extending employment policy to supply chain. It is significant that, out of top 100 companies, 49 companies still do not extend their human rights policies to their supply chain.

What are the recommendations?

There are three categories of recommendations. The first category is about strengthening labour laws, especially post the dilution through four Labour Codes; the second category is on streamline corporate responsibility through effective mechanisms and the last category is to recognise and realise the human rights of communities affected by business.

(a) Review of Labour Codes, existing laws and mechanisms: Clearly, there is a requirement in terms of revisiting Labour Codes to give centrality to human rights of the labour than ease of doing business. The Codes should be reviewed from the lens of the ILO's Employment Security Index. In the first six months the Government should come out with a time-bound action plan to achieve high score in the ILO's security index within five years of NAP¹⁹. There is a stress on Reversal of the dilution of laws, and in fact, strengthening of legal framework to increase accountability of businesses around issues of labour rights, environment, land and natural resources, social and cultural rights of indigenous communities. UNGPs are premised on a strong legal framework, which it expects businesses to respect, State to protect and independent institutions like judiciary and constitutional bodies to protect. Without strengthening the legal framework and introducing policies that demand corporate accountability, UNGPs would find no premise in domestic legislation. While voluntary mechanisms may provide a guide to good behaviour, mandatory legislations are key to ensure protection from human rights violations. Some key areas that require revision are: -

¹⁹ The index includes **Income Security**, mandating terms of minimum wages; **Employment Security** against arbitrariness-termination and harassment; **Labour market Security** ensuring enough jobs and employability; **Work Security** ensuring basic provisions of facilities like electricity, toilets, creches, safe environment, fencing etc.; **Skill Security** in case of Labour Replacement technology. (Law doesn't give any opportunity for re-skilling to workers.); **Representation Security** to ensure strong unions and associations for collective bargaining.

- Mainstreaming the concept of Living Wage: The Constitution of India, seven decades ago, in the Directive Principle of State Policy, declares that the State shall endeavour to secure to workers a living wage, humane conditions of work, a decent standard of life, and full involvement of workers in management of industries. A living wage is that which enables a family to meet its basic needs with a small amount of discretionary spending. As per the Anoop Sathyapati Committee Recommendation, the concept of living wage needs to be promoted. Businesses should be mandated to move from the minimum wage to living wage, and make its wage calculation transparent.
- Defining and Rigorous implementation of Minimum Age of Employment in Supply Chain: The minimum age of employment to be set at 18 years across the supply chain, with zero tolerance for violators. The clauses therefore in Child labour should be amended to ensure that children below 18 are not employed in companies and their supply chain. The list of hazardous industry also needs to be revised keeping in mind the impact of various sectors in children and their development. There requires legally established monitoring of home based enterprises to ensure child labour laws are not violated.
- Strengthening Trade Unions: In order to promote industrial peace and to minimise production losses, the Trade Unions as a key stakeholder to maintain the healthy industrial relations with the state, workers and employers. In the Labour Code, there has been an attempt to minimise the role of trade unions through adding registration cancellation process, mandatory annual returns, and adding criminal sanctions for the non-compliance.
- Mental Health of workers key aspect of OSH²⁰: A psychologically healthy and safe workplace does not happen by chance or guesswork. Establishments and/or factories need to be mindful of what could go wrong at the workplace and its consequences. They must do whatever is reasonably practicable to control - eliminate or minimise - psychological health and safety risks arising from the establishment and/or factory. The same should find space in Occupational Safety and Health and Working Conditions Code.
- Arbitration system: The Labour Code aims to promote a mechanism for Industrial Dispute Resolution Systems which are based on the Alternative Dispute Resolutions (ADR) models and often used in the commercial disputes. The Section 10 of ID Act, 1948 has been repealed and its mechanism for dispute resolution from Workmen Committee, to conciliation to Adjudication will be phased out to encourage to a new method of dispute resolution which is voluntary and based on bargaining position of the workers. In this context, many temporary and contract workers whose bargaining powers are less and they are not likely to have collective bargaining strengths will be pushed out from the legal recourse of labour rights. It will further restrict their access to legal remedy and which is an act of violation of Human Rights. All litigation related to collective disputes of workers will be litigated in the small cause courts. This will further restrict the access to justice without any recourse to any appeal to higher judiciary in India.

There is a need to recognise safety as fundamental human rights of all workers and creating systems and mechanisms such processes are revised and disclosed²¹.

(b) Streamlining Business Responsibility towards respecting rights of workers and communities:

The NGRBC has elaborated core elements across nine principles including on human rights and well being of workers. In this regard, some immediate steps are needed: -

- A model labour code to be developed by the Business Chambers on a sectoral basis to enable independent audits of HRDD and compliance to labour laws. Deviation from the code should cost businesses their membership.
- A model Human Rights Due Diligence Framework, as enshrined in UNGP, should be made mandatory to all companies above a threshold turnover.
- With respect to the framework itself, all ILO and human Rights conventions required to be clearly

²⁰ Mental Health Interventions for the Occupational Safety and Health and Working Conditions Code 2019- Please see Annexure 5

²¹ Observations of Safe in India Foundation ("SII") on the Occupational Safety, Health and Working conditions Code, 2019 ("the OSH Code") – Please see Annexure 4

specified. Not having a law does not alter the characteristics of human rights abuse. In this regard, the Ministry of Labour should codify all provisions under various labour conventions and the same be used by the businesses to be made applicable in HRDD. The Ministry should come out with a plan within the first six months of NAP towards ensuring that businesses respect all conventions irrespective of the presence of enabling laws or not.

- The Ministry of Labour should prepare mandatory guidelines that should inform supplier codes of the businesses, given that most labour rights violations take place in the value chain.
- The business chambers should prepare model supplier codes informed by sector-specific challenges after consultations with ministry and trade unions.
- Creating an acceptable Certification system is also a challenge. Certification itself has become an industry and there is a corrupt nexus that are being formed around the system. It is important that BIS creates a working group that evolves guidelines on the same.
- Sectoral Independent Human rights Ombudsman to be setup which is linked to the businesses to enable deeper percolation of labour laws and stronger auditing mechanisms
- The industrial association must create a digital portal where basic trade union demands can be recorded, such as registration of trade union, collective bargaining agreements etc. The industries should promote industrial relations in the spirit of employee-employer, as equal stakeholders. The aforesaid portal will set a precedent and lead to harmonize labour market, as never before.

(c) Recognising Human Rights of Community: There is a need to restore the mandatory inclusion of public consultation processes to ensure public participation, democratic process of decision-making, inclusion and transparency.

- In the name of Ease of Doing Business, the public consultation processes existing in domestic law have been severely compromised, leading to environmental destruction, loss of livelihood of communities and increasing pollution and climate crisis.
- Similarly, the implementation of laws and judicial pronouncements concerning environmental pollution is the need of the hour. There is a lack of monitoring of industrial and business linked pollution. Processes of due diligence, company certification, application and renewal of permissions for setting up industries need to be made water-tight to ensure that there is no incidence of pollution due to setting up of industry.
- Acquisition of land belongs to Adivasi communities for the development or extraction of major minerals – such as iron ore, coal etc, the process of social and environmental impact assessments are not taken up with due care; often carried as paper based exercise, community participation and their voices and concerns are not seriously considered -leading to major human rights violation as per BHR. While dealing with issues of land rights – the state and private sector should respect the provisions of legislations related to forest rights and environment.



SECTION 3

RECOGNISING HUMAN RIGHTS OF WORKERS AND COMMUNITIES

CHAPTER 6:

MANDATING DIVERSITY IN DECISION MAKING SPACES OF THE CORPORATES

What is the current status on Diversity?

The Government has made efforts to make the workspace diverse and non-discriminatory. Some provisions include: mandatory, at least one, woman board member; reservation of SC and ST in Public Sector Enterprises, 4% reservation for Persons with Disabilities. However, there are a number of gaps and challenges. According to a study by CRW²², 53% of top 300 companies have a male to female ratio of 10:1 or worse. Among 83 board members of top 10 listed companies (whose surnames revealed their castes), 77 belonged to Brahmin, Kshatriya, Kayastha, Jain or Parsi – none from the Dalit or Adivasi community.²³ A study of a 1,000 business-merger and acquisition deals between 2000 and 2017 revealed that nearly 50% of the deals were made between boards that had members of the same caste. The Rights of Persons With Disabilities Act, 2016 states that every government establishment shall appoint not less than four% of persons with disability. However, the study further revealed that only three out of the 47 PSUs that were part of this study had three or more percent of employees with disability. Despite the presence of the Act, the increase in the number of PWDs among the workforce in the sample company over one year is negligible (0.006%).

An analysis of data from top 300 companies reveals that only 39 companies out of the top 300 have proactively disclosed having employees from Scheduled Caste (SC), Scheduled Tribe (ST) or Other Backward Classes (OBC) groups as part of their workforce.²⁴ Only 35 companies have provided data substantiating the same. Out of 47 PSUs, 32 have provided figures while only 3 private sector companies – Tata Steel (17.29%), Bajaj Finance (4%) and Bajaj Auto (9.34%) have provided these numbers. Bajaj provided these figures only for the new recruits. Interestingly, 3 PSUs have also provided figures related to representation of minority communities.

Though in terms of disclosures the results were not very promising, it was found that in terms of commitments there has been some progress over last few years and this creates a good ground for settling systems for measuring diversity in companies. The results from India Responsible Business Index 2018²⁵ based on the top 100 companies public disclosures and commitments for the year 2016-17 are summarised below:

Table 6.1 Number of companies disclosing on specific groups vulnerable to discrimination during recruitment and career advancement through policies.

Social Identity	2016 (n=100)	2017 (n=99)
People with Disabilities	61	56
Scheduled Castes	62	61
Scheduled Tribes	50	48

22 Status of Corporate Responsibility in India, 2019; Praxis (2019). Accessed at: http://www.corporatewatch.in/images/Status_of_CR_Report_2019.pdf

23 <http://www.businessworld.in/article/Finding-The-Plan-In-The-National-Action-Plan-On-Business-and-Human-Rights-/24-02-2020-184834/>

24 <https://indianexpress.com/article/business/companies/53-of-top-indian-companies-have-male-to-female-employee-ratio-of-101-or-worse-6052215/>

25 Making Growth Inclusive-2018: Analysing Policies, Disclosures and Mechanisms of Top 100 Companies; Praxis, Oxfam India, Corporate Responsibility Watch, 2018. Accessed at: http://www.picindia.org/wp-content/uploads/Finding_Making-Growth-Inclusive-2018-INSIDE_20-Feb-18_web.pdf

Religious Minorities	21	18
Sexual Minorities	56	53

Companies have been naming groups that are vulnerable to discrimination. More than 50 companies have identified women, persons with disabilities, scheduled castes and religious minorities as vulnerable groups. While 32 companies indicate sexual minorities, only 18 companies explicitly mention scheduled tribes.

What are the key challenges in the concept of Diversity?

How to define *Diversity*? A common concern is that diversity could be very contextual.

- It is possible that the company has workforce with persons from marginalised identities at the ground level, whereas the senior management and middle management does not have much representation from marginalised identities.
- Some companies could be very local, so may not have, say, ST population. Some may be located with less of SC population. So, a common understanding of diversity would be a challenge.
- Another common challenge is related to marginalisation within marginalisation. For example, often disability is understood largely as physical disability. Learning disabilities and others often find lack of understanding, awareness and representation.
- Thus, to have a comprehensive definition of diversity is going to be a challenge. Nevertheless, NGBRC in its principle related to “No Discrimination”²⁶ names certain identities such as caste, tribe, gender, migrants, disability, LGBTQ.
- There is a need to understand the issues of diversity from different contexts such as in procurement, supply chain, market place/ chain, employment, governance, etc.

What are the Recommendations?

Despite the above challenges, the following processes are considered to be very significant and must be made mandatory:

- Companies to be mandated to define, address diversity and conduct a diversity audit on an annual basis. This can be termed as a “No Discrimination Assessment” or as “Affirmative Action”, but the objective is to understand whether the work space has diversity or not, especially in its decision making spaces such as Boards, Management Committees, Senior Management or supervisors.
- Companies need to welcome, encourage and foster diversity within the company workforce.
- Companies need to define diversity and evolve policies to implement affirmative action, encourage non-discrimination and provide an example of good practice through business conduct and recruitment. The policies need to be evolved after consultation with internal and external stakeholders. Companies should be made accountable for the diversity policy they themselves have evolved and implemented.
- Companies need to undertake a yearly diversity review basis which company diversity policy to be evolved to include recruitment and development of SC, ST, women, ND/DNT, LGBTQ, specially-abled and other groups in proportion to the overall employee count. The diversity may be measured keeping the following domains in mind: inclusive workspace; No discrimination in recruitment, skill development and career advancement; and prevention of harassment, including sexual harassment.
- Business chambers should evolve diversity policy, which might specify gold standards for a diverse workplace in different sectors and locations.

The companies worry that they do not want to ask “caste status” or “sexual orientation status” from their employees. In that case, the diversity audit can be conducted through an anonymous survey. There

²⁶ https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf

are examples of diversity assessments done by different companies using diverse methods. In case the companies find that the workspace is not diverse enough, they may explore various kinds of affirmative action programmes to promote diversity. This could include: proactively including people from diverse race, ethnicity, nationality and faith to cultivate a supportive environment; creating capacity building programme for marginalized identities who could later take up the roles within organisation; and even reservation for certain levels- so that the decision making spaces are diverse. The diversity assessments and action taken thereof should be disclosed in the public domain. The Business Associations should come out with annual periodic reports on diversity among companies, along with sectoral disaggregation. They should organise seminars and capacity building programmes to create inclusive workspace and non-discriminatory environment, including provisions of affirmative action.

The Ministry of Corporate Affairs should monitor the implementation of the system of reservation rigorously in the Public Sector enterprises. They should set a target of three years to achieve targeted diversity, especially on those that are legally mandated. Effectively adhering to the Reservation system in PSEs including for PWDs. The Ministry of Corporate Affairs, in consultation with DPEs should evolve a two-year time plan to effectively implement the system of reservation in the Public Sector enterprises. They should set a target of two years to achieve targeted diversity, especially on those that are legally mandated. A review after two years may be done by MCA.



SECTION 4

**LEVERAGING EXISTING
MECHANISMS AND
PROCESSES TO
PROMOTE HUMAN
RIGHTS IN BUSINESS**

CHAPTER 7

GOVERNMENT AS 'MODEL PROCURER': PROMOTING HUMAN RIGHTS IN BUSINESS

The NAP (Zero Draft) of the Government of India states that public procurement accounts for more than 25% of India's GDP. The Government of India is committed to ensuring responsibility and accountability to bring efficiency, economy, and transparency in matters relating to public procurement of goods and services. It indicates the following:

The Manual for Procurement of Goods (2017) provides that the eligible bidder is required to comply with sustainability criteria and legal requirements of environment or pollution control

There is *Competition Commission of India's Diagnostic Tool - Towards Competitive Tenders* that governs public procurement. Competition in procurement would reduce costs, incentivize innovation and promote allocate, productive and dynamic efficiencies.

The Manual for Procurement of Consultancy & Other Services (2017) states that many services are subject to various statutory provisions relating to labour, taxation, workmen safety, child and women labour, environmental protection, mining, forest clearance, employment reservations etc. which must be complied with by the relevant service provider

The Government of India launched the Government e-Marketplace (GeM) that is the National Public Procurement Portal. GeM facilitates online procurement of common use goods and services required by various Government Departments / Organisations / Public Sector Undertakings. With GeM, the Government aims to enhance transparency, efficiency and speed in public procurement.

Relevant Government Rules are

- **Rule 144, General Financial Rules**, 2017, Ministry of Finance, Government of India²⁷
- Manual for Procurement of Goods, (2017), Ministry of Finance, Government of India, Chapter 2.2 (vi)²⁸
- **CCI's Diagnostic Tool - Towards Competitive Tenders**, (2018)²⁹
- **Manual for Procurement of Consultancy and Other Services**, (2017), Ministry of Finance, Government of India, Para 9.9.1(g)³⁰
- **Central Public Procurement Portal**, Government of India³¹
- **GeM**³²

Should we not extend Model Employer Concept to Model Procurer?

The Government is, in the case of Public Procurement, a buyer. Given the volume of procurement, the buyer could demand from businesses their compliance with UNGP as well as all human rights and ILO conventions, even though the State as government has not ratified the convention or made laws to make the provisions justifiable. The Government as a public procurer should aim to be one step ahead of the Government as law-maker. The concept is similar to that of the Government as model employer. In *Som Prakash Rekhi v. Union of India* (1981), Justice Krishna Iyer stated, "Social justice is the conscience of

²⁷ https://doe.gov.in/sites/default/files/GFR2017_0.pdf, accessed on 02 November 2018 .

²⁸ https://doe.gov.in/sites/default/files/Manual%20for%20Procurement%20of%20Goods%202017_0_0.pdf, accessed on 25 October 2018.

²⁹ https://www.cci.gov.in/sites/default/files/whats_newdocument/Final%20Diagnostic%20Tool%2019032018-1.pdf accessed on 09 November 2018.

³⁰ https://doe.gov.in/sites/default/files/Manual%20for%20Procurement%20of%20Consultancy%20and%20Other%20Services%202017_0.pdf

³¹ <https://eprocure.gov.in/epublish/app>

³² <https://gem.gov.in/aboutus>

our Constitution, the State is the promoter of economic justice, the founding faith which sustains the Constitution and the country is Indian humanity. The public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt." The Government being a model employer actually set legal standards for the corporate sector. From ensuring wages to pension benefits to maternity benefits to affirmative action to promoting freedom of association, the public sector set high standards, which then got extended to wider corporate sector, either through law or through self-regulation.

Identical to that model employer concept, the state could become model procurer, setting standards even higher than the international buyers. For example, in the garment industry, there are clearly two supply-chains - one for international trade and another for domestic market. It is often stated that the international buyers organise regular due diligence in the supply chain- owing to which there is lesser human rights violations such as child labour and bonded labour and such other practices. The international buyer dictates compliance not through any regulatory power, but because of the volume the buyer procures. Similarly, the Governments in India procures a huge volume of garment products- from uniforms for police, defence forces, hospital staff, PSU factory workers to school uniforms for children under Right to Education law. The Government can very well influence the garment industry if it specifies procurement guidelines that seek disclosure and compliance of not only existing laws, but also such globally recognised conventions. Similarly, an MP stated in the Parliament in 2019, "Modernisation of the railways does not matter if the employment of manual scavengers continue. There are about 95,000 people engaged in the work through contractual employment without any safety gear."³³ The fact that the Ministry does not recruit manual scavengers directly seems to help the government from evading the responsibility. However, if the public procurement guidelines on contracting had made disclosure and compliance with human rights conventions mandatory, the government would be able to address this problem, which is even legally wrong.

Should Public Procurement not be leveraged to enforce compliance of NGRBC?

The National Action Plan on Business and Human Rights should have a road map for making the Government Departments use their procurement process to be linked to the Human rights due diligence system as 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 the public procurement system.

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. Just like the way a foreign buyer enforces compliance through mechanisms, the government procuring products, works and services should verify compliances. For that, it should propose to create a division within the Department of Expenditure, Ministry of Finance to prescribe systems and mechanisms for the same. The guidelines, among other things, could make the vendors of public contracts mandatorily disclose the information on compliance in the supply chain. The NAP additionally should propose verification measures with public authorities to ensure that information provided is appropriate.

Further, the public procurement mechanisms could also be used to address inequalities in market. The Government has brought a policy of 20% on mandatory procurement by the Government through MSME, including 20% from SCs and STs enterprises. The Government later initiated a consultation process with DICCI to implement similar process, including development of an IT platform to identify and list SC and ST enterprises, but it has not yet made a policy. The Government should evolve a policy on public procurement

³³ <https://www.thehindu.com/news/national/kanimozhi-slams-govt-for-employing-manual-scavengers-in-railways/article28377410.ece>

of goods and services by the state through SCs, STs and women-led enterprises.

What are the changes needed in regulatory mechanisms?

In other words, the NAP should propose 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 linking 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.

Activities	PHASES I: Months 0-6; II: Months 7-18; III: Months 19-36 months; IV: Months 37-48			
	I	II	III	IV
1 MCA creating NGRBC index based on disclosures				
2 MCA coordinates with DoE, MoF to link the index with Public Procurement Guidelines				
3 MCA coordinates with GeM to incorporate the elements of the Index in its system				
4 Conceptualising, framing and passage of Public Procurement legislation				
5 Creating and building systems of verification and certification on Business and HR to inform procurement				
6 Creating institutional mechanisms including integrating to monitor impact of public procurement				
7 Government promotes Businesses to follow Public Procurement model in corporate Procurements				

CHAPTER 8:

GOVERNMENT AS MODEL INVESTOR, PROMOTING HUMAN RIGHTS IN BUSINESS

UN Principles on Responsible Investment³⁴ work to integrate environmental, social and governance (ESG) concerns in investment decisions of the member organisations. Based on six principles, the principles clearly spell out the need to incorporating ESG and seek disclosures from entities. The OECD Guidelines for Multinational Enterprises³⁵ argue that corporations should “contribute to economic, environmental and social progress with a view to achieving sustainable development”. This means companies (including financial institutions) should not only adhere to legislation and regulations in the countries where they operate, but also are expected to comply with widely supported international conventions, standards, and initiatives that recognise issues challenging sustainable development, even when they are not recognized in national laws. And this compliance should be extended to partners, subsidiaries and supply chain.

What are the existing efforts by the Government?

In India, the financial system is regulated with the help of independent regulators, associated with the field of insurance, banking, commodity market, and capital market and also the field of pension funds, with the Indian Government also playing a significant role in controlling, through RBI and SEBI among others. There have been some efforts by the government to ensure Financial Institutions become key contributors to the actions and discussions around sustainable development. In 2007, RBI, through a notification suggested that banks are key contributors to the agenda on sustainable development, and therefore stressed that their activities should “reflect their concern for human rights and environment”³⁶. And in doing so, it suggested that banks should keep themselves updated with the developments and modify strategies to ensure they address the increasing concerns and challenges that arise. The National Voluntary Guidelines on Responsible Financing recognise the need for financial institutions to realise and address the imperatives of sustainable development and proactively step in to “lead the way, inform and help operationalise India’s sustainable and inclusive development objectives besides enhancing the performance of financial institutions themselves”³⁷. The National Guidelines on Responsible Business Conduct, especially principle 5, also emphasise the need for third party responsibility of human rights impact. It states that “business should ensure that their business, where it is causing, contributing or otherwise linked to adverse human rights impacts, takes corrective actions to address such impacts.”

What are the prominent gaps and challenges?

Currently, however, investments by financial institutions in India continue to be guided by financial transparency and accountability, which is guided by the primary motive of maximizing the returns of the investors. In doing so, the investment companies invest in profit making entities, without consideration for the social impact of such companies. The investment guidelines do not go beyond governance in the ESG framework. For example, the existing guidelines are limited to just market standing and financial capacity of the company. Even after the formulation of National Action Plan on climate change the investment guidelines have not incorporated environmental considerations in decision-making.

What are the contemporary Global Initiatives in this regard?

More specifically, to remediate sector specific human rights violations, many initiatives have been developed

34 <https://www.unpri.org/>

35 <http://mneguidelines.oecd.org/guidelines/>

36 <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=3987>

37 <https://www.cafraL.org.in/sfControl/content/LearningTakeaWays/1213201764617PMNationalVoluntaryGuidelinesforResponsibleFinancing.pdf>

to encourage financial institutions to contribute to sustainable development by arresting human rights violations. These initiatives under UNEP's Finance initiative including UNEP's Tobacco Free Finance, Principles of Sustainable Insurance. UNEP's Finance initiative³⁸ clearly spell out that core elements of sustainable development, including inclusive, resource-efficient, low-carbon economy cannot be achieved without the active participation of investment institutions, considering the key environmental and social challenges our planet is facing.

1. **UNEP's Tobacco-Free Finance**³⁹ in addressing the global health issues due to tobacco is encouraging financial institutions to cease funding and investment in tobacco companies and cease business relationships with the tobacco industry in light of the global tobacco epidemic
2. **Principles of Sustainable Insurance**⁴⁰ work towards identifying, assessing, managing and monitoring risks and opportunities associated with environmental, social and governance issues in activities in insurance value chain.

In following these international initiative and guidelines, many investment funds and organisations, like the BNP Paribas AXA, AMP Capital, world over are ceasing financing and investment activities in major portfolios including tobacco, oil and natural gas companies involved in shale or oil sands. Many countries in making similar efforts are disinvesting from industries in accordance with the compliance to international conventions, including FCTC. "In Australia, the governments of Australian Capital Territory, New South Wales and South Australia, as well as the City of Melbourne, have divested their public investment in the tobacco industry. In 2012, First State Super became the first mainstream Australian superannuation fund to implement a tobacco-free investment policy, and as on December 2017, there were 41 Australian superannuation funds with tobacco-free policies that cover all investment options, including the Australian Government's Future Fund. In 2016, Medibank (Australia's largest health insurer) also divested from tobacco. Elsewhere, the Norwegian Government Pension Fund—one of the largest in the world—ceased investing in tobacco in 2010. The country's finance minister stressed the importance of the fund's ethical guidelines reflecting "at all times what can be considered to be the commonly held values of the owners of the fund" (i.e., the Norwegian people). The New Zealand Superannuation Fund has also excluded investment from companies directly involved in the manufacture of tobacco products, and OP Trust, a large Canadian pension fund, has also announced it is divesting from the tobacco industry"⁴¹.

According to Fair Finance Guide (FFG) a civil society initiative, CSR efforts of financial institutions should primarily focus around its core activity of providing capital and in doing so should ensure human rights compliance. This is borne out of the rationale that financial institutions offer their clients a wide range of financial services with which they enable companies, governments, and private clients to acquire capital for all kinds of activities. These activities have the potential of leading to human rights violations or environmental pollution, as well as contribute to ending malnutrition or improving biodiversity. Therefore, financial institutions should operate on the principle of human rights and while doing so respect supported international standards and initiatives and disclose these expectations in their policies on specific issues and sectors.

What are the changes proposed to make Government a model investor?

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 organisations, 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 obligations to them. Some key recommendations are:

38 <https://www.unepfi.org/>

39 <https://www.unepfi.org/psi/tobacco-free-finance/>

40 <https://www.unepfi.org/psi/the-principles/>

41 <https://www.tobaccoinaustralia.org.au/chapter-10-tobacco-industry/10-18-the-investment-of-public-funds-in-tobacco>

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.

CHAPTER 9: MAINSTREAMING HUMAN RIGHTS-BASED APPROACH IN CORPORATE SOCIAL RESPONSIBILITY UNDER THE COMPANIES ACT

What is CSR under the Companies Act, 2013? The Act has a unique clause that provides for companies to spend on corporate social responsibility (CSR). The Ministry of Corporate Affairs (MCA) in February 2020 stated that the total CSR spending, as per filing received as on 31st March 2019, from 2014-15 to 2017-18 stood at Rs 52208.3 Crores. A substantial part of these funds has gone to Government-initiated programs such as Statue of Unity (3000 Crores), to PM relief Fund, Swachh Bharat etc. There is no doubt that CSR has, to some extent, provided funds to date, which was not done prior to the Act. One can see that corporate policies now speak about CSR in a big way, and terms such as deprived communities, caste and human rights have started appearing in business policies.

What are some of the key observations regarding linkage between CSR and human rights? There have been incidents reported by Companies that local MPs, MLAs, politicians, political parties, bureaucrats demand spending on specific issues, specific regions. Local politicians and businesses know that companies have funds, compulsorily for non-core business of corporates. There is greater pressure. Some companies may also take advantage and instead of going through projects, just donate it to the PM relief Fund defeating the very purpose of Schedule 7. Certain companies might use CSR to access policy-making spaces. For example, tobacco companies otherwise are disallowed from accessing government policy think-tanks such as Niti Ayog, but CSR provides them formal legitimate access. CSOs have a significant role in enforcing human rights in business operation by bringing such violations in public domain and campaigning around the same, however funds availability under CSR for advocacy on Human Right issues remain scarce. Risks also remain that CSR funds itself could be used to undermine Human Rights⁴². CSR becomes legitimate source of corporate funds for activities such as building statues, to get into the good books of the political parties that support such initiatives⁴³.

What are the key changes that need to be made to make CSR activities align with NGRBC?

Human Rights based approach needs to be integrated into CSR, which includes mandatory consultation on human rights issues faced by communities; mandatory consultation with vulnerable stakeholders; and mandatory human rights based impact of CSR operations. The Human Rights Due diligence system should be extended to CSR programmes as well. Some specific measures in terms of amendments suggested to CSR guidelines are:

- (a) There requires a specific clause in terms of mandatory guidelines to prevent CSR from becoming an instrument for nexus with political parties, individual politicians and bureaucrats.
- (b) CSR cannot be used to circumvent rules that prohibit advertising of certain products. Certain industries, which are prohibited from promoting their products, such as alcohol, tobacco, addictive substances, prescriptive drugs, asbestos should not be allowed to use CSR to publicise their brand logo, which is the same as that of the product that is prohibited from being advertised. In this case, MCA's notification dated 16th May, 2016 on linkage between CSR and COTPA, needs to be applicable for all products of the above nature.

⁴² <https://www.outlookindia.com/magazine/story/where-nexus-is-legitimate/300987>

⁴³ <https://www.livemint.com/Companies/XQJTp5bYxHuPWGvmsJVVHP/PSUs-devote-over-Rs121-crore-of-CSR-funds-towards-Statue-of.html>

- (c) CSR should be brought within the purview of statutory financial audit, by making details of CSR spending as part of the financial statement of a company, and incorporated in Schedule III of the Act.
- (d) CSR should not be used as instrument to build partnership with regulators, especially when the company is producing products or services that come under the purview of the regulator.
- (e) CSR cannot be used as instrument to get access to public policy making spaces and institutions, when the companies otherwise are disallowed through human rights conventions. For example, FCTC convention⁴⁴ of WHO (section 5.3^{45&46}) prohibits tobacco industry to access policy making spaces.
- (f) Mapping Schedule 7 against the Sustainable Development Goals to ensure better alignment with human rights framework.
- (g) CSR should be used to fulfil affirmative action agenda. The social audit process and mechanism should be extended to CSR projects
- (h) CSR cannot be used to mitigate impacts of business operations, which fall within its usual line of work which must conform to existing laws of pollution control, extraction, etc.

44 <https://apps.who.int/iris/bitstream/handle/10665/42811/9241591013.pdf;jsessionid=220F41ED7632CA413267EC34EB997675?sequence=1>

45 https://www.who.int/fctc/guidelines/adopted/article_5_3/en/

46 https://www.who.int/fctc/guidelines/article_5_3.pdf?ua=1

ACKNOWLEDGEMENTS

Since 2018, Partners in Change has been engaging with a spectrum of stakeholders, including students, civil society organisations, businesses, academicians and academic institutions international NGOs, human rights defenders, donor organisations, lawyers, UN bodies, bilateral organisations and community groups and leaders. The publication is a collation of these interactions and suggestions, which were received during the meetings and consultations.

We would like to express our sincere gratitude to all the contributors, for investing their time in attending the consultations and providing us with their comments and suggestions.

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8	Ritu	ABSS
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**Consultation with CSOs to release the Kannada version of Status of Corporate Responsibility in India and seek comments for National Action Plan on Business and Human Rights
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Consultation with CSOs to release the Status of Corporate Responsibility in India and seek comments for National Action Plan on Business and Human Rights New Delhi

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39	Saloni Thommy	Justice Ventures
40	Pritam Prasoon	VPT Pvt Ltd
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Consultation with Mill workers and Supervisors on Gender and Business related issues Dindigul

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Experts Consultation on Business Violation

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