

Chapter 10:

What Can The National Action Plan on Business and Human Rights (NAP) Learn From NVG Implementation?¹⁹⁷

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On 16 June 2011, the UN Human Rights Council adopted Guiding Principles on Business and Human Rights (UNGP) for implementing the UN “Protect, Respect and Remedy” Framework. The UNGPs became an acceptable global standard for assessing the status of Human Rights adoption by businesses and the State’s role in ensuring protection to citizens vis-à-vis businesses’ human rights violations. The Government of India, incidentally, whole-heartedly supported the motion. The UNGPs encompass three pillars outlining expectations of States and businesses.

1. The state duty to **protect** Human Rights;
2. The corporate responsibility to **respect** Human Rights; and
3. Access to **remedy** for victims of business-related abuses.

The second pillar envisages that business enterprises should respect Human Rights. This means that they should avoid infringing on the Human Rights of others and should address adverse Human Rights impacts with which they are associated.

The National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business (NVGs) were parallelly adopted by the Ministry of Corporate Affairs, Government of India in July 2011. It has a set of **nine principles** that offer businesses an Indian understanding and approach to inculcating responsible business conduct and was prepared through a process of multi-stakeholder consultations. The Securities and Exchange Board of India (SEBI) made it mandatory for top 100 listed companies to file Annual Business Responsibility Reports from the financial year ending on or after December 31, 2012. This has been extended to 500 companies since the year 2016-17. Principle 5 of the NVGs

recognises that “Human Rights are the codification and agreement of what it means to treat others with dignity and respect”. It states that businesses should understand the Human Rights content of the Constitution of India, national laws and policies and the content of the International Bill of Human Rights. Businesses should appreciate that Human Rights are inherent, universal, indivisible and interdependent in nature. Further, it asks businesses to integrate respect for Human Rights in management systems, in particular through assessing and managing Human Rights impacts of operations, and ensuring all individuals impacted by the business have access to grievance mechanisms. Also, businesses should promote the awareness and realisation of Human Rights across their value chain. Further, it clearly states that businesses should not be complicit with Human Rights abuses by a third party.

There are two significant advancements that happened in the year 2018. The Ministry of Corporate Affairs has shared the revised draft version of the NVGs called **National Guidelines** (NG) where the word voluntary has been removed. The second one is the apparent intent shown by the Government of India to develop a National Action Plan on Business and Human Rights (NAP). The NAPs are expected to articulate priorities and actions to be taken by the states to support the implementation of national, regional and international commitments and obligations related to businesses and Human Rights.

Where do businesses stand in terms of respecting human rights?

As mentioned above, from the financial year 2012-13, SEBI had mandated the top 100 listed companies on the Bombay Stock Exchange (BSE) to share Business Responsibility Reports as per the prescribed format. The BRRs provide a simple framework with which to understand the status of the implementation mechanisms of policies across the nine NVG principles.

“Apart from maybe a dozen companies, there is only a nascent understanding of the rights-based approach to inclusion, exclusion and discrimination among Indian businesses. Under these circumstances, any initiatives companies would take would be more tactical than long-term or sustainable and strategic.”

- Viraf Mehta in Emphasising a Human Rights-based approach to inclusiveness in business

(a) Human Rights not a taboo word among top-500 listed companies

A look at disclosures by 200²⁰⁰ top listed companies related to the Human Rights principle generated some interesting insights as detailed in Table 10.1 below

Table 10.1: Status of implementation mechanism related to NVG Principles vis-a-vis Human Rights Principle for 2016-17 (n=200)

	Implementation Mechanism	Companies responding in the affirmative (%)
1	Existence of policy	94
2	In-house structure to implement the policy	89.5
3	Grievance redressal mechanism related to the policy	89
4	Policy formulation in consultation with relevant stakeholders	84.5
5	Specified committee of the Board to oversee the implementation of the policy	82.5
6	Policy has been approved by the Board	79
7	Policy has been formally communicated to all relevant Stakeholders	78.5
8	Policy conform to any national /international standards	74
9	Independent evaluation of the working of the policy	66.5
10	Policy has been signed by senior management	66

Source: Business Responsibility Reports of 200 companies.

The ‘good news’ is that Human Rights is no longer a taboo word because as seen above, 94 per cent of the study sample companies have claimed that they have human rights policies. Further, about 89 per cent have stated that they even have in-house structures to implement these policies, including grievance redressal mechanisms. The percentage does reduce to 66 per cent of companies that claim to have provisions for independent evaluation of the working of the policy.

(b) When businesses say Human rights, they may mean zilch

As part of the third edition of the India Responsible Business Index²⁰¹, the study team analysed the corporate policies of top-100 companies to understand the claim made by these companies. The findings are detailed in Table 10.2 below.

Table 10.2: Policy commitment of companies vis-à-vis some key aspects of Human Rights; IRBI 2016-17 (top 100, n=99)

	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	Priority to local suppliers in supply chain, including training and skill development	57
5	Commitment to inclusion of people with disability in recruitment as well as career advancement	56
6	Promoting diversity in board	27
7	Extending employment policy to supply chain	22
8	Providing fair living wage	6
9	Providing social security benefits to contractual employees	6
10	Provision of similar or better living conditions for project affected people	5
11	Free, Prior and Informed Consent (FPIC) of communities through discussions for land acquisition or displacement	2

Source: India Responsible Business Index- an outcome of a collaborative partnership of Praxis, Corporate Responsibility Watch, Oxfam and Change Alliance

The greatest fear in the next decade would be sanitizing the term Human Rights. One can foresee a situation, where almost 100 per cent companies claim that they have policies on human rights; but they would have defined ‘human rights’ narrowly to mean a couple of provisions that are anyway mandated by law. In Table 10.2, one sees that companies having anti sexual harassment policies and CSR policies for marginalised groups, is as high as 95 per cent and 86 per cent respectively, whereas less than 6 per cent of the companies have policies relating to providing fair living wages, extension of social security benefits to contractual employees, provision of similar or better living conditions for project-affected people and providing for FPIC of communities during land acquisitions. Only 22 per cent extend their employment policy to supply chain.

(c) The grievance redressal mechanisms of companies tend to report zero grievances

While 89 per cent of companies stated that they have grievance redressal systems for reporting human rights violations, the study team analysed the data from BRRs to understand the functioning of these systems. Findings of **company disclosures on complaints received as part of Business Responsibility Reports** are in the figures below. Figures 10.1, 10.2 and 10.3 detail the reporting of sexual harassment cases, human rights violations cases and child labour/ forced and involuntary labour cases respectively for the years 2014-15 with a cohort of 97 companies and for 2016-17 for 97 companies. This includes the total number of reported cases as well as the cases where data was not nil. Figure 10.4, details the same for the year 2016-17 for a cohort of 97 companies.

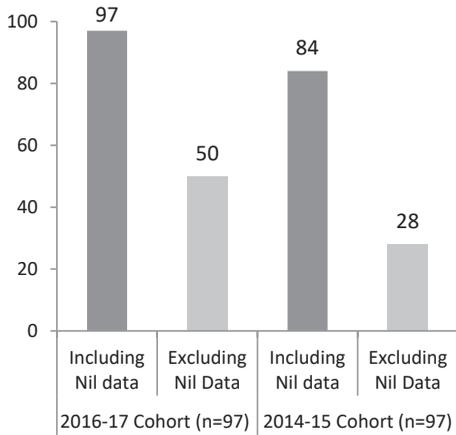


Fig 10.1: Sexual Harassment Cases Reporting

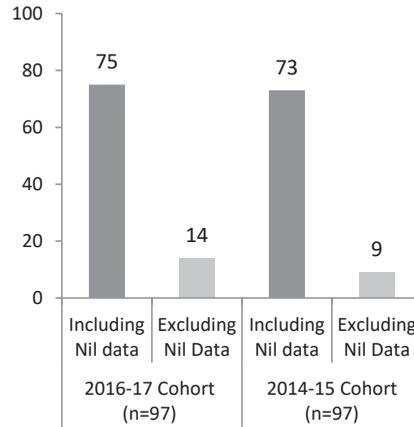


Fig 10.2: Human Rights Violations Reporting

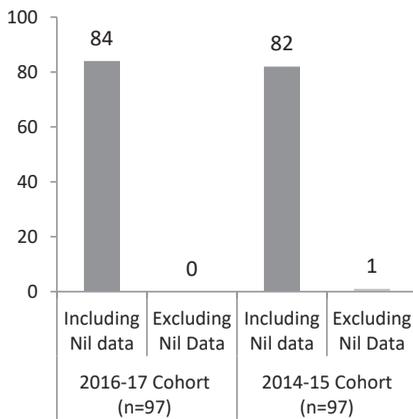


Fig 10.3: Child Labour/ Forced & Involuntary Labour Reporting

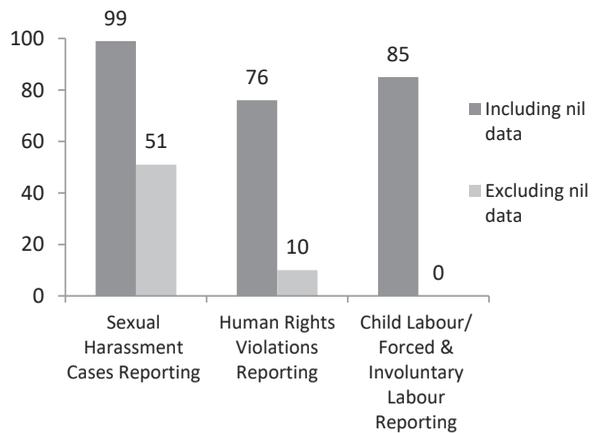


Fig 10.4: Data for 2016-17 (top 100, n=99)

While more than 75 per cent of companies have provided information on complaints received by them, the companies that have reported “at least one complaint received during the year” on sexual harassments, human rights violations and on child labour/forced labour are 51 per cent, 10 per cent and 0 per cent respectively in 2016-17. Zero reporting can be interpreted as either existence of safe workspaces or a failure of systems encouraging any form of reporting of violations. It would probably not be difficult to assume that the grievance redressal systems are not yet strong

enough for people to trust and report. It seems to be the only valid explanation for cases of child labour or forced labour reporting to be zero, considering that grievance redressal systems ought to be available even for supply chain members. What is interesting is the rise in companies reporting complaints on sexual harassment from 28 to 50. This jump can possibly be attributed to the presence of the law on anti-sexual harassment.

Importantly, even the number of companies that have reported cases of one or more human

rights violations increased from 9 to 14 between 2014-15 and 2015-16. Reporting on human rights violations is largely confined to reporting on code of conduct violations, cases under the Protection of Whistle Blowers, workers issues and in some instances of shareholder complaints. Gail in its disclosures has not differentiated between Human Rights complaints from other complaints and has reported a varied nature of complaints as part of disclosures on Ethics, Transparency and Accountability. At present, reporting on Human Rights violations is being done, as there is a

dedicated question in BRRs on this. United Spirits has reported complaints as filed on their whistle blower portal. Infosys has reported cases on workspace harassment, workplace concerns and disciplinary issues in Human Rights complaints. Tata Motors and Hero Motorcorp have reported complaints related to violations of code of conduct as part of Human Rights complaints. An understanding of what Human Rights comprises is varied and still evolving and often related disclosures are shadowed under Human Resources terminology.

Learning from NVG implementation for the NAP journey

Analysis and insights from BRR disclosures needs to be incorporated for informing the NAP development process. NVGs, which are slated to become NGs, can be seen as precursor to the NAP and have facilitated the NAP development process on the following two counts.

Firstly, NVGs has definitely served its purpose in creating a **national narrative on responsible business**; and by virtue of principle five, have made human rights integral to the responsible business agenda of the State. As a voluntary guideline, the NVGs are very progressive and most of the global guidelines on responsible businesses find place in the nine principles.

Secondly, NVGs today are probably the **only mandatory disclosure instrument on responsible business in India**, other than on financial responsibility. It could happen, essentially, because of SEBI seizing the initiative and making BRR, a listing requirement for the top 100, and then top 500 companies. This is important because now the companies are making a number of proactive disclosures on things, which the citizens would have never received easily from these businesses.

Nevertheless, NVGs has not been a transformative instrument yet.

Firstly, whether there is the word “Voluntary” in NVGs or not, it is a voluntary institution; and it has its own cost. In this instance we can quote the case of Nestle. On 5 June 2015, after 18 months of testing, re-testing and validating, the Food

Safety and Standards Authority of India (FSSAI), indicated three major violations including (a) Presence of lead in the product in excess of the maximum permissible level of 2.5 ppm; (b) Misleading labeling information on the package reading “No added MSG”; and (c) Release of non-standardised food products in the market without risk assessment. A quick analysis based on NVG principles shows that Nestle has contravened five of the nine principles of the NVGs. Nestlé’s defense was more on technical grounds blaming the testing protocol. It said that the product contained two parts, which have to be tested in the way it is consumed, i.e., after boiling the mixture of the noodles and tastemaker in water. Nestle said that the Government laboratory had tested the two components separately and therefore used it as ground to dismiss the tests. The second response was that the “No added MSG” label reflects that the company had not added MSG; and that they followed this practice as the industry in India generally follows this practice. The company later agreed that they would remove the label from the next lot²⁰². In this case, Nestle used the laws of the land to protect its irresponsible behavior. The company has one of the most progressive disclosure policies, but when it is about accountability, their own policies or these guidelines have no teeth. NVG describes rights-based principles, but as an instrument they do not have any enforcement clause and does not create or protect any rights or entitlements. Neither can it hold anyone accountable.

Secondly, companies do not even respect government circulars especially if the circular is about voluntary guidelines. For example, the Uniform Code of Pharmaceutical Marketing Practices (UCPMP) issued by the Department of Pharmaceuticals in the year 2012 became effective from 1 January 2015. The code provided for certain provisions that govern the activities of the companies and other related bodies, with regard to product related claims and comparisons, free samples, textual and audio, video promotional materials, medical representatives, gifts and freebies to health care professionals, relationship with health care professionals, complaint redress mechanisms and formation of an Ethics Committee. The code was to be implemented by all Pharmaceutical Associations and Companies. The Government had taken efforts to make the code effective by imposing certain responsibilities on the eleven associations that represented various manufacturers from the pharmaceutical industry. It was extended through five circulars until further notice. The lackluster response of the association to these efforts could be assessed from the fact that, though called for, only three associations uploaded the UCPMP on their website. Only two associations disclosed the names of the member companies. And only one association mentioned the creation of an Ethical Committee for Pharmaceutical Marketing Practices (ECPMP) while the other ten did not mention anything. Out of the eleven associations, only one association mentioned the procedures of complaint in its Code of Pharmaceutical Practices. None of the associations mentioned anything about the creation of Apex ECPMP in their website. Lastly, none of the associations mentioned about any complaints received, the nature of the complaints received or the status of the same. This clearly shows that the associations representing certain sectors are also not willing to enforce voluntary guidelines such as UCPMP. To put it bluntly, the Government would not be able to enforce 'anything', when it is about business unless the instrument has a punitive mechanism.

Thirdly, mechanisms to enforce the human rights agenda in the market space, are often categorized

as "due-diligence", "certification" and "labeling" which themselves are under the control of corporate actors. They also assume the presence of "informed and empowered consumers", if not a vigilant citizenry. Hence, the State while developing the NAP needs to strengthen itself to ensure that business reports to it; and then to curb the potential nexus, requires to strengthen the quasi-judicial institutions (such as NHRC), civil society organisations, trade unions and consumers. The NVGs have traditionally, not been able to empower any institution located in State and Civil society or make them accountable. The State has to recognise that it is one of the largest consumers in the Indian market. NAP should leverage public procurement to enforce a human rights agenda in businesses.

Finally, the death of any process is when it is adopted only in a technical way. For example, some companies have actually copied the core elements from NVGs and incorporated them in their policies, without really making any change on the ground. Some of the companies have adopted human rights language without any changes in action. Often, change in language is an immediate indication of progress towards responsible business. However, NVG experiences say that they are the immediate warning for businesses to allocate resources to whitewash or camouflage their deeds.

The evolving of a National Action Plan on Business and Human Rights, therefore, is going to be a very challenging process. It is important that the process does not assume that there is a facilitating environment that seeks accountability from business on Human Rights but that the starting point is an uninformed citizenry and disempowered consumers. The state has to play a proactive role in defining and anchoring the Human Rights agenda in businesses. While doing it, it also needs to ensure that there is no incentivizing of any state-business nexus. Nevertheless, the process of evolving the NAP does provide an opportunity for everyone, especially Human Rights defenders, to redefine the roles of the state, business and civil society to create a Human Rights friendly environment.

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197. This article is a shortened version of the forthcoming report on Human rights and Business for NAP consultations.
 198. Partners in Change
 199. Praxis Institute for Participatory Practices
 200. Randomly selected from top 500 listed companies reporting BRRs as on BSE website
 201. The India Responsible Business Index, http://www.corporatewatch.in/images/Making_Growth_Inclusive_2018.pdf
 202. <http://www.corporatewatch.in/images/nestle.pdf>

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