

Status of Corporate Responsibility in India, 2018

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Do Businesses Respect Human Rights?
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Preface

Growth, measured through Gross Domestic Product, is hegemonic as a narrator of progress in today's India. It is facilitated in a context where businesses pursue profits, while doing comparatively little to integrate themselves within a holistic framework of social and environmental responsibility. Since the passing of the Companies Act 2013, the narrative of the two per cent spends on Corporate Social Responsibility (CSR) has been narrowing the wider accountability of India Inc. CSR is now assuming an increasingly important and strategic role given its ability to act as an enabler of basic human rights within communities. Given its extensive role in public goods delivery, what begs questioning is the approach to development that characterises companies' CSR efforts. The reality is that while businesses have been engaging across multiple domains of community development in India, they have negligible formal guidance on what to do, and how to do it.

Yet it is through their core business that corporations have their greatest impacts, and where, therefore, the most critical attention must be focused. There are a number of cases that stand testimony to gross failures on the part of corporations to respect human rights at the workplace and across supply chains. Last year, in one of the country's worst industrial accidents that claimed 43 lives, media reports suggested inadequate safety measures that could have been responsible for the explosion at the National Thermal Power Corporation (NTPC)'s Unchahar plant in Rae Bareilly. In another instance, clearly contravening Principle 1 of the NVGs, a diamond merchant made a safe exit from India after swindling and allegedly defrauding Punjab National Bank (PNB) of over Rs 12,000 crore in one of the worst bank scams in recent times. Recently, thirteen casualties were reported when Anti-Sterlite protests seeking the closure of the heavily polluting Sterlite Copper's smelter plant in Thoothukudi, Tamil Nadu, turned violent. With its disregard for environmental rights and health impacts on communities, the Sterlite Copper unit has been in the centre of controversy for a while now.

Corporate Responsibility Watch (CRW) is an initiative that is attempting to unpack, track and monitor corporate responsibility as well as clearly separate it from the overpowering CSR narrative that tends to absolve companies of their responsibilities to the nine basic principles defined in the Ministry of Corporate Affairs' National Voluntary Guidelines (NVG) for responsible business. After having published analyses of Business Responsibility Reports (BRRs) through the series Disclosure Matters and three editions of the India Responsible Business Index, this is the third in the series of Status of Corporate Responsibility in India reports. The authors, all experts in their respective fields, have built on the analyses of the BRRs to unpack and nuance ground realities of corporate responsibility in India on issues as diverse as the dilution of environmental norms, corporate control of the media, bonded labour in the corporate sector and businesses and human rights defenders, among others. The report uses information available in the public domain, largely put across by companies themselves through their business responsibility reports, annual reports and annual CSR reports.

This report would not have been possible without valuable contributions by the organisations and networks associated with Corporate Responsibility Watch. We would also like to place on record our sincere thanks to the distinguished authors Digvijay Singh Bisht, Joyjeet Das, Lara Jesani, Malini Aisola, Matthew Jacob, Rajavelu K., Sowmya Bharadwaj, S. Srinivasan and Vijay Prakash. We would also like to thank Deepti Menon for providing overall support in data analysis and Anusha Chandrasekharan and Rohan Preece for report production and finalisation.

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List of Abbreviations

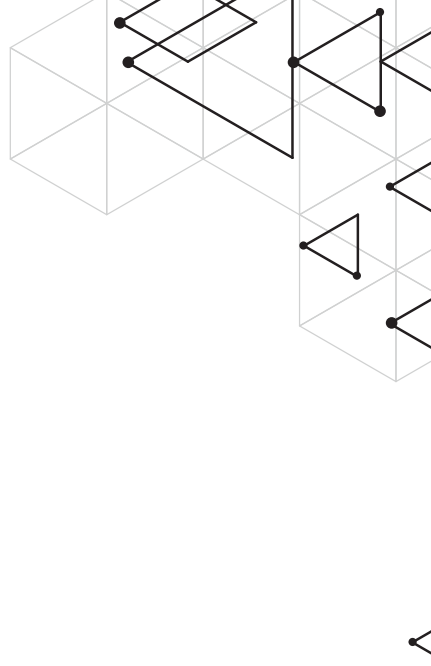
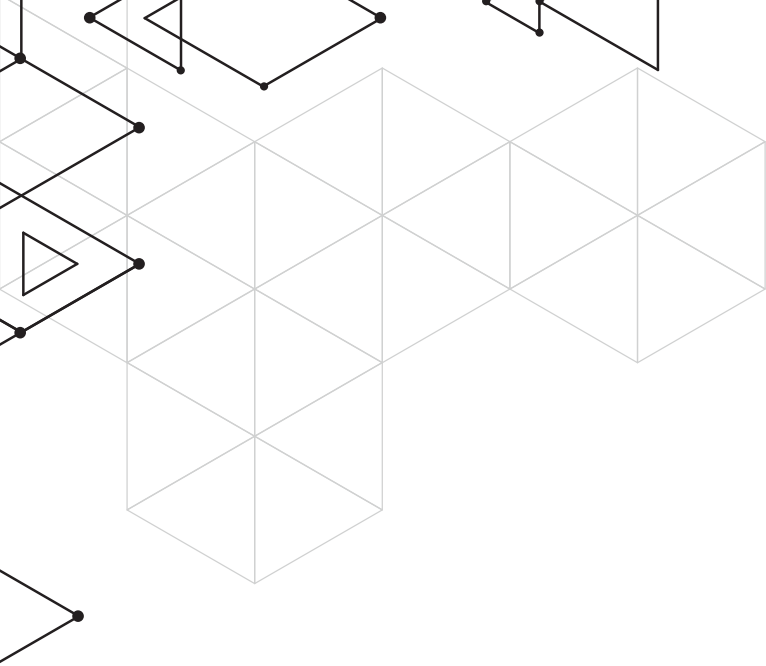
ABC	Audit Bureau of Circulations
AIUFWP	All-India Union of Forest Working People
API	Active Pharmaceutical Ingredient
BARC	Broadcast Audience Research Council of India
BCCL	Bennett Coleman and Company Limited
BIFR	Board of Industrial and Financial Reconstruction
BR	Business Responsibility
BRR	Business Responsibility Report
BSE	Bombay Stock Exchange
CAG	Comptroller and Auditor General
CDSCO	Central Drugs Standard Control Organization
CII	Confederation of Indian Industry
CrPC	Criminal Procedure Code
CRZ	Coastal Regulation Zone
CSR	Corporate Social Responsibility
CSO	Civil Society Organisations
DCGIs	Drug Controller Generals
DEIAA	District Environment Impact Assessment Authority
DPCO	Drug Price Control Order
EAC	Expert Appraisal Committee
EIA	Environmental Impact Assessment
EMP	Environment Management Plan
EU	European Union
FDC	Fixed Dose Combinations
FICCI	Federation of Indian Chamber of Commerce and Industry
FSSAI	Food Safety and Standards Authority of India
HAL	Hindustan Antibiotics Limited
HIV/AIDS	Human Immunodeficiency Virus Infection and Acquired Immune Deficiency Syndrome
HRD	Human Rights Defenders
HRDA	Human Rights Defenders Alert – India
IDPL	Indian Drugs and Pharmaceuticals Limited
IICT	Indian Institute of Chemical Technology
ILO	International Labour Organization
IOCL	Indian Oil Corporation Limited
IRBF	India Responsible Business Forum
IRBI	India Responsible Business Index
IRS	Indian Readership Survey
JICA	Japan International Cooperation Agency
KMSS	Krishak Mukti Sangram Samiti
MAPE	Maximum Allowable Post-manufacturing Expenditure
MCA	Ministry of Corporate Affairs
MHA	Ministry of Home Affairs

MNC	Multinational Companies
MoEFCC	Ministry of Environment, Forest and Climate Change
MSME	Micro, Small and Medium Enterprises
NAP	National Action Plan on Business and Human Rights
NBA	Narmada Bachao Andolan
NCI	National Chemical Laboratory
NCST	National Commission of Scheduled Tribes
NG	National Guidelines on the Economic, Social and Environmental Responsibilities of Business
NGO	Non-Government Organisation
NGT	National Green Tribunal
NHRC	National Human Rights Commission of India
NHSRCL	National High Speed Rail Corporation Limited
NLEM	National List of Essential Medicines
NPA	Non-Performing Assets
NPPP	National Pharmaceutical Pricing Policy
NSA	National Security Act
NSE	National Stock Exchange
NSS	Niyamgiri Suraksha Samiti
NVG	National Voluntary Guidelines on the Social, Environmental and Economic Responsibilities of Business
PPSS	Posco Pratirodh Sangram Samiti
PSU	Public Sector Undertakings
RBI	Reserve Bank of India
RJMSC	Rajasthan Medical Services Corporation
RRI	Rights and Resources Initiative
RRL	Regional Research Laboratory
SC	Scheduled Caste
SCB	Schedule Commercial Banks
SDGs	Sustainable Development Goals
SEBI	Securities and Exchange Board of India
SEIAA	State Environment Impact Assessment Authority
SIPCOT	State Industries Promotion Corporation of Tamil Nadu
SLA	State Licensing Authorities
ST	Scheduled Tribe
ToR	Terms of References
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TNMSC	Tamil Nadu Medical Services Corporation
UAPA	Unlawful Activities Prevention Act
UN	United Nations
UNGC	United Nation Global Compact
UNGP	United Nations Guiding Principles for Business and Human Rights
UNFCCC	United Nations Framework Convention on Climate Change
WHO	World Health Organization
WPT	World Press Trends
WTO	World Trade Organisation

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**The views of all authors are personal and do not necessarily represent the views of their organisations.*



Part 1

The Big Picture

Chapter 1:

Will National Guidelines Provide the Much Needed Boost to Business and Human Rights?

- Amita Joseph¹, Karandeep Bhagat², Subhash Mittal³, Dheeraj⁴, Rohan Preece⁵, Deepti Menon^{4,6}

2017-18 saw India overtake France to become the world's sixth largest economy by GDP⁷, gain thirty places from the previous year in the international Ease of Doing Business Ranking to place it in the top-100⁸ and some stunning earnings for India Inc. Indian Oil Corporation posted a record net profit of Rs. 21,346 crore, among private sector companies, Reliance Industries achieved a highest-ever net profit of Rs. 36,075 crore,⁹ and in April to June 2018, the economy grew at 8.2 per cent - the highest in two years¹⁰. Many across Government, business and the media, have warmly received these developments, But is this all good news?

As some economists pointed out, the per capita GDP presents a very different picture where India ranks a lowly 126 globally¹¹. At the same time, profits in general are evidently not being distributed equally: in 2017, 73 per cent of the wealth generated went to the richest one per cent; and the wealth of this elite group increased by Rs. 20,913 billion¹²: an amount equivalent to the total budget of Central Government in 2017-18. To put things in perspective, India's top 10 per cent of population holds 73 per cent of the wealth and it would take around 17.5 days for the best paid executive at a top Indian garment company to earn what a minimum wage worker in rural India will earn in their lifetime (presuming 50 years at work)¹³. Another face of inequality is the millions not able to access work – 31 million counted this year – the highest figure in two years¹⁴, and a reminder that the high rate of economic growth does not necessarily lead to universal employment. Among those in work, there are severe inequities: women's participation in the workforce – at just 27 per cent - is significantly below the average for Asia-Pacific, and there are signs it is declining¹⁵. Additionally, 82 per cent of male workers and 92 per cent of female workers

in India earn less than Rs. 10,000 a month¹⁶. Wage disparities, meanwhile, are even starker between scheduled castes and scheduled tribes on the one hand, and upper castes on the other hand: with the more disadvantaged groups earning on average 56 per cent and 55 per cent, respectively, of upper caste earnings. Meanwhile, the efforts to pursue growth, and ease the path of business, have been coinciding with the easing of many labour regulations, with concerning regressions in areas such as collective bargaining and equal pay for equal work¹⁷; and proposals to enable further contractualisation¹⁸, which means, among other things, lower wages for workers.

As events this past year have illustrated, some obtain their wealth with a little help from their friends. Recent years have seen a number of frauds related to the banking system unearthed. This includes the Nirav Modi swindling of Punjab National Bank, in a flourish of crony capitalism. Over recent months, another major bank, ICICI bank, has come under severe scrutiny, amid allegations of nepotism.

Corporate irresponsibility can also, in varying ways, cost lives. The murder of 13 protestors, including a 17-year-old student, in Thoothukudi, Tamil Nadu, in May 2018, was a brutal example of State aggression towards an unarmed crowd. The crowd was attempting to build awareness of the wider society on environmental pollution and consequent health hazards to local villagers caused by M/s Sterlite, which is owned by London-based Vedanta. The incident presents a complex picture of State aggression in defence of corporate interests. Indeed, that the Government banned the functioning of the Plant subsequently justifies the protest. Sadly, the reactions of authorities were not isolated in the Indian context: rather, they form part of an upward trend of repression of protests

and civic activism over recent years¹⁹.

The incident in Unchahar, Rae Bareilly district of Uttar Pradesh, was another example of how corporate irresponsibility can also cost lives. The explosion at NTPC's coal-fired power plant in November 2017, which took the lives of 43 workers, could have been prevented if the staff concerned had taken a more precautionary approach after becoming aware of excessive ash build up in one of the gas boilers. NTPC does not have an automated system for measuring ash build up, so relies on physical inspections. An internal report prepared by the company said that an earlier shut down would have been sensible.

Today, business leaders are garlanded at 'CSR' awards as if they were doing something much

more than complying with the law; but no 2 per cent CSR story, however positive, should be allowed to camouflage corporate irresponsibility. India's corporations have a real opportunity to redress social inequalities, to transform the conditions of their workers and those working across their value chains, to safeguard the human rights of local communities as well as to ensure that the environment is protected: indeed, of contributing to national development, as envisaged in the National Voluntary Guidelines. But are they ready for the responsibilities that this entails? As part of the Status of Corporate Responsibility in India 2018 study, disclosures of 200 randomly sampled private and public sector top 500 BSE listed companies were analysed. This and other sources, offer a helpful reality check.

Are businesses a force for inclusion in the workplace?

Women continue to be underrepresented in most of the businesses featured in this study. In only three per cent of the businesses were more than half the workers women. On the other hand, more than 50 per cent of the businesses had a male to female ratio of 10:1, or worse. This can be seen in figure 1.1 below.

People with disabilities are also grossly underrepresented among permanent employees. Although disabled people make up more than 2

per cent of the population of India (more than the entire population of Australia), over 65 per cent of businesses studied have either zero disabled employees, or 1 per cent or lower. Furthermore, 43 of the 200 businesses studied do not even report this data, meaning that almost 90 per cent of the largest businesses in India either do not proportionately include disabled people, or do not think their stakeholders are interested in whether they include them or not. This is seen in figure 1.2 below.

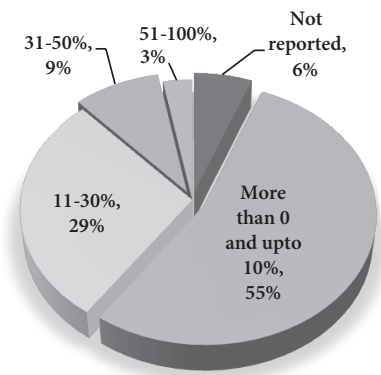


Fig 1.1: Permanent Women Employees (n=200)

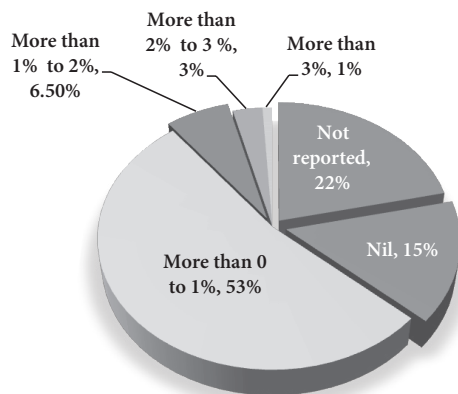


Fig 1.2: Permanent Disabled Employees (n=200)

Given the vulnerabilities of many disabled people, to discrimination, to social exclusion and to poverty; but also because of their human rights,

and the contributions they can make, it is critical that India's businesses do more to provide them with opportunities for permanent employment.

Contractualisation: a widespread phenomenon

A myopic focus on reducing human resource expenditure in the shorter term can obscure recognition of some of the conditions needed to ensure dignity and well-being in the workplace and, beyond it, the security necessary to protect against poverty, from one generation to the next.

Among the surveyed businesses, the majority of those that provided data indicated that contractual workers make up 26 per cent or more of their workforce (seen in Figure 1.3 alongside) – a significant number. As may be expected, incidence of contractual employment is highest among private companies, though the incidence of high contractualisation (51 or more or more) is approximately equal among private companies and PSUs. Contract workers, apart from facing uncertainty about long-term employment prospects, often receive lower wages

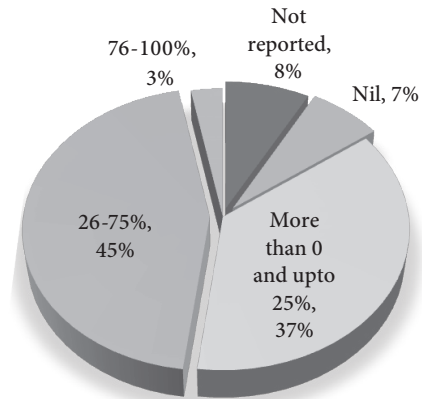


Fig 1.3: Total Contractual workers (n=200)

than permanent workers. This distribution of contractual workers in PSUs and non-PSUs can be seen in Figure 1.4 below.

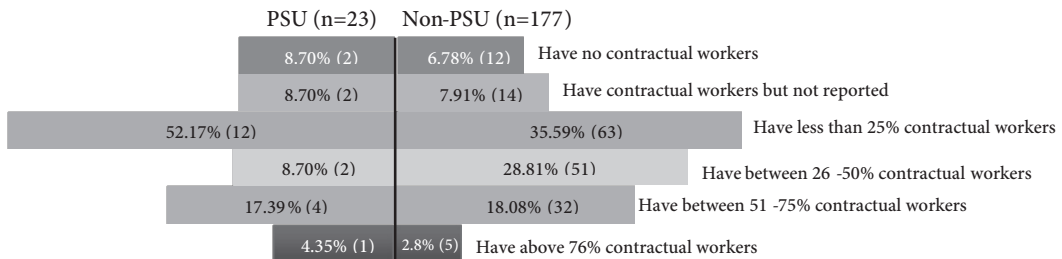


Figure 1.4: Distribution of contractual employees across workforce of PSUs and non-PSUs

Do workers have freedom to associate?

A key tool for enhanced worker rights is the ability to freely associate within the workplace and discuss and attend to issues of shared concern and interest. This is a Constitutional right, but one that is currently available only in 55 per cent of India's top 200 randomly selected companies. In this pool of companies, 73 did not have a recognised association, and 17 did not report whether they had such an association or not. Of the 110 companies that recognised employees' union, 92

provided actual membership data. Between private and public sector companies, it was found that levels of recognition were higher among the public sector companies (83 per cent as compared to 51 per cent). It is notable that the focus here is only on permanent employees: once we account for other categories of workers (such as contractual workers), the levels of participation in employee associations will be shown to be far lower. Details can be seen in figure 1.5 below.

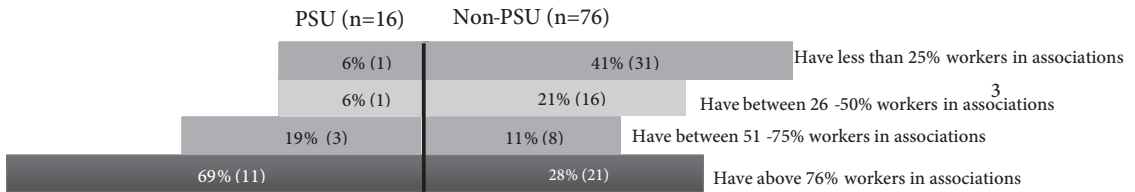


Figure 1.5: Distribution of percentage representation of permanent employees in associations in PSUs and non-PSUs

Policies for whom?

Beyond the workplace and the boardrooms, businesses' social and environmental impacts unfold across their supply chains. Here, especially but not only in the initial tiers, millions of workers contribute invisibly to the process of production, in contexts that may be illegal or where the law is flouted with impunity. Business impacts, as numerous cases clearly illustrate, also occur in communities, especially but not limited to those near which they are located.

The question arises as to how well stakeholder concerns are integrated into policy, considering the vastness of Indian corporations' stakeholder communities. How many Indian businesses are interested in identifying their external stakeholders and their value chains? The table below presents a glimpse of the same.

Table 1.1: Status of implementation mechanisms related to National Voluntary Guideline Principles 2016-17 (n=200)

Indicator	Ethics, Transparency & Accountability	Product Life-cycle Sustainability	Employee Well Being	Stakeholder Engagement	Human Rights	Environment	Public Advocacy	Inclusive Growth	Customer Value
Policy formulation in consultation with relevant stakeholder	181	169	184	178	170	177	127	180	167
Policy has been approved by the board	183	155	169	168	159	167	120	179	154
Policy communicated to all relevant stakeholders	171	159	170	168	158	166	130	171	159
Existence of the grievance redressal mechanism	194	181	193	183	179	177	143	180	177
Carried out independent audit of working of the policy	142	134	141	135	134	140	110	143	133

As the table above indicates, the vast majority of businesses that were surveyed claim that they formed policies against NVG Principles in consultation with relevant stakeholders, had the policies approved by the board, communicated it to relevant stakeholders, and also established a

grievance redressal mechanism. For the significant number of companies that have not have carried out an independent audit of various NVG-related policies, it raises questions about the inclination, or competence, of businesses to identify stakeholders systematically, especially the most

marginalised. It is also concerning that whilst, in another area of their Business Responsibility Reports, more than 75 per cent (154) of companies studied say they have identified marginalised stakeholders, less than 40 per cent (73) have listed who they are and indicated engagement with these stakeholders.

Given the size of Indian businesses, the scale of their value chains and of their community level

impacts, these figures suggest a fundamental lack of due diligence among Indian companies. Yet without rigorous processes to identify stakeholders, the definition of materiality – of who and what is material for a business (now a key principle of reporting) is more than likely to be reduced to the bottom line, whilst the question of which public it is that policies are actually written for, still remains.

NPAs: to what extent are they a problem of lack of capacity?

For a number of service sectors, such as the financial sector, their value chain includes entities that receive finance. Further, their impacts are bound up with the conditions, or lack thereof, that are attached to their financing decisions. However, there is very little evidence of banks and insurance companies of what may be termed ‘upward accountability’ towards the value chain, exercising what the UN Guiding Principles term as leverage to influence their businesses partners. Very few banks publically disclose a policy or system for environmental and social risk assessment.

Noteworthy, in this respect, is the scale of the NPA crisis, which saw bad loans reach a staggering Rs

10.25 lakh crore – a 16 per cent increase from the previous quarter - at the end of March 2018. This would seem to suggest that a large number of Indian banks are not able to effectively assess credit risk. Clearly, there may be more to this than meets the eye: it cannot be assumed that when banks do not appear to take account of various risks, including non-financial risks, that they do so simply because of technical deficiencies – other factors may well be at play. But in the absence of public disclosure of how they assess credit risk, the citizen is - at the very least - entitled to demand transparency on which criteria are being applied.

CSR: spending where it is most needed?

A closer look at the CSR spend across various sectors in the FY 2016-17 (amounting to INR 13,464 crore²⁰) sheds light on the fact that as in previous years, areas such as education, health and rural development make up the bulk of expenditure with 38 per cent, 25 per cent and 11 per cent respectively, of the total share of CSR spend. Yet, whilst businesses are investing considerable sums, and occupying key roles in the delivery of services critical to the realisation of fundamental rights, they are, beyond the provision of a basic framework, receiving precious little guidance on how to spend it; with more emphasis being on the need, simply, to spend.

Table 1.2 below details the geographical distribution of CSR spending and what emerges is that expenditure is highest in some of India’s most

industrialised states. On the face of it, it is not surprising as the presence of industries will tend to be associated with CSR activity, and there may be good reasons to justify this. However, the data also shows that some of the poorest states in India are relatively underserved by CSR funds.

The data raises some salient questions. What methods, for example, are companies using to assess the efficacy of CSR from a human development and human rights perspective? What happens when CSR fails to deliver? What effective accountability mechanisms are in place, given that companies, unlike government administrations, cannot be voted out?

Among states, striking comparisons can be made between, for example, Bihar, which received Rs 94.4 crore of CSR funds in 2016-17, and

Table 1.2: Geographical Distribution of CSR spending in the year 2016-17

Ranking	State	Amount spent FY 2016-17 (INR Cr.)	Ranking	State	Amount spent FY 2016-17 (INR Cr.)
1	Maharashtra	2222.25	11	Madhya Pradesh	282.03
2	Karnataka	843.49	12	West Bengal	274.7
3	Gujarat	779.88	13	Assam	268.87
4	Andhra Pradesh	729.97	14	Telangana	221.26
5	Delhi	478.63	15	Kerala	117.54
6	Tamil Nadu	470.54	16	Uttarakhand	94.64
7	Haryana	346.56	17	Jharkhand	94.63
8	Rajasthan	318.88	18	Bihar	94.4
9	Uttar Pradesh	312.74	19	Chhattisgarh	80.36
10	Odisha	311.96	20	Punjab	67.19

Source: <https://csr.gov.in/CSR/index16.php>

Maharashtra, which received Rs 2222.25 Crore. This chasm exists despite Maharashtra's superior performance on most indicators of human development, and the states' similar populations: with Maharashtra's only around 10 per cent greater than Bihar's.

Further, we also find that within Maharashtra itself, far from CSR money being spent equitably across the State, or going to the poorest regions, there is evidence that it is being concentrated in certain areas. This can be seen in the Figure 1.6 below²²:

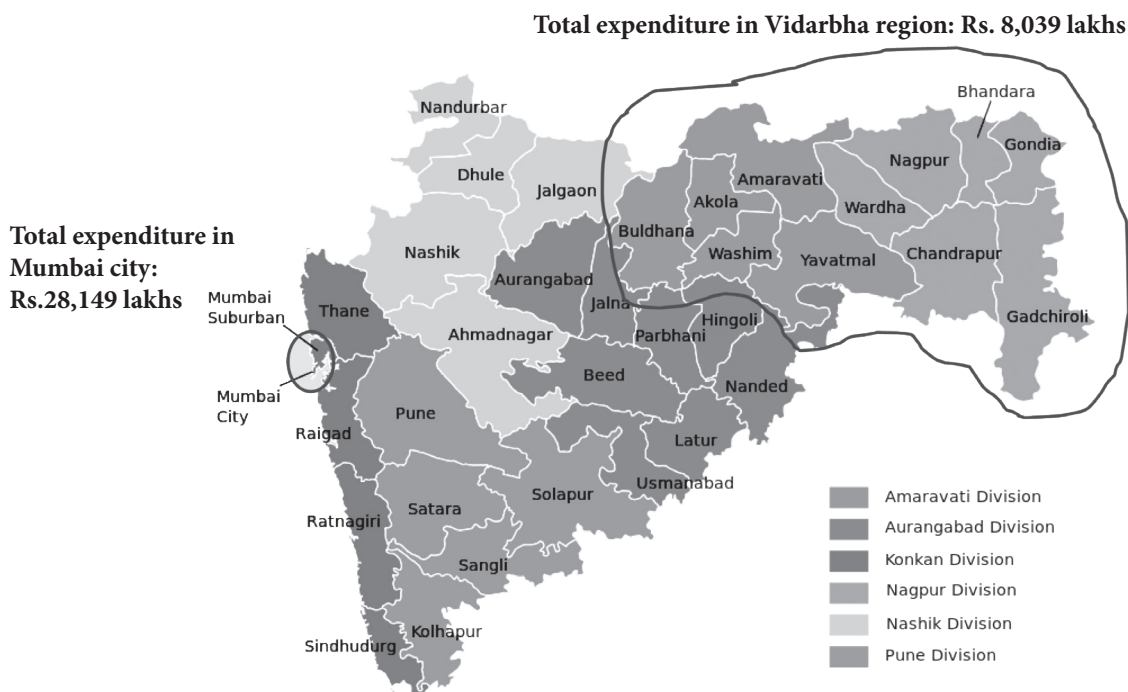


Figure 1.6: Comparison of CSR expenses on the Vidarbha region of Maharashtra and Mumbai city

The total CSR spend in Mumbai City is approximately 3.5 times that of the entire Vidarbha region, the poorest region in the State, with a larger population and far larger geographical area than Mumbai. Even within Vidarbha, spending is skewed – Nagpur, home to the State's third largest city, receives a far greater share than most other districts. This supports the view that CSR is not necessarily a driver of more equitable human development across

Government measures

The Government has been active in some areas of regulation of business, and in certain key domains of the business responsibility ecosystem. Preliminary notices were issued to 272 companies for failure to comply with the CSR spending requirements stipulated by the 2013 Companies Act²³. In the past year there has also been a crackdown on so-called 'shell companies'. A staggering 5.43 lakh businesses were closed at the end of June 2018, with only 66 per cent of 17.79 lakh companies in the country found to be active. Being in a persistent state of dormancy was not the only reason companies were closed: over 2.25 lakh companies were slated to be deregistered under the 2013 Companies Act, part of an attempt to root out black money and illegal activities. SEBI has also dealt firmly with the world's second largest professional services company, Price

Conclusion

Businesses have enormous opportunity to shape the lives and destinies of people in India. However, in the midst of their extraordinary power and influence, there are severe doubts around the sincerity of their attention to the interests of people they impact. As the above data illustrates, in terms of areas such as freedom of association, gender equity, and stakeholder engagement, the largest Indian corporations are failing to rise to their responsibilities.

There is a clear need for effective instruments of public accountability, and particularly of better means of measuring private sector impacts.

the country, nor does it help to address areas of greatest need. Instead, there are other factors that appear to determine spending, which may include convenience, visibility, and other prerogatives of companies themselves. CSR spending can be a force for good, but, without adequate management and direction, it can actually serve to widen certain inequalities, or, at the very least, fail to do enough to combat them.

Waterhouse Coopers, banning its firms from auditing listed companies, after finding PWC responsible for certifying the false accounts of Satyam Computer Services from 2000 to 2008²⁴.

This year, the Ministry of Corporate Affairs also renewed its commitment to a renamed National Guidelines on the Economic, Social and Environmental Responsibilities of Business, facilitating a process of public consultation and stakeholder feedback. The decision was also made to extend SEBI's Business Responsibility Reporting to Top 500 BSE-listed Companies. The Government of India also took steps towards a National Action Plan on Business and Human Rights: a key responsibility under Pillar 1 of the United Nations Guiding Principles.

This need is underlined as more businesses are entrusted with the delivery and management of public goods. Here, CSR is just one small part of the story; with this shift visible in many other areas. Notably, following the National Health Policy of 2017, the Government this year announced Ayushman Bharat, a national health insurance scheme designed to make healthcare affordable to crores of underserved Indians. A silver bullet? Perhaps not, given the challenges of marshalling the private sector to make healthcare available to all, yet sustainable within the limits of the insurance²⁵. Integral to the healthcare ecosystem are pharmaceutical companies, whose

track record tends to suggest that business priorities will, by default, take precedence over the interests of the last in line. This speaks of a wider concern: whether it really is in the public interest to place so much dependence on the private sector for the realisation of Fundamental Rights.

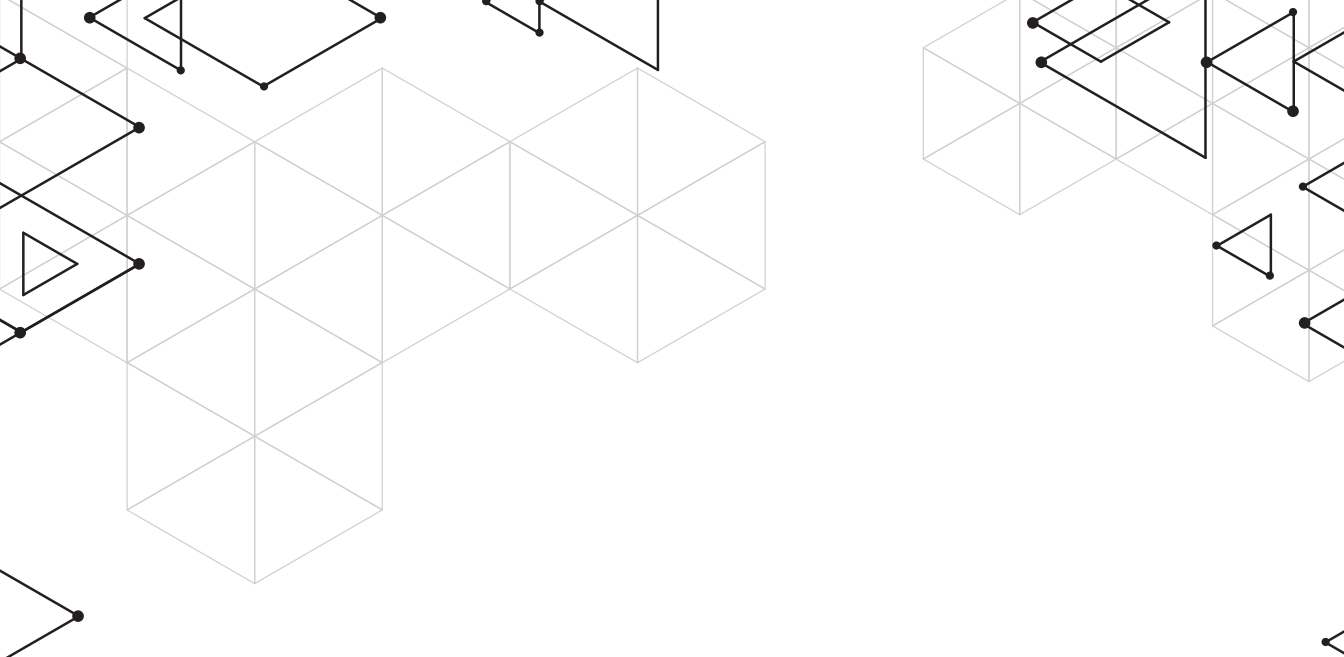
On this question, the jury is most definitely out. Businesses in India have a lot to do in order to convince of their intent as well as their capacity to uphold the Constitution and serve the public interest, especially the interests of their most marginalised stakeholders. For a start, there must be greater recognition that the sustainability of businesses is not reducible to the sustainability of its business; and, normatively, that what is material for a business is the interests of the society and environment on which it depends. In this spirit, efforts to respect human rights and the environment must be integrated into policies and systems; and corporate governance must recognise that if growth and profits serve any ultimate purpose, it is to better serve these ends. Ultimately, if businesses are to contribute constructively to national development, they need to abide by democratic values and allow themselves to be kept in check.

To some extent, the Government seems to understand that business needs more guidance and, in certain respects, a flashing of regulatory

teeth and a more stringent demeanour. This year, the Ministry of Corporate Affairs renewed its commitment to a renamed National Guidelines on Economic, Social and Environmental Responsibilities of Business. Further, SEBI's decision to extend the Business Responsibility Reports mandate to the Top 500 BSE-listed companies marks a highly significant extension of the Right to Information to the private sector. More effort is needed, though, to devise ways of ascertaining that whatever is promised in policy measures up in practice. The Government's steps taken towards a National Action Plan on Business and Human Rights are arguably the most significant of all, and extremely welcome, in terms of what they promise for a new environment for responsible business. Progressive systems and standards to ensure more transparent corporate governance as well as corporate responsibility are not new to India. But the voluntary emphasis of the erstwhile national guidelines and other global standards gave them a 'friendly' spin, which made companies take them less seriously. The hope is, that with more regulatory oversight mechanisms, companies respond with due seriousness, and demonstrate constructive intent if they are keen to reap the benefits of the domestic and global capital markets.

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2. Centre for Social Equity and Inclusion
3. Socio-Research and Reforms Foundation
4. Praxis Institute for Participatory Practices
5. Partners in Change
6. With inputs from Mary George, Pradeep Narayanan, Shireen Kurian and Tom Thomas
7. According to World Bank data, India's GDP is now at \$2.597 trillion <https://www.thehindubusinessline.com/economy/india-scores-over-france-in-gdp/article24392629.ece>
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13. ibid
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Part 2

Environment and Human Rights

Chapter 2:

Sterlite: An Intersection of Human Rights, Environment Rights and Cronyism

- Tom Thomas²⁶ and Shireen Kurian²⁷

In recent months, Vedanta's Sterlite has been in the news for all the wrong reasons. Grave human rights violations were reported when protests seeking the closure of Sterlite Copper's smelter plant in Tuticorin or Thoothukudi in Tamil Nadu turned violent in May this year. This resulted in clashes with police and led to 14 casualties and property damage. It is such an irony that Sterlite has bagged a couple of awards in the past as a company that has strong commitment to its employees and Human Rights (HR) practices. However, this commitment has come under the scanner after the series of incidents that unfolded at Thoothukudi, around the public protest against the impact the company's operations had on the environment. Sterlite is a good example of an Indian business that has grown exponentially – creating enormous wealth. In 2017, its net worth was estimated at²⁸ \$3.3 billion (Rs 21,485

crore). It is this collective wealth creation by businesses that has been the key driver in pushing the GDP up by 2,216% and per capita income by 1,338% in 25 years. However, its inability to reduce unemployment (down by just 1%) or lift the vast number of Indians from abject poverty or improve the environment in which we live, is a telling of the skewed imbalance of this enormous wealth. While it has created very deep pockets for sections of businesses, it has left out the large majority - labour, society and environment - from its benefits. This naturally raises the question of not just distribution of profits, but how profits are made. Sterlite Copper's operations are a case in point that 2% Corporate Social Responsibility (CSR) isn't what matters, and how the company makes its profits is more critical to a sustainable business environment.

Frames of reference - national and international

From a business and human rights perspective, there are two guiding frameworks that are relevant in understanding the business operations of Sterlite Copper in Thoothukudi.

(i) The first is the National Voluntary Guidelines (NVG) formulated in 2011, anchored by Indian Institute of Corporate Affairs, and adapted by SEBI in the form of monitoring reports (Business Responsibility Report) which provides an excellent framework, outlined in nine principles, for companies to conduct their business responsibly.

While all nine principles are applicable, for the specific purpose of this Public Inquest, Principles 4, 5 and 6 have been examined.

- Principle 4: “Businesses should respect the interests of, and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalised”.
 - Principle 5: “Businesses should respect and promote human rights”.
 - Principle 6: “Businesses should respect, protect, and make efforts to restore the environment”.
- (ii) The second framework is the United Nations' Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' endorsed by the UN Human Rights Council, by consensus, in 2011. This framework consists of (i) the state duty to protect against human rights abuses, (ii) the corporate responsibility

to respect human rights, and (iii) greater access by victims to effective remedies.

Although the primary duty to protect human rights remains with national governments, companies have a responsibility to respect human rights in their operations. Guiding Principle 11 states: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and

should address adverse human rights impacts with which they are involved." The official commentaries to the Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council, state: "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate...[It] exists over and above compliance with national laws and regulations protecting human rights."

Findings from People's Inquest

Secondary evidence

From its inception, the copper smelting plant seems to have paid no respect to rights of communities around the plant, including to life essentials like clean air, clean water and safe environs. Water contamination had been reported within a year of its operation in the area and studies by National Environment Engineering Research Institute (NEERI) found that Sterlite's Effluent Treatment Plant wasn't capable of meeting the Tamil Nadu Pollution Control Board (TNPCB) standards. It also found unacceptable levels of Sulphates, Lead, Selenium, Cadmium, Magnesium and Copper in samples collected from the plant site and neighbouring villages. NEERI also noted that the process of cooling the slag by spraying, leads to emissions of aerosols containing arsenic, selenium and lead, which can cause health hazards to workers and people living in the vicinity. Rather than addressing it responsibly, the company chose

to circumvent the issue by funding²⁹ NEERI to say differently later.

Primary evidence

"We don't need your schools, hospitals or water. Just get out of here" is the refrain that echoes across the villages that surround the Sterlite Copper plant in Thoothukkudi. And this sentiment is not just an outburst of anger arising from the killing of 13 (one succumbed to injuries later) people in police firing, the blame for which the people put squarely on Sterlite. It stems from the years of suffering from contaminated water, air and soil. Since the company's inception in 1994, there have been voices of protest against the ecologically damaging nature of their business. The jury also met community members who narrated their struggles against Sterlite's disrespect for their basic human rights for nearly quarter of a century.

A fear of reprisal came across in many testimonies. Initially the several persons who were injured did not go to the GH for fear of arrest and many left before getting the full course of treatment in spite of going there, on account of the increased police presence. There were also cases reported of injured who did not want to be discharged fearing police reprisal after leaving the protection of the hospital. People who had been detained and had their properties taken into custody are scared to go and collect their articles for fear of arrest. People have testified credibly that the police are continuing with harassment and the threat of being implicated in open FIRs which provide space for picking up 400 to 7000 unnamed accused persons under various sections, has left them terrorised. Such omnibus FIRs are a recipe for misuse by the police.

Source: https://peopleswatch.org/sites/default/files/reports/full_report/PI%20TUT%20-%20Part%20I%20Final%20without%20Annexures.pdf

The jury members also found all random samples of ground water from the villages visited to be visibly polluted and clearly not potable nor fit for domestic use. It was also clear that communities were forced to buy water for drinking. Health issues ranging from skin ailments, eye irritations, breathing difficulties, delayed puberty, frequent miscarriages, infertility and cancer were reported by community in every village that the jury visited.

The jury also met members of local merchants associations, chamber of commerce and bar association and their wholehearted support was evidence of the legitimacy and the wider acceptance of the struggle by the affected communities. The issue is no longer that of just a few villages but of the entire industry town Thoothukudi, and its surrounding villages.

During the visit, the Sterlite officials available for comment took refuge saying "we are a compliant company" that follows the norms laid down by various monitoring authorities like TNPCB rather than demonstrate a willingness to respond to the grievances that the communities around had been pouring out to the members of the jury. Reading this together with subsequent public statements and actions by the company, it seems they are in no mood to give an ear to what aggrieved communities have to say, let alone taking corrective measures.

From both secondary and primary evidence, it is very clear that Sterlite Copper plant in Thoothukudi is in clear violation of Human Rights principles outlined in the NVGs as well as the UNGP on Business and Human Rights.

The People's Inquest (PI) team observes that many young men have been forced to leave their homes, as they fear arrest and torture at the hands of the police, even though they were not part of anti-Sterlite rally on May 22 or even before that. Those who took part in the protests apprehend arrest as police have filed open FIRs against thousands of unnamed persons. There have even been instances where all the members of a family have fled their home, fearing false cases. There are also several injured people who have not availed medical treatment or reported their injury out of fear of being targeted by the police. The PI team witnessed a huge presence of police personnel and observed people living in terror even ten days after the rally. Testimonies also stated that the CCTV cameras in Thoothukudi South Police Station were covered with cloth when persons are illegally detained were taken to its precincts.

Source: https://peopleswatch.org/sites/default/files/reports/full_report/PI%20TUT%20-%20Part%20I%20Final%20without%20Annexures.pdf

State's response

The state, which is duty bound to protect its people against human rights abuses, seems to have not only clearly failed to do so, but also, in the eyes of the affected communities, been a co-conspirator. Its actions of closing down the plant in the aftermath of massive police violence against

them has not cut any ice with the communities affected. For them the state not only clearly failed in its role to protect its people but also actively connived against them and continues to do so with threats of fabricated police cases against them.

Way forward

Though both NVGs and UNGP on Business and Human Rights are guiding frameworks, much of the violations come under the purview of

enforceable laws of the land. The state will do well in redeeming itself in the eyes of the people whom they represent by expediting exemplary actions

against the company for all its violations and not let its deep pockets interfere with justice to the affected communities. In a situation of unequal

power, the state is meant to be an arbitrator in favour of the less powerful and not a protector of the perpetrator.

While in areas surrounding the plants, there are doctors who call skin patches as ‘sterlite patches’, Sterlite website boasts of its CSR, ‘a bus with team of professional doctors travels through the villages of Thoothukudi to provide free primary and secondary health care access benefitting 50,000 population covering 28 villages’. Adding to that, it even received ‘BT-CSR excellence award’ in 2017.

For businesses, this rejection of Sterlite’s CSR outreach by the surrounding villages is in more ways than one, a clear indication of the shape of things to come. CSR cannot give companies the goodwill of people if the core business is problematic. The sooner the companies incorporate this into their business vision, the better. Times are changing and corporate India is dealing with a new generation that is more aware, more inquisitive and more connected. This generation’s eyes do not dazzle at the CSR goodies on offer. Nor do their spines bend obligingly at the staged benevolence. They emphatically say that in a welfare state, it is the responsibility of the state to deliver basic services and it cannot abdicate that responsibility to companies. They want a

strong state and not a state that is subservient to the wishes of corporates. While this may not yet be a universal scenario given the geographical imbalances in education and political awareness among other issues, companies will do well to heed to these signs and not make hay till trouble breaks out.

The communities while scarred and scared from the brutal police violence against them, are in no mood to give up their struggle against Vedanta/ Sterlite Copper. It is a cause that is striking at their very existence and the future of their children. The State and Vedanta will have to heed their voices sooner rather than later – and, in their own interest, the sooner, the better.

26. Convenor, Corporate Responsibility Watch and Member, People’s Inquest Jury Team

27. Coordinator, Corporate Responsibility Watch

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Chapter 3:

Facilitating Businesses through Environment Policy

Dilutions: The Contemporary Indian Reality

- Lara Jesani³⁰

Businesses, by their very nature, depend on natural resources and the environment. It is consequently not surprising that businesses are deeply interested in environmental policy and play an important role in influencing it. Good environmental governance contemplates strong and robust laws and regulations, stringent implementation and monitoring, independent institutions, transparent decision-making process with public consultation and an effective civil

society. It puts businesses under legal obligation to be accountable and act ethically. The last few years have seen an unprecedented and casual dilution, by the government of environmental safeguards and social legislations, brought in over time with the purpose of protecting the poor, indigenous and project-affected communities, against exploitation of their land, habitat, livelihood and environment at the hands of unscrupulous businesses.

Advent of environmental policy in India

The development of environmental governance came from the need to address any potential conflict between economic development and environmental protection. Originally, the Indian Constitution did not explicitly contain provisions for protection of the environment. It is pursuant to the United Nations Conference on Human Environment and Development, held in Stockholm (known as 'Stockholm Conference') in 1972, which resulted in the Stockholm Declaration on the Human Environment³¹ that the environmental law regime officially kick-started in India with a view to fulfill its international commitments. The Indian government enacted the principal laws for the protection of environment such as the Water (Prevention and Control of Pollution) Act, 1974; Air (Prevention and Control of Pollution) Act, 1981; Environment (Protection) Act, 1986 enforced by the then Ministry of Environment and Forest (now, Ministry of Environment, Forest and Climate Change, in short referred to as MoEF), Government of India, and several other laws followed. In 1976, by way of the 42nd Amendment³², the Indian Constitution was amended by inserting Article 48A, which provides as a directive principle of State policy, an obligation on the part of the State to protect and improve the environment and safeguard the forests and wildlife of the country. In addition,

under the fundamental duties chapter, Article 51A(g) was introduced which makes citizens duty bound to protect and improve the natural environment. Right to a healthy environment was time and again recognised as an integral part of right to life under Article 21 of the Constitution by the Supreme Court in environmental litigations.

The United Nations Conference on Environment and Development (known as 'Earth Summit') was held in 1992, closely following the introduction of the New Economic Policy in India, which embraced principles of neo-liberalism over welfare state. The Earth Summit raised several concerns over sustainable development and resulted in the Rio Declaration of Environment and Development³³. The principles of Environment Impact Assessment and the constitution of National Green Tribunal (NGT), which are key features of environmental jurisprudence in India, have been derived from the Rio Declaration. The United Nations Framework on Climate Change was also strengthened by adoption of the Kyoto Principle³⁴ in 1997 to prevent dangerous interference in the climate system by limiting the emission of green house gases into the atmosphere.

India has, since, developed an extensive framework of environmental laws and has

historically shown legislative intent and commitment to fulfill its international obligations, coupled with wide recognition of environmental laws by Indian courts. However, with the advent of globalization and neoliberal policies and opening up of the economy for trade, exploitation of resources and unparalleled development, came the pressure to de-regulate environmental laws and regularize wrongs. Under the current

regime, it has become the norm to take a pre-emptive approach, with environmental dilutions being introduced to pave way for development. The recent years have seen a spate of dilutions in environmental laws and dismantling of age-old institutions and safeguards in order to allow for urbanization, industrialization and unfettered development to the detriment of the people and the environment.

Systematic weakening of environment protection policies

Signaling this change in approach, even during an election campaigning pitched on the promise of development – seen in terms of economic and industrial, rather than human or sustainable development – a business-friendly governance structure was assured to industries to ease businesses and increase profitability. Soon after coming into power, the current government fulfilled its commitment to industrialists, who had supported its campaign, by approving at least 230 projects³⁵ – environmental clearances of which were held up by the previous government – and lifting the moratorium on new industries in critically polluted clusters of the country³⁶. Some of the early corporate beneficiaries of these prompt clearances include big entities like Adani Ports and Reliance Power³⁷. Moratoria in critically polluted areas like Ankleshwar, Vapi and Vatva in Gujarat were lifted with fanfare in the presence of industrialists, a day before municipality elections in Vapi³⁸.

Confederation of Indian Industry (CII), an Indian business lobby group, submitted 60 action points to the government after it came into power, seeking specific changes in policies to remove hurdles in securing environment, forest and other green clearances and ease the process³⁹. This was only the starting point of industry-led environmental policy dilutions. With a view to overhaul the environmental policy of the country, by an Office Order dated August 29, 2014, the MoEF constituted a high-level committee, under the chairmanship of former cabinet secretary T.S.R Subramanian, to review various acts administered by the MoEF, including the Environment (Protection) Act, 1986; Forest (Conservation) Act, 1980; Wildlife (Protection) Act, 1972; The Water (Prevention and Control of Pollution) Act, 1974; The Air (Prevention and

Control of Pollution) Act, 1981; and The Indian Forests Act, 1927 (added to this list on September 18, 2014). The stated objective of constituting this high-level committee was for it to recommend specific amendments needed in each of these Acts so as to bring them in line with (the government's) requirements and objectives and to draft proposed amendments in each of the aforesaid Acts to give effect to the proposed recommendations. The committee submitted its report⁴⁰ in November 2014. However, following objections and depositions by several civil society organisations and non-profits, a Parliamentary Standing Committee rejected the report citing that some of the essential recommendations it contained “would result in an unacceptable dilution of the existing legal and policy architecture established to protect our environment”. However, the government quietly retained a legal consultant in October 2015 to examine the report and draft the Environmental Laws (Amendment) Bill, 2015⁴¹ broadly based on the high-level committee recommendations, which sought to disrupt the prevailing environmental jurisprudence. It evoked heavy criticisms.

While the T.S.R. Subramanian Committee report was kept in abeyance, the environment ministry stealthily implemented its controversial recommendations by amending the environmental laws surreptitiously in a piece meal manner to dilute the protections originally guaranteed under them. Several of the amendments have been carried out without notice to the public and in anticipation of proposed “pet” urbanisation projects of the government in public private partnership with industries or to facilitate private businesses of crony partners, with a view to avoid the essential scrutiny on environmental impact of such projects.

The principal environmental law that has suffered systematic blows is the Environment Impact Assessment (EIA) Notification, 2006⁴², which imposes restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts. EIA Notification mandates prior environmental clearance for projects and activities covered by it, before commencement of construction work or preparation of land, and provides procedure for screening, scoping, public consultation, and appraisal for that purpose. It also provides for post-clearance monitoring by submission of

compliance reports by the project proponent. The protections and procedures under the EIA Notification have been greatly watered down by a spate of amendments, involving delegation of regulatory powers, removal of requirement of environmental clearances for certain projects / activities, increasing permissible levels, creating exceptions and allowing for procedural relaxations. Most of these amendments have been introduced in a manner undermining democratic process and public participation, by dispensing with notice in the name of “public interest”, thereby avoiding public scrutiny altogether.

Dilutions and exemptions to scope of application of EIA Notification for certain industries

By an amendment notification dated June 25, 2014⁴³, several exemptions/dilutions to activities and projects in the Schedule to the EIA Notification were introduced to benefit industries and public-private partnership projects. These included hotly contested government, energy, industrial and construction activities like river valley and irrigation projects, thermal power plants, mineral beneficiation projects, chemical fertilizer industries, pulp and paper industries,

highway projects and building construction projects. The threshold limits were also modified.

In October 2014, in an amendment⁴⁴ brought with intention to benefit the mining sector, mineral prospecting was completely exempted from requirement of environmental clearance under the EIA Notification. Further, no fresh clearance was required for mining projects at the time of renewal of mining lease.

Relaxing / removing restrictions for projects in green areas

A major dilution was made to the general condition in the Schedule to the EIA Notification in June 2014 by reducing the distance of projects and activities from boundary of protected areas under Wild Life (Protection) Act, 1972, such as wildlife sanctuaries, national parks etc., critically polluted areas, eco-sensitive areas and inter-state / international boundaries, from 10 km to 5km. This applied to all projects except the projects specified in the amendment, within which environmental clearance was required to be obtained from the MoEF. The condition was entirely exempted in

case of inter-state governments, by agreement between the respective states and Union Territories. Following this, industries involved in mining and minerals, riverbed mining, sand mining (upto 25 ha), building and construction projects and activities in proximity of such green areas were also granted exemption from obtaining environmental clearance. Meanwhile, the requirement for wildlife board clearance was also taken away⁴⁵, facilitating projects abutting wildlife parks and sanctuaries, such as the Vadodara-Mumbai Expressway project.

Exempting linear projects from public consultation process

By an amendment⁴⁶ introduced in February 2015 to the EIA Notification, the requirement of Scoping was exempted for all new national

and state highway projects in border-states and expansion of existing national and state highway projects. All linear projects such as

highways and pipelines in border states were exempted from the possibility of public objection altogether, thereby obliterating public objection and participation. This was done around the time that so-called linear projects such as the proposed Bullet Train between Mumbai and

Ahmedabad were in the pipeline. Owing to these dilutions, some transmission lines in Maharashtra and road projects requiring forest diversion were recommended or allowed exemptions from processes such as scoping and public consultation⁴⁷.

Attempted dilution to exempt certain industries from public consultation process

The previous government had issued an Office Memorandum dated May 16, 2014 before its exit, which clarified that the exemption from public consultation would be granted only to projects located in industrial parks or estates that had obtained environmental clearance under item 7 (c) of the Schedule to the EIA Notification. However, vide an Office Memorandum dated December 10, 2014, the current government diluted this provision by issuing a clarification that the exemption from public hearing would extend to projects or activities located in industrial estates and parks notified by the government prior to September 14, 2006 (the date of EIA Notification coming into force). In effect, it grants exemption to projects or activities located in industrial estates and parks, which had not undergone environmental scrutiny at any point or obtained environmental clearances under the EIA Notification. This dilution was to the benefit of

companies such as Vedanta, who could continue its environmental clearance for expansion of its polluting Sterlite Copper Smelter in Thoothukudi (by setting up a Unit II) without conducting a hearing, on the basis that it was allegedly located within a notified industrial estate (SIPCOT).

The government has been making such attempts to clear some industries/projects by issuing office memoranda in the name of clarifications or qualifications, despite the provisions of the EIA Notification being quite clear on this aspect and the NGT having set aside such cryptic office memorandums in the past.

An Office Memorandum dated February 13, 2018 classified small units manufacturing Linear Alkyl Benzene Sulphonic Acid (LABSA) as Category “B2” projects, thereby exempting such projects from public consultation process altogether.

Dilutions brought in for the Coal Industry

On May 30, 2014, the government exempted the requirement for public hearing for coal mining projects with specific capacity expansion, increased to up to 40 per cent capacity expansion for coal mining projects in July 2017⁴⁸. Meanwhile, in March 2015⁴⁹, the provision relating to transferability of environmental clearance granted in respect of coal block was amended to create an

exemption from the requirement of no objection from either holder of environmental clearance or regulatory authority, thereby easing transfer of clearances to new coal mine allottees.

By way of an Office Memorandum dated February 27, 2018, the process of melting of coal tar pitch, since it involves change of state, was clarified to not attract provisions of EIA Notification.

Relaxing scrutiny and procedures concerning environmental clearances

In April 2015, a retrograde dilution⁵⁰ was brought into force, increasing the validity of environmental clearance from 5 years to 7 years in the case

of all projects and activities other than river valley projects for which validity is 10 years, with a further provision to allow extension for

a maximum period up to 7 years on application to the regulatory authority. As a result of this amendment, the validity of environmental clearances has been increased when they ought to have been reduced from the original five-year period in light of the technological advances which have provided faster means of construction; and this, when the challenges on account of a rapidly deteriorating and changing environment and landscape are requiring constant monitoring and fresh assessment. This amendment has benefited companies such as Vedanta for expansion of its controversial and polluting Sterlite Copper Smelter in Thoothukudi (for setting up Unit II). However, this provision enabled them to get the same extended by an additional five years, without conducting fresh environment impact assessment and public consultation. While the

initial five-year period was from January 1, 2009 to December 31, 2013, Vendanta took advantage of this validity extension provision to procure additional 2 years and also obtained a renewal for 3 years, thereby totally increasing the period of validity until December 31, 2018 on account of this relaxation.

By an Office Memorandum dated October 7, 2014, the powers of appraisal at the scoping stage of environmental proposals by the regulatory authority were restricted.

Such relaxations in timelines for assessment of projects and compliance undermine the entire environmental clearance process, which is then based on antecedent data and is hence rendered faulty and futile.

Delegation of Powers

A major amendment to the EIA Notification, 2006 was made in January 2016 by introducing District Environment Impact Assessment Authority (DEIAA) as regulatory authority by creating a sub category for mining of minor minerals, which covers sand mining, and also constituting District Expert Appraisal Committee to assess these projects, thereby delegating powers. However, due to lack of implementation of provisions and departmental lapses, illegal sand mining continued unabated and the Bombay High Court passed an order dated April 11, 2018 in a case of illegal sand mining in Maharashtra, setting up a vigilance committee⁵¹. Pursuant to

this, a notification dated July 25, 2018⁵² has been issued providing procedure for preparation of District Survey Report for Sand mining or seabed mining. However, state impunity and inaction have resulted in rampant illegal sand mining. In yet another case of illegal sand mining in Akola district in Maharashtra, the NGT, Principal Bench, Delhi, has ordered strict compliance of guidelines framed by the regulatory authority to fight the menace⁵³.

Meanwhile on August 14, 2018⁵⁴, restrictions on mining of minerals, river valley and irrigation projects, townships and area development projects in the EIA Notification have been further diluted.

Introducing private intermediaries

In March 2016⁵⁵, environmental consultant organisations accredited by the government were given authority to prepare and present the EIA Report and Environment Management Plan (EMP) of a project / activity. This amendment also provided for empanelment of national level 'reputed' educational and research institutions as environmental consultant organisations. An attempt has been hereby made to close the

distance between project proponents and the regulatory authority and increase possibility of exercising influence and corruption through accredited environmental consultant organisations.

Attempted dilutions for availing of green clearances in building and construction industry

By a dilution introduced on December 22, 2014, the definition of “built up area” for the purpose of building construction projects was limited to built up or covered area, excluding all open to sky activity areas from its definition. This considerably reduced the area under scrutiny in several urbanization and beautification projects, such as the Statue of Unity project of the Gujarat state government, removing it from the purview of the notification. Further, projects and activities such as industrial sheds, schools, colleges, hostels for educational institutions were completely excluded from scrutiny, irrespective of its impact or expanse, at a strategic time of increasing privatization and corporate investment in education. By an Office Memorandum dated March 5, 2015, the word “industrial shed” was clarified to imply building (whether RCC or otherwise) used for housing plant and machinery of industrial units, hence removing all godowns and buildings connected with production related and other associated activities of the unit in the same premise, from calculation in built up area.

In a further move to ease development in the real estate sector and for building construction projects, the requirement of scoping was exempted for all such projects in April 2015⁵⁶.

On December 9, 2016⁵⁷, arguably in a move to remove building and constructions projects from EIA process altogether, under the claim of ensuring Ease of Doing Business and streamlining

permissions for buildings and construction sector, a completely new set of objectives and monitorable environmental conditions were introduced to integrate environmental conditions in building bye-laws, thereby taking away the role of State Environment Impact Assessment Authority (SEIAA) and MoEF in granting environmental clearances for building construction projects and authorizing the local authorities like development corporations and municipal corporations to certify compliance of environmental conditions prior to issuance of completion certificate. Following this vide order dated June 12, 2017 issued by the MoEF concerning Delhi area, the Authority Competent was authorized to grant building permission with integrated environmental clearance conditions for building and construction projects up to 1,50,000 sq.m. This was bound to increase corruption in an already corrupt process of grant of building permissions and heavily compromises environmental safeguards, in increasing urbanized and highly polluted cities such as Delhi. Holding that this amendment constituted modification of environment law to the detriment of environment protection and would result in adverse impacts, the violating provisions were overturned by the NGT, Principal Bench, New Delhi, in December 2017⁵⁸ in the matter of Society for Protection of Environment vs. Union of India and others. The NGT observed in its order that the impugned notification “attempts to hide behind the poor for the benefit of the builders.”

Blanket regularisation of environmental violations by industries and businesses

On March 14, 2017⁵⁹ (further amended by notification dated March 8, 2018) a procedure was put in place for post-facto environmental clearance to regularize violating projects and activities, which had started work on site, expanded the production beyond the limit of environmental clearance or changed the product mix without obtaining prior environmental clearance. This notification is completely contrary to the objects, intent and provisions of the

EIA Notification, 2006, which mandates prior environmental clearance, with violating projects and activities liable to prosecution, compensation and restoration. Businesses and corporations have been given a clean chit for their violations. This is also a back door entry to defeat the orders passed by the NGT in 2010 in some cases quashing and setting aside earlier attempts of the government to regularize violating projects who had not obtained prior environmental clearance. The

projects / activities were given six months time to avail of the procedure for regularization under this notification i.e. until 13th September 2017. Following this notification, in a study conducted by Centre for Policy Research⁶⁰, it was found that 207 applications for regularization of projects, of which 175 were the bigger “A” category projects, were received to be scrutinized by MoEF. The remaining were “B” category projects, under the

SEIAA. Eighty-five per cent of the applications for Gujarat were in the mining sector and almost 64 per cent of the applications for Maharashtra were in the Building and Construction sectors (See Figure 3.1 for State-wise break up). Meanwhile, Tamil Nadu had the highest number of violators at 66.18 per cent of the total (See Figure 3.2 for state-wise break up).

Sector-wise number application of projects

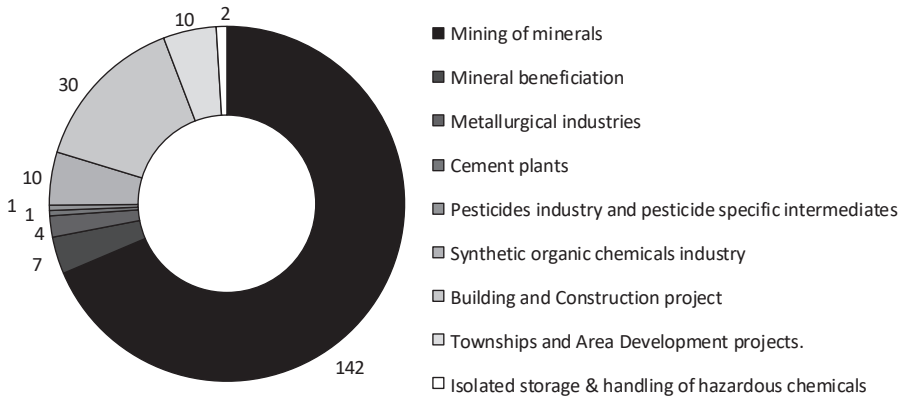


Figure 3.1: Sector- wise list of applications. Courtesy: Centre for Policy Research

State-wise number of applications for regularisation of projects

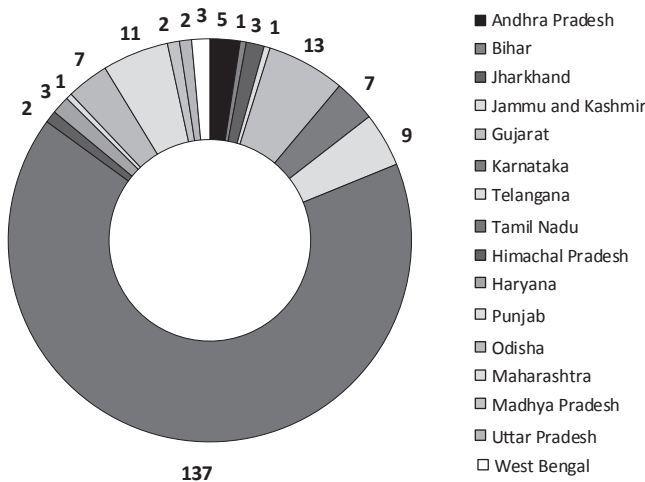


Figure 3.2: State-wise break up of the applications. Courtesy: Centre for Policy Research

Dilutions to law governing the protected coastal zones

Coastal Regulation Zone (CRZ) Notification, 2011 was issued with a view to ensure livelihood security to the fisher communities and other local communities living in the coastal areas to conserve and protect coastal stretches, its unique environment and its marine area and to promote sustainable development based on scientific principles, taking into account the dangers of natural hazards in the coastal areas and sea level rise due to global warming. The CRZ Notification classifies and declares the coastal stretches and water area up to its territorial limits and restricts the setting up and expansion of any industry, operations or processes and manufacture or handling or storage or disposal of hazardous substances in the CRZ area. The CRZ Notification includes water area up to 12 nautical miles in the sea and water area of a tidal body such as creek, river, estuaries etc. It notifies no-development zones and prohibits construction activities detrimental to the marine environment. Activities permissible under the CRZ Notification in the CRZ area are subject to environmental / CRZ clearance.

On February 4, 2015⁶¹, the guidelines under Annexure III of the CRZ Notification were relaxed for development of beach resorts or hotels in the CRZ-II area by doing away with the application of several restrictions such as the prohibition from construction within 200 metres in the landward side of High Tide Line and within the area between Low Tide Line and High Tide Line and allowing proposed constructions only beyond the hazard line or 200 metres from the High Tide Line, whichever is more. Apart from this, the inclusion of no development zone in calculation of FSI, limit of 0.33 FSI and several other building and construction parameters were relaxed and environmental safeguards done away with. Hoteliers and real estate developers across the country welcomed this move⁶².

By a separate notification dated February 17, 2015⁶³, the CRZ Notification 2011 came to be amended to allow for construction of memorials/monuments and allied facilities in CRZ-IV (A) areas by the state government concerned. This amendment was issued during the pendency of a

proposal for construction of the Shivaji Memorial/ statue in the Arabian Sea Mumbai, Maharashtra, where the Expert Appraisal Committee (EAC), noting that construction of the statue was prohibited under the CRZ Notification (prior to this amendment), recommended the amendment of the CRZ Notification itself to facilitate the superfluous project. The objections made by the fisherfolk and local communities to the project were completely ignored. The environmental clearance for the project was granted on February 23, 2015, less than a week after the issuance of this amendment notification. In March 2018, the contract for the Rs 2500 crore project was awarded to Larsen & Tubro⁶⁴.

Following this, on December 30, 2015⁶⁵, roads on reclaimed surface were allowed to be constructed in CRZ I area, even in case such roads passed through mangroves or was likely to damage mangroves, subject to three times the number of mangroves destroyed or cut during construction process being replanted. This relaxation also coincided with another project for construction of a strongly opposed Coastal Road in Mumbai, in a possible attempt to remove legislative restrictions if any to this project at the cost of the coastal ecosystem.

On March 6, 2018⁶⁶, CRZ Notification was amended to extend validity of clearance under CRZ to 7 years, just like in the EIA Notification. Further, by the notification, post facto clearance and regularization of violating projects was permitted under requests received up to 30th June 2018, completely contrary to the requirement of prior environmental clearance under the EIA Notification read with the CRZ Notification. This was achieved by dispensing with notice in the name of “public interest”, thereby avoiding public scrutiny altogether.

In a drastic amendment to the CRZ Notification, on July 2, 2018⁶⁷, a substantial area was removed from the protected CRZ area under the notification and the scientific method of accurate hazard mapping was discarded. This is a big move towards de-regulation of construction in the coastal areas in a move to aid the real estate and industrial businesses, especially in commercial

hubs like Mumbai, exposing the coastal areas to considerable hazards from flooding and natural disasters. The lack of preparation for disaster management is striking in the context of recent Kerala floods, which hit the southern state, leaving it without funds to take on the task of disaster management, despite existence of a

National Disaster Management Authority⁶⁸. The centralization of funds and lack of involvement of the Centre in disaster management, and denial to allot required funds, is telling of the government's commitment towards climate change and disaster management.

Dilutions of other laws

Wetlands (Conservation and Management) Rules 2010 has been diluted by the government considerably by notifying the 2017 Rules, ironically of the same name⁶⁹. In the garb of balancing development with environmental protection, the 2017 Rules is said to have lost its objective of wetland conservation. The Central Wetlands Regulatory Authority under the 2010 Rules has been dissolved and powers have substantially devolved to the States⁷⁰, who were guilty of not adhering to even the earlier rules. There is no interest being shown in the implementation of the 2017 Rules either.

The **Compensatory Afforestation Fund Act 2016**⁷¹ has been introduced in violation of the rights of adivasis by way of compensatory plantations. The funds collected as compensation is allocated to forest departments to set up plantations to replace the lost forests due to felling of trees by industries, miners, corporations who require forest land for their projects. No provision is made for obtaining consent from the village councils of adivasis and other forest dwellers before carrying out plantations on their traditional forest lands, thereby diluting the protection granted under the Forest Rights Act, 2006. This allocation of the funds will empower the forest department to exert control and power over the traditional forests and adivasis, who have been in any case voicing their grievances and protests in respect of the Forest Rights Act, 2006. The recently notified draft Compensatory Afforestation Fund Rules, 2018⁷² go further in violation of the Forest

Rights Act, 2006 and in potentially permitting atrocities against adivasis and forest dwellers.

In March 2016, the **National Waterways Act, 2016**⁷³ was passed, purportedly to facilitate river water transport and navigation. Although, it is ordinarily the state's power to develop and inland waterways, the present law declares 111 stretches of river as "national waterways" giving central government the power to develop and regulate them. Not only are the financial costs for building and operating waterways huge, but the diversion of water and dredging will have a major impact on irrigation, fishing and other activities and also lead to disturbance of drinking water schemes. The few places where waterways exist, major pollution complaints have been recorded due to use of waterways for transport of coal. It is clearly an unsustainable scheme, aimed at urbanization, commercialisation and change of user of the waterway areas.

Meanwhile, there has been an active subversion of the land acquisition process by introducing dilutions in what was considered a progressive **Land Acquisition Act 2013** by introducing state amendments. In Gujarat, legislative changes were brought in to do away with social impact assessment for the high cost Bullet Train project, which is being vehemently opposed by the farmers⁷⁴. Meanwhile, the government has been attempting to make large-scale amendments to the Land Acquisition Act 2013 to dilute the protections granted to land owners under it⁷⁵.

Introduction of heavily diluted 'umbrella' laws in the pipeline

The government is aggressively diluting environment protection laws essentially to help big corporates to flourish. Even while dilutions are being brought about in a staggered manner to

meet its immediate requirements, the government has not entirely shelved the plans for holistic implementation of the T.S.R. Subramanian Committee's recommendations to bring about

a complete transformation in environmental policy. For instance, the **draft National Forest Policy 2018**, which restricts participation of forest communities, opens up forests for privatization and commercialisation and fails to address the issue of forest diversion⁷⁶, is one such case in point. Between 2014 and 2017, 36,500 hectares of

land was diverted for non-forestry purposes like mining, highways, industry and so on⁷⁷. Another problematic legislation also in the pipeline is the **draft CRZ Notification 2018**, which reads as a guideline to facilitate construction projects and destructive development rather than protect the coastal environment.

Crippling of Environmental Institutions

Another recommendation of the T.S.R. Subramanian Committee and the Draft Bill is quietly underway with serious attempts being made by the government to curtail the independence and autonomy of the NGT set up under the National Green Tribunal Act, 2010. This is being done ingeniously through change in rules governing qualifications, experience and other conditions of service of members of the Tribunal and by making innocuous but highly compromising changes by way of the Finance Act 2017⁷⁸. The changes include imposition of executive control on qualification, appointment and terms of office of the expert and judicial members of the Tribunal, in effect taking away the administrative and financial autonomy of the

Tribunal. Provisions have been inserted diluting qualifications of members, providing for selection of expert members by bureaucrats, completely compromising the quality and independence of the Tribunal⁷⁹. Meanwhile, the zonal benches of the NGT, which had previously proved to be effective body for protecting the environment and addressing violations, have been rendered in-operational for stretches of time due to lack of appointment of members, resulting in many policy changes and violations remaining unchallenged. With the zonal benches practically shut due to no new appointments being made, petitioners are being forced to travel to Delhi to have their grievances heard in the only functioning Principal Bench⁸⁰.

Gains to businesses and commensurate losses to the environment: a clear nexus

India has jumped up 30 spots in the World Bank formulated ranking released on October 31, 2017 in the list of countries assessed according to their ease of doing business, based mainly on the country's regulatory laws, approval process, difficulty in starting business⁸¹. However, the dilutions are at a heavy cost to the environment and risk to the citizens. India ranked 177 out of 180, at the very bottom, on the Environmental Performance Index 2018, plummeting 36 points from 2016 according to a biennial report by Yale and Columbia Universities along with the World Economic Forum released in Switzerland⁸². As far as air quality is concerned, it ranked 178 out of 180, with the low ranking linked to poor performance in health policy and deaths due to air quality. Meanwhile, out of the 280 cities, air quality of which were monitored, none met the World Health Organization (WHO)'s safe levels of Particulate Matter, as per Greenpeace India's

report⁸³, meanwhile as per data released by WHO, 13 out of the 20 most polluted cities in the world are situated in India⁸⁴. As per a study released by Global Environmental Justice Atlas, there are more environmental conflicts in India than any other country, and more clashes are over water (27%) than any other cause⁸⁵. People's movements, which have an active participation from people from marginalized groups, indigenous populations and adivasis, are facing increasing state repression coupled with attacks by non-state and corporate actors, who are emboldened by the impunity provided by the government. A case in point, is the police firing on protestors who were opposing Vedanta's expansion plans and operation of the polluting Sterlite copper plant in Thoothukudi in May 2018, which eventually resulted in death of at least 13 civilians.

Even while the Prime Minister has been recently

bestowed with the highest environment honour of the United Nations, the Champions of the Earth Award for the year 2018, for championing international Solar Alliance and promoting new areas of cooperation on environmental action⁸⁶, the irony of it is striking, considering his government's "dilution spree" and lack of implementation of existing laws by weakening all the institutions part of environmental governance. Instead it is bad and unsustainable development that is being permitted through these legislative

relaxations. The rising pollution levels, agrarian crisis, increase in sea level and flooding, loss of forest cover, the crisis over waste management and effluent treatment, water and land, human-animal and human-human conflict, violence against and increasing alienation of project affected persons, all narrate the story, that it is not ease of business but an era of environment and habitat destruction that is being propagated, and which needs to stop urgently before it's too late.

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Chapter 4:

Human Rights Defenders Are On Their Own: Will The NHRC Back Them Up?

- Rajavelu K. and Mathew Jacob⁸⁷

The United Nations (UN) Secretary General's recent report⁸⁸ on reprisals against activists for cooperating with the UN is a glaring testimony on the situation of human rights defenders (HRD) in India. They are facing more reprisals at present than ever. Activists, researchers, academicians, writers, journalists, students, civil society organisations, lawyers — any voice or peaceful act of dissent, faces a wide range of attacks: from murders, physical attacks, false and fabricated cases, restrictions to freedoms of speech as well as assembly and association, suspension/cancellation/non-renewal of foreign funds and other severe measures.

A dangerous discourse is being cultivated against human rights in addition to the vilification of human rights work, specifically about HRDs. There is no protection mechanism specifically for people who are protecting and promoting the rights of others.

HRDs raising issues of human rights violations by corporations and business houses, discrepancies and malpractices in land acquisition, issues concerning the environment and natural resources, etc are targeted by such corporations as well as the State. After the advent of globalisation, privatisation and liberalisation in the 1990s, ruling dispensations have demonstrated more proximity with private corporations. Over the past three decades, the push has been to ensure a better environment for privatisation. However, this has come at the cost of the people and the resources they owned.

The current dispensation at the centre has shown a greater zeal in the push for easier private control and the related mode of development. This has resulted in bringing down the existing

norms and practices related to environment protection. Existing environmental laws such as the Environment Impact Assessment Notification, 2006; the Coastal Regulation Zone Notification, 2011; etc have been diluted through office memoranda, notifications and changes in rules and procedures. Private infrastructure and industrial development are being facilitated through single-window clearances, detrimental to communities and beneficial to the corporates. The government proposed amendments to the Right to Fair Compensation and Transparency in the Land Acquisition, Rehabilitation and Resettlement Act, 2013 through an ordinance in 2014. Some states have amended this law and introduced exemptions for consent in cases of linear projects, public-private partnership projects, projects related to 'national security', Forest Rights Act, etc.

A trend clearly witnessed in the recent past is that when affected community/people oppose some illegitimate actions of the state/corporations, they are often met with brutal state repression. Section 144 of the Criminal Procedure Code (CrPC) is often misused to prevent freedom of assembly and to criminalise any public protest. Community members/HRDs active in organising and supporting protests have been charged with the Unlawful Activities Prevention Act (UAPA), the National Security Act (NSA) and other provisions of the CrPC and draconian laws. There are instances when in a protest area, thousands of unknown people are named in open First Information Reports (FIR), and police for years target individual voices of dissent and protest using those open FIRs.

This paper attempts to look at challenging situations faced by HRDs engaged with work on protecting human rights, natural resources and

the environment and the response from justice institutions. A representational case study format is used for articulating the above.

1. Case Studies

i) Tamil Nadu

For over two decades, the coastal town of Thoothukudi has witnessed a sustained protest against Sterlite Copper's plant. People in Thoothukudi believed it to be causing severe environmental degradation and impacting the health of the people in the district. The town witnessed a state of terror on May 22, 2018, which marked the 100th day of continuous peaceful protests since February 2018. As claimed by the people, anywhere between 70,000 and 100,000 from various parts of Thoothukudi marched to the district collectorate on May 22nd as there was no response from the administration to their demands of the past 100 days. The Thoothukudi Police responded by spraying the peaceful assembly of protestors with bullets from sniper guns, images of which went viral in the media. Fourteen persons were killed and hundreds were injured due to excessive, arbitrary use of police force on the people demanding the closure of Sterlite Industries, the copper business unit of Vedanta Limited.

The violence and state terror continued: People were arrested on false grounds under draconian preventive detention laws such as the NSA, the Goondas Act and were charged with sedition⁸⁹. Police registered 'omnibus' FIRs, incriminating thousands, through which they arrested activists and organisers of the protest. Though the government claims that the firing was an act of self-defence, a public inquest team highlighted how the firing happened in an unauthorised and arbitrary manner and, in fact, was targeted and not an act of self-defence. Only after this bloodshed, the Government of Tamil Nadu ordered for a closure of operations of Sterlite Copper through a government order. However, a cabinet decision would have been stronger; Sterlite Copper has challenged the government order in the National Green Tribunal⁹⁰.

This whole series of incidents saw a targeted and systemic attack on activists, including lawyers and HRDs who were part of anti-Sterlite protests. Advocates Vanchinathan and Hariraghavan, who represented those arrested on cases related to anti-Sterlite protests, were arrested under the National Security Act (NSA). Their detention was later quashed by the Madras High Court, which also questioned the manner in which NSA was imposed and asked whether it was a democracy or a police state⁹¹.

The state also witnessed how the police curbed the people-led movement against Koodankulam Nuclear Power Plant in Tirunelveli district using excessive force, defamation, arrests, false and fabricated cases against villagers and activists⁹².

Recent instances of reprisals on HRDs in Tamil Nadu:

- Thirumurugan Gandhi, a social activist and HRD, was arrested on charges of sedition for uploading a video of his speech about the anti-Sterlite movement and other peoples' movements at the June 2018 session of the UN Human Rights Council⁹³.
- Valarmathi, a student-activist was detained under Goondas Act for distributing pamphlets about the Methane extraction project in Tamil Nadu in 2016⁹⁴. She was arrested again in July 2018 while meeting villagers affected by the Salem-Chennai Greenfield Highway project.
- Prof T Jeyaraman, who had been organising and creating awareness about projects with environmental concerns such as a hydrocarbon extraction project, was arrested in February 2018 along with villagers protesting against Oil and Natural Gas Corporation's (ONGC) hydrocarbon extraction project at Kathiramangalam village⁹⁵.
- Prof Yogendra Yadav was detained and man-handled by the police in Tiruvannamalai district while he was going to meet farmers affected by the Chennai-Salem expressway project⁹⁶.

- Environmentalist Piyush Manush was arrested on false charges of instigating the public against the Salem-Chennai greenfield highway project and land acquisition for the expansion of Salem Airport⁹⁷.

ii) Odisha

The people of Odisha, especially the marginalised tribes, have been continuously struggling to protect natural resources from exploitation and against displacement. The state has had strong people-led movements such as Niyamgiri Suraksha Samiti (NSS) and Posco Pratirodh Sangram Samiti (PPSS).

Abhay Sahoo is an anti-displacement activist and has been the president of PPSS since 2005, which spearheaded the movement against the establishment of Posco's steel plant in Odisha. Since then, he has been targeted by the state machinery and more than 60 false cases have been brought against him in order to restrict and suppress his active human rights work. Sahoo was arrested in 2016 for his association with 'Jamihara Chasi Sangh', a formation, which works on the issues of displacement and land rights of villagers in Kujang tehsil of Jagatsinghpur district due to construction of an oil refinery by Indian Oil Corporation Ltd (IOCL)⁹⁸.

NSS is a platform to protect the Niyamgiri forests, formed by native and tribal inhabitants belonging to Dongria Kondh tribes. NSS has spearheaded the movement to safeguard life, livelihood and environment under and have been resisting bauxite mining by Vedanta. After the Supreme Court's interference, gram sabhas voted unanimously against the \$1.7 billion mining project⁹⁹.

In its annual report for 2016-17, the Ministry of Home Affairs (MHA) associated Niyamgiri Suraksha Samiti with extremist organisations¹⁰⁰. The report stated "In Niyamgiri Hills area (Districts Rayagada and Kalahandi, Odisha), the outfit [the Maoists] continued to guide the activities of the Niyamgiri Suraksha Samiti". This

received strong condemnation from various quarters of civil society and environmental groups and activists in particular, who wrote to the President and the Prime Minister, condemning the linking of NSS with Maoist organisations by the MHA¹⁰¹.

A few days after the release of this report, on May 1, 2017, the police raided Gorata village at midnight and picked up 20-year-old Kuni Sikkaka, daughter of NSS co-founder Dosi Pusika. The police claimed she had links with Maoist organisations and were motivating her to surrender¹⁰². Her family and other NSS member categorically denied the police version and said they believed intimidation tactics were being used to create a fear of psychosis among the community to make them agree to the mining project.

In the past, the police arrested other tribal leaders associated with movements against mining, including Dasru Kadraka, Lada Sikaka and Haribandhu Kadraka¹⁰³. The police have also threatened tribal villagers who were proceeding to file a complaint with the National Commission of Scheduled Tribes (NCST) regarding the intimidation, abduction and wrongful confinement of members of NSS by Odisha Police and para-military forces in June 2017¹⁰⁴.

iii) Assam

The Government of India decided to put 12 small oilfields¹⁰⁵ belonging to public sector enterprises, Oil India Limited and ONGC, for global auction. There were wide-spread condemnations and protests across Assam by different groups against the move to privatise natural resources in the state and auction the oil fields to private parties, including foreign investors. The decision was taken by the central government unilaterally without consulting the people of the state. In June 2016, when activists of Krishak Mukti Sangram Samiti (KMSS) were demonstrating against the decision, police and para-military personnel tried to remove them forcibly. They later physically assaulted protesters indiscriminately with batons, leaving around 20 persons injured and also detained protestors, including Akhil Gogoi, the

chief functionary of KMSS. Later, in September 2017, he was detained under the NSA for protesting against forceful evictions in Kaziranga National Park¹⁰⁶.

iv) West Bengal

The Power Grid Corporation of India Ltd proposed to construct transmission lines in Bhangar area of West Bengal that would pass over a number of villages¹⁰⁷. This project caused agitation among farmers who feared loss of agricultural fields, damage to crops and environmental concerns, they also alleged that they were not provided any information about the project before parting with their lands. The villagers formed the Jami, Jibika, Poribesh O Bastutantra Raksha Committee (Committee to Protect Land, Livelihood, Environment and Ecosystem), in December 2016 to protest against the project. The agitation intensified in early 2017 and Sharmistha Choudhury, associated with the Communist Party of India (Marxist-Leninist) Red Star, worked along with farmers and villagers in the agitation against the power project. The farmers' demands were to shift the project elsewhere. In January, two protestors were killed in police firing and the agitation intensified, leading to the arrest of Choudhury who was later charged under the UAPA.

v) Arunachal Pradesh

The government has planned to construct 37 dams in the state's Tawang (located 10,000 feet above sea level) and West Kameng districts that make up the Mon region. The largest of these are Tawang-I (600 megawatt) and Tawang-II (800MW) on the Tawang Chu river and Nyamjang Chhu (780 MW) in Tawang district. Tawang is considered an ecologically sensitive region. The National Green Tribunal had on April 7, 2016, suspended the environmental clearance to the 780 MW Nyamjang Chhu project in response to an appeal filed by the Save Mon Region Federation¹⁰⁸. Lama Lobsang Gyatso who heads the Save Mon Region Federation (SMRF) that works towards ecological and environmental conservation in Mon region of Arunachal Pradesh, was arrested¹⁰⁹. In May 2016,

the police opened indiscriminate fire on hundreds of people demanding his release and two persons were killed¹¹⁰.

vi) Madhya Pradesh

The Narmada Bachao Andolan (NBA) through its struggle covering 31 years has managed to get the promised land rehabilitation for approximately 14,000 tribal and Dalit farmers and their families¹¹¹ – especially those from Gujarat and Maharashtra. However, the status of rehabilitation is shockingly slow and shameful when one considers that submergence started in 1995 and in 2016 more than 40,000 families were still awaiting their rightful rehabilitation. Farmers and their families were forcefully made to sacrifice their homes, farms and forest resource base in the name of “development” and progress of the country.

In 2017, the Government of Madhya Pradesh issued orders directing affected families in the submergence area of the dam, close to the Narmada river in Madhya Pradesh, to vacate their dwellings by July 31, 2017. But it provided no rehabilitation to them, which is in complete violation of the Supreme Court order. The move of the government to increase the height of the dam from 122 meters to 139 meters has caused unexplainable misery to large numbers of people. 178 villages and a town will be submerged in Madhya Pradesh. This move, for so-called development, will render 40,000 families displaced and with no rehabilitation.

To protest this move, Medha Patkar, along with 12 project-affected women, went on an indefinite hunger strike since July 27, 2017. Patkar and five other protestors were forcefully moved from the place of protest. Nearly 2,000 police personnel were mobilised who came down heavily on the peaceful meeting. They used force to break pandals and when women protestors tried resisting the arrest of Patkar, they were beaten and manhandled by policemen. Several were injured and the police broke the stage, pandals, chairs and rope fencing, etc at the protest site¹¹².

vii) Gujarat

The Mumbai-Ahmedabad High Speed Rail (Bullet Train) project has been proposed with financial aid from Japan through Japan International Cooperation Agency (JICA). There is a discontent brewing among affected farmers and people as not much information has been shared with them by project authorities about the impact and likely displacement¹¹³. On May 14, 2018, environment consultation for the Bullet Train project was announced by National High Speed Rail Corporation Ltd (NHSRCL), a special-purpose company registered under the Companies Act with the ownership of Government of India through the Ministry of Railways. The consultation was organised by Arcadis, a company from Netherland holding the contract to undertake surveys.

Though a public call for participation was made regarding the consultation, there was unprecedented police deployment and an atmosphere of fear and intimidation created by the police to intimidate the farmers and deter them from representing themselves in a fair manner. Before the start of the consultation, the police took Darshan Nayak, member of the Surat District Panchayat and director of Sayan Sugar Co-operative Society who was in conversation

with the designated land acquisition officer, into custody. The farmers and environment activists sought his whereabouts, the police forcibly took them away from the venue and illegally detained them for more than two hours, thus preventing them from participating in the public hearing and to raise and share legitimate concerns and issues¹¹⁴.

viii) Uttar Pradesh

Sukalo Gond is an Adivasi women leader and is associated with All-India Union of Forest Working People (AIUFWP). She has been working for implementation of Forest Rights Act in the Sonebhadra area of Uttar Pradesh. Sukalo, along with others in her community, filed claims on forest land as per the community resource claims made available through Forest Rights Act, on March 23, 2018. On June 6, soon after they submitted a representation on police atrocities to Uttar Pradesh Forest Minister Dara Singh Chauhan and were returning from Lucknow, they were illegally detained and beaten up by the police¹¹⁵. Sukalo has worked to mobilise people and create awareness about the Kanhar dam project since 2014. She was arrested for holding a dharna for asserting their rights and was sent to prison.

Role of the National Human Rights Commission

i) Response to cases on attacks on HRDs

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. All the above-mentioned cases 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. The NHRC did not exercise its powers to the fullest in even a single case and order either compensation or prosecution. For example, in the recent case of Thoothukudi, the NHRC only undertook an independent investigation after the

ruling by the Delhi High Court and even in the same, it has not yet made the report public.

On incidents of false and fabricated cases against HRDs, the NHRC disposes off the complaint saying that the defender has to seek appropriate legal recourse and never used its powers under Section 12 of the Protection of Human Rights Act to intervene in courts.

HRDA, since 2010, has filed more than 550 complaints on incidents of attacks on HRDs across the country. While most of the cases are pending with the Commission, the main reason for this pendency is the non-response

by state authorities. In 2015, the High Court of Allahabad in a landmark judgment ruled that the recommendations made by the NHRC cannot be ignored as mere “opinion or suggestion” and be allowed to be disregarded with impunity¹¹⁶.

The NHRC also transfers cases sent to them by State Human Rights Commissions (SHRC) using their powers¹¹⁷. But these state institutions themselves lack capacity to deal with complaints as there are high numbers of vacancies of chairpersons and members of SHRCs, inadequate funding, infrastructure, resources and staff.

There were also instances where complaints were closed solely based on reports by police authorities, which amounts to a travesty of justice as police personnel are themselves the perpetrators of attacks on HRDs in many such cases¹¹⁸.

ii) Initiatives on Business and Human Rights

The NHRC has recently constituted a core group on Business, Environment and Human Rights and its terms of reference are listed below ¹¹⁹:

- Promote implementation of United Nations Guiding Principles on Business and Human Rights
- Review exiting law and regulations relevant to business, environment and human rights
- Assist NHRC on recommending to concerned

Conclusion

Development is essential for a country, but dissent and discourse are equally paramount for a democracy. No development project can be forcefully imposed on people with utter disregard to the concerns of displacement, the environment and other livelihood issues.

As the NHRC celebrates its 25th year of existence alongside the commemoration of 20 years of United Nation declaration on HRDs, the NHRC as an institutional HRD should stand in solidarity with the HRDs in the country and ensure justice for them. One hopes they will be more proactive

Ministries on implementation and revision of laws and regulation

- Identify barriers in effective access to remedy on human rights violations and suggest revising the provisions to make it more accessible to victims
- Advise NHRC on updating National Voluntary Guidelines on Social, Environment and Economic Responsibilities of Business
- Undertake national mapping of business, environment and human rights issues
- Advise NHRC in recommending to the Ministry of Corporate Affairs to address the identified risks in the National Action Plan on business and human rights

Experiences from the case studies mentioned in this article demonstrate that the NHRC’s actions are merely on paper, falsely showing compliances to the existing international and national requirements. The NHRC has, as an institution, failed to protect the rights of the community/ people/HRDs on several occasions when corporations were involved. On several occasions, the cases were dismissed stating that they were not against public officials. The NHRC as the apex human rights body in the country, needs to take serious and urgent measures to ensure that human rights of Indian citizens are protected and hold supremacy in cases where businesses’ and governments’ actions are affecting the citizens, their environment and natural resources.

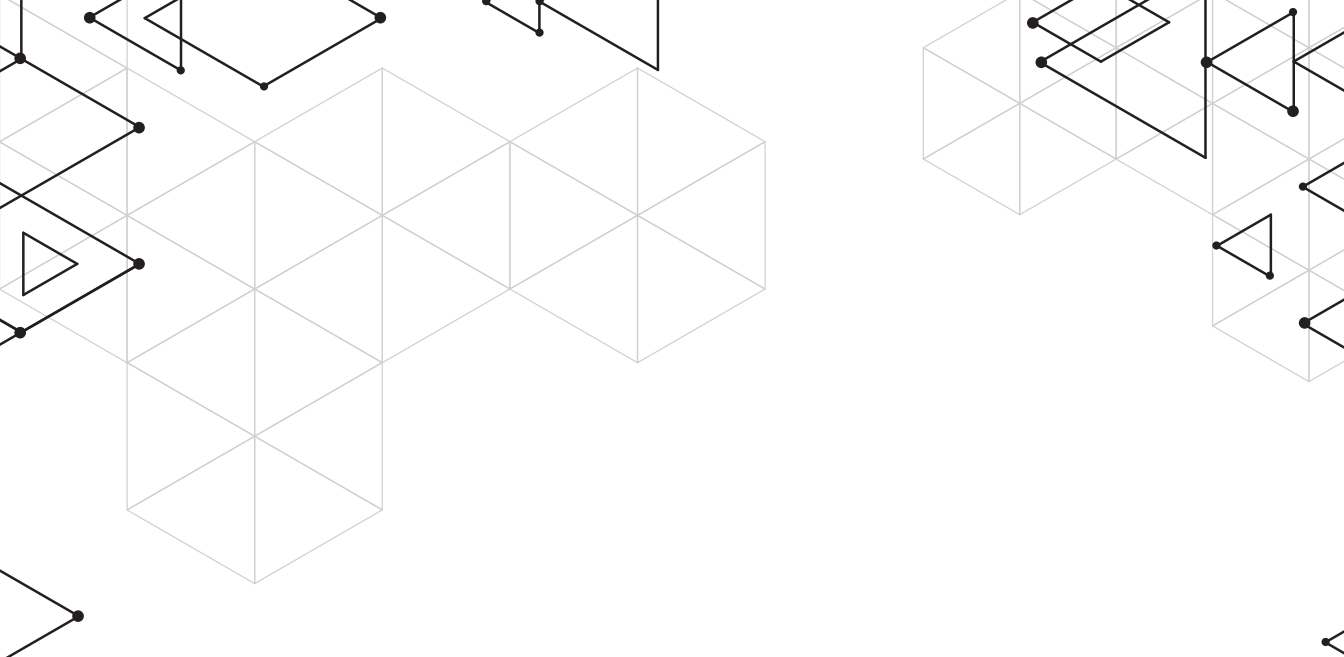
in their mandate on protection of HRDs. The NHRC has a double responsibility to ensure that businesses adhere to human rights and alongside protect the HRDs who work on issues of business and human rights. According to the Edinburgh Declaration¹²⁰ on business and human rights to which NHRC is also a party, it should monitor and document human rights violations by corporations.

The role of corporations is huge in terms of protecting human rights in their business, it includes legal, ethical and moral measures to

protect human rights and create a space and dialogue with people defending human rights. Corporations should see HRDs who work towards creating sustainable business and reducing violations as partners in their work. There is an increased responsibility of the government to

prevent and act upon human rights violations by public sector enterprises. The human rights are guaranteed by the state and in no case should the state step back and leave it to the businesses. The NHRC has a larger role in ensuring this.

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Part 3

The Labour Question: on Accountability and Dignity

Chapter 5:

Bonded Labour: India Lives in Denial

-Vijay Prakash and Sowmyaa Bharadwaj¹²¹

The Global Slavery Index 2016¹²² ranked India fourth among 167 countries based on the proportion of population in bonded labour situations. According to the report, “all forms of modern slavery continue to exist in India, including intergenerational bonded labour, forced child labour, commercial sexual exploitation, forced begging, forced recruitment into non-state armed groups and forced marriage.”¹²³ The 2011 Census reported close to 4.4 million child labourers, who form a small sub-set of bonded labour. Most of them are spread across the supply chains of industries such as agriculture, brick kiln, garments, manufacturing and automobiles among others. While there is acknowledgement that modern slavery clearly occurs within India, the realities of global trade and business make it inevitable that countries that import from India will also be exposed to the risk of modern slavery, just as India is vulnerable to the same through imports from other countries where it is

rampant¹²⁴.

According to India Responsible business Index, 2017, 85 companies reported complaints on child labour, forced labour and involuntary labour (all of whom reported 0 complaints) and only 9 have assessed the situation of workers’ rights and labour issues. Only 65 of the top 100 companies have extended their “no child labour” policies to their supply chain and only 49 have extended these policies of human rights to their supply chain. Adani Ports, for example, prohibits the use of child labour by the group, but does not mention the applicability of the same to its supply chain. Maruti Suzuki mentions: “The Company does not have a standalone Human Rights policy. Aspects of human rights such as child labour, occupational safety, non-discrimination are covered by its various Human Resource policies”. While there are six policies available on their website, none of these mention an extension of human rights principles to its vast supply chain.

Caste reinvents itself as unaccountable supply chains

Regardless of a longstanding debate on the use of the term ‘slavery’ for bonded labour, in the Indian context at least, the intrinsic link with the caste system with which the traditional form of slavery was associated, is still in place. Lets look at some examples from our experiences with communities in Bihar. Ramlal¹²⁵, who resides in Doli village in Nirmali block in Supaul district, Bihar, and is from the Ravidas community (SC), works for a landlord who is very influential and belongs to the dominant caste. Ramlal’s grandfather had taken a loan from the landlord on compound interest several decades ago for his sister’s marriage. Since then, his grandfather and then, his father, and now him, have been working for the landlord to repay the loan. Ramlal works in the landlord’s field for more than 18 hours a day. He does not feel that he is bonded, because the employer provides for his

food and clothes and lends him small amounts of money as and when he needs it. In fact, Ramlal feels obligated to his employer for providing him these ‘comforts’. Ramlal’s story is reflective of a very common narrative, normalised to such an extent, that there is seldom any attempt to problematise it.

While one may believe that people like Ramlal exist in the past, and even if they do exist, they do so only in small villages in far corners of the country, the reality of his bondage situation is a form of slavery that one still continues to see in several parts of rural and urban India. And now, it extends across more sectors of work, especially in the primary sector.

Cut back to the secondary and tertiary sectors and one sees Milton Friedman’s idea of Indian

economy's growth characterised by adaptability¹²⁶ playing out, even in the context of bonded labour. The contemporary labour market is a shining example of the adaptation of the feudal form of bonded labour into a capitalist framework.

Birju is one among ten boys from a village in Motihari district who was taken to Tamil Nadu to work in a factory manufacturing nuts and bolts. The contractor who took him paid his mother an 'advance' of Rs 5000 with the promise of a regular monthly salary and teaching her son some strong saleable skills – a tough offer to refuse for a widow with six children to look after. Birju worked in the factory for 18 hours a day, hunched over a loud machine in a room with limited lighting. He was underfed, often drugged (on a hunger suppressant that also kept him awake long hours), prevented from taking more than two toilet breaks a day, not allowed to leave the premises, not allowed to speak to his family for months on end – so much so that he felt he was living in conditions worse than prisons he had seen in films when he was at home. One night eight months later, he scaled the walls of the factory and escaped along with two other boys from his village to make the long and arduous journey back home. Once he got home, he found out that the contractor had not paid his mother a single rupee for the eight months that he had worked. He realised, like many others in similar situations, that there was no way for him to seek redress as there was no documentary evidence that he had actually worked for the employer in the factory.

It is very interesting to see traditional feudal practices find place in modern occupations in a modified form. The three important requirements of a landlord from the traditional system were 'regular and sustainable supply of labour', 'low wage costs' and 'captive labour'. The caste system ensured a regular supply of this labour to the upper caste landlord. With the emergence of modern occupations and with agriculture no longer being the primary form of employment, "advance" payments became the sustaining factor for labour at a cheap cost, and 'fear' of different forms of abuse added the element of 'captivity'. The caste system still plays a significant role, but has

been well integrated into the system of contracting and sub-contracting, which is widespread in the supply chain of all the major industries. In addition, the advance is typically routed through a middleman/ sub-contractor that has a link with the location from which a person is recruited, ensuring that even if she/he runs away or escapes the work place, they cannot return safely.

The story of Birju is commonplace in most industries in the informal sector that is part of the primary and secondary sector of our economy. And one almost always dismisses such cases as evils of the 'informal' sector. However, if one takes a closer look at the supply chain of the formal sector, comprising large industrial houses and corporate agencies, what becomes evident is that somewhere down the line, the nuts and bolts that Birju and many like him produced, have found their way directly or indirectly into the premises. While it is more indirect for sectors such as FMCG or pharmaceuticals, it forms a key part of the production process in sectors such as construction, transport, mining and many others. This entry through the supply chain contributes a significant value to the products, which get subsequently "branded" by these companies.

Given that any product purchased has passed through a long chain of producers, manufacturers, distributors and retailers who have all participated in its production, delivery and sale, it is often very difficult to track a component of an end product back to a particular producer and rarely possible to be certain that a product has or has not been produced in bonded labour conditions¹²⁷. It is not surprising that few companies take responsibility for workers in their extended supply chain. They use 'sub-contractors' and 'contractors' to carry out the exploitation of several million adults and several thousand children on their behalf and themselves turn a blind eye. As a result, it is almost too easy for companies to absolve themselves of any responsibility towards this extended supply chain, as such entities fall well beyond the purview of their systems. Data from the India Responsible Business Index 2017¹²⁸ on inclusiveness in the supply chain is telling of the commitment of businesses to responsible supply chains. While 57

companies have disclosure related to recognition of priority to local suppliers, only 15 companies have actually reported systems and mechanisms to recognise local suppliers. Similarly, one

company has reported in its policy the business responsibility to procure raw products at a 'fair price'. This sets the companies on a back foot as far as their core business practices are concerned.

Bonded labour is in no man's land

Unlike child labour and trafficking, the Government of India has been consistently denying the existence of bonded labour for a long time. Statistical institutions in the country do not 'count' bonded labour practices. Similarly, every Ministry and Department, owing to absence of data and lack of conviction, denies the prevalence of bonded labour. India is a curious case of the coexistence of progressive laws and yet, the scaled presence of practice of bonded labour, if one were to go with civil society figures.

As Kevin Bales¹²⁹ put it, "India has the world's best Anti-Slavery laws and the largest number of slaves". It has an excellent bonded labour¹³⁰ legislation - Bonded Labour System (Abolition) Act, 1976 and in addition, the Supreme Court of India has taken a wide view of what may constitute "force" in a labour relationship juxtaposed in contexts of extreme poverty and deprivation. The Constitution, through article 23, prohibits and criminalises human trafficking and forced labour and we have passed the Child Labour (Prohibition and Regulation) Act of 1986. In addition, India has also ratified six out of eight ILO conventions related on abolition of forced labour, equal remuneration and no discrimination between men and women in employment and occupation as well as two conventions on child labour.

There is a global push for eradication of forced labour conditions, especially in supply chains. Initiatives and regulations such as the UK Modern Slavery Act, the California Transparency in Supply Chains Act, French Duty of Vigilance Law on supply chain responsibility and an EU Directive on disclosure of non-financial and diversity information all point towards the need for a robust rights-based approach to supply chain transparency as they have repercussions for Indian businesses.

As a result there have been some changes – such as the acknowledgement of the potential to use satellite imagery to identify bonded labour and steps such as disrupting electricity supply to errant factories or providing training to workers in the supply chain¹³². Several Indian companies in 2017 and 2018 have created anti-slavery and anti human trafficking policy statements that even take cognisance 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 prevention of child labour, forced and involuntary labour.

Accompanying the newly proposed National Guidelines is an attempt to ensure that there is a modern slavery lens used in the new Business Responsibility Reporting formats. In its current draft form, there are questions related to percentages of establishments/ supply chains that have been inspected for forced / bonded labour as well as those remediated, adherence to health and safety norms in the supply chain and child labour in the supply chain.

Only time will tell whether businesses take enough steps to recognise and strengthen their supply chains and enshrine the principles of responsible business practices in the inclusive growth story of India. There is a strong business case for slavery with the ILO¹³³ estimating that forced labour in its various forms generates a shocking \$150 billion in profits a year, which just makes "modern slavery obscenely profitable"¹³⁴. But it is also illegal everywhere, and abhorrent — and with sufficient political will and ambition, there is hope that it can be put out of business¹³⁵.

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Chapter 6:

Inequalities in Indian Business Space and Industry

- Karandeep Bhagat¹³⁶

I: Introduction – The Inequalities

The participation of Indian women and persons from disadvantaged communities like scheduled castes (SC) and scheduled tribes (ST) and Muslims in the professional workforce has reduced drastically in the past 20 years and so has their wage ratio, showing a glaring inequality that exists within our eco system. The participation of disadvantaged sections in governance and other decision-making spaces is also abysmal. The above is due to a persistently discriminatory environment at work spaces for these marginalised communities.

Development hasn't been spread evenly in India. The United Nations Human Development Index 2017 projects our income inequality at 18.8 per cent — the highest — compared with 15.7 per cent for neighbouring Bangladesh and 11.6 per cent for Pakistan. Factoring in the inequalities, India's development value has practically not changed in the past 17 years.

This article intends to look at inequality issues in Indian industries with two main discrimination dimensions:

- i) Gender gap
 - ii) Exclusion (with focus on other disadvantaged groups)
- (i) Gender participation gap in overall work force participation**

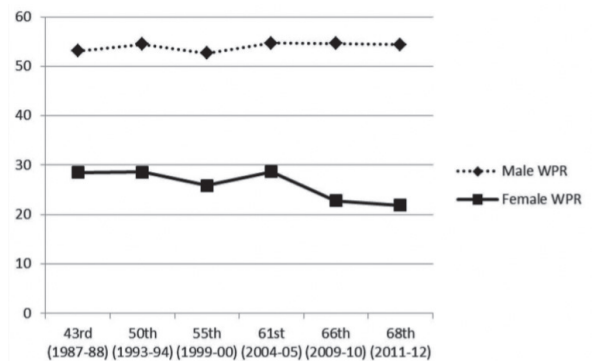
Women contribute to one-sixth of India's economic output — among the lowest in the world and half the global average. The low contribution of women and the unrealised potential of women of our country is one big reason why India remains so poor¹³⁷.

Yet, far from joining the labour force, women have been falling away at an alarming pace from formal

work opportunities. The female employment rate in India, counting both the formal and the informal economies, has tumbled from an already low 35 per cent in 2005 to only 26 per cent now¹³⁷.

In the same period, the economy has more than doubled in size and the number of working-age women has grown by 25 per cent, numbering 470 million. Yet, nearly 10 million fewer women are in jobs in India. It has been projected by many that a rise in female employment rates to male levels would provide India with an extra 235 million workers, which will be more than the total number of male and female workers the European Union has. Hypothetically, if these 235 million join work then our available workforce would be more than enough to fill all the factories in the rest of Asia, excluding China¹³⁷.

Figure 6.1: Male-Female Workforce Participation Rates



Source: Employment and Unemployment Surveys of NSS

- (ii) Wage differentials on social and gender parameters**

According to the current India Wage Report by the International Labour Organisation (ILO)¹³⁸,

the following analysis can be drawn.

ILO's India wage report has looked at various survey rounds of the National Sample Survey Organisation (1993-94, 2004-05 and 2011-12) and concludes that for elite-dominated white-collar jobs such as legislators, senior officials and managers real wages have gone up by 98 per cent on an average. Even "professionals" have seen a 90 per cent jump in their salaries during the periods analysed. On the other end of this spectrum, the lowly paid blue collar jobs of plant and machine operators, shop-floor operators and helpers in manufacturing sectors have received a much lower hike of 44 per cent in average real wages over the (nearly) two decade-long analysed period. In the same period, daily wages for low-skilled informal occupations have only grown at a mere 3.7 per cent¹³⁸. This clearly points to the growing inequalities within our eco system and as society. There further isn't enough data / evidence about the situation of women-dominant informal sectors like domestic work and other informal low-paying jobs to look at the actual and real wage growth for women in these sectors.

The report notes that "the ratio between the best-paid occupation and the lowest-ranked ones was 7.2 in 1993-94, this increased to 10.7 in 2004-05 and then declined back to 7.6 in 2011-12," resulting practically in no ratio growth¹³⁸.

The ILO report highlights that salaries in organised work spaces in urban India rose steadily during the period of high economic growth (1993-94 to 2004-05) and this was especially so for those working in the professional and administrative categories. The Government of India's Pay Commissions contributed not just to

higher government and public sector wages but also had an impact on wages in the private sector, particularly in the upper levels of wages¹³⁸.

Currently, the Wage Report notes that the lowest-skilled occupations fetch salaries that are only 60 per cent of the overall average earnings across all sectors. While medium-skilled jobs provide wages varying from 0.7 to 1.8 times the average earnings, high-skilled occupations receive wages 1.9 to 4.3 times higher than the average¹³⁸.

However, the increase in average daily wages has not been the same for men and women. It can also be concluded after the analysis that even in the highest ranks of labour (legislators, senior officials and managers) the participation of women in India has remained low and that here the wage gap is the smallest among men and women. In 2011-12, women in this category earned 92 per cent of what the men earned. Among professional workers, women earned only 75 per cent of men's wages in 2011-12¹³⁸.

In low-skilled jobs, women receive only 69 per cent of men's average daily wages. This occupational segregation seems to have intensified during the period 1983 to 2011-12. Further, there is a higher propensity for those from scheduled castes and tribes to be stuck in occupations with lower wages¹³⁸.

Despite some reduction of the gender wage gap in most occupational categories over time, the difference between men's and women's average daily wage is still quite large as highlighted in the report. Also, women workers have a lower probability of getting social security benefits than their male counterparts as most of them are concentrated in low-skilled occupations¹³⁸.

Table 6.1 Urban and Rural Work Participation Rate: Male and Female

Round	Female WPR		Male WPR	
	Urban	Rural	Urban	Rural
43rd	15.2	32.3	50.6	53.9
50th	15.5	32.8	52.1	55.3
55th	13.9	29.9	51.8	53.1
61st	16.6	32.7	54.9	54.6
66th	13.8	26.1	54.3	54.7
68th	14.7	24.8	54.6	54.3

Source: Employment and Unemployment surveys of NSS 2011-12

(iii) Skill Gaps & Unemployment rates

The skill gap between men and women and advantaged and disadvantaged communities is very high. It is evident in enrolment rates in higher education and professional courses, including technical education, accounting and finance, and in other management courses, with higher participation by men than by women and also by general categories than by those from SC, ST and minority Muslim communities.

The percentage of those from disadvantaged communities who come under the employment-prepared category is very low. Indeed, the overall youth population of India prepared with market skills is one of the lowest in the world. Similarly, the employment rate in organised sectors by youth from SC, ST and Muslim communities is lower than the general community youth average.

II. Policy benefits and disadvantages

Here we look at the situation of women in relation to the special measures and benefits provisioned for female workers in various industry settings. It looks at this in light of the affirmative actions mandated in government employment processes and also the voluntary affirmative action policies adopted by the private sector to pursue positive discrimination towards women and towards members of the communities described as disadvantaged in different state and central government lists.

The focus here, then, allowing for constraints of scope, is on the gender perspective. The methodology followed has been to obtain responses through informal question and answer interviews with industry leaders. It is to our utter dismay that our findings show that the current India Inc leadership misconstrue and misread supportive measures as hindrances to business growth and even hold strong biases against these communities, stretching nearly to their marginalisation. All efforts to strengthen the provisions further under these protective legislations are being interpreted with further discriminatory internal policies to further exclude these communities. If one looks at the recent

amendments to laws governing the benefits to women and disadvantaged workers through the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities Act) 1989, the Sexual Harassment At the Workplace (Prevention, Prohibition and Redressal) Act 2013 and others like the period of maternity leave which has now been increased to 26 weeks / six months and the provision of crèches for the early working mothers.

These equity measures provisioned to overcome disadvantages of women have not been welcomed by the Indian corporate sector, which has been resisting the implementation of these important equitable changes due to its discrimination towards women. The industry is not just unwelcoming but has been discouraging of women workers. This is adding another dimension of low employment of women in the current context.

The other dimension of the research has been on the challenges women face when returning back to work after their maternity leave. For this, we look at some of the findings of an Irish study 'How Companies Can Ensure Maternity Leave Doesn't Hurt Women's Careers' by David Collings, Yseult Freeny and Lisa van der Werff¹³⁹ and explores its relevance to the Indian context by speaking to men and women working in corporates in different parts of India.

Our study finds that while women find it tough when they go on maternity leave, they find it tougher still to join back after their maternity leave is over. In several companies, maternity leave is viewed as a major disruption in the senior leadership of the Industry. A few focused research studies on this aspect such as the one mentioned above has been that women's careers suffer when they get pregnant. After returning from the maternity leave, they get sidelined to less responsible roles. They experienced a significant decline in positive emotions once they return to work, reflecting the lived challenges of this transition. Their colleagues held unconscious biases against the returning women, and find that professional relationships also deteriorated after returning from leave. Another major gap with

the Indian industry has been the preparedness for the basic facilities that they are supposed to provide to these returning lactating and young mothers as mandated in the law discussed above. A 2015 dipstick survey¹⁴⁰ carried out by Partners in Change and Corporate Responsibility Watch found that while 19 out of 20 companies had measures in place for pregnant women and lactating mothers, only 15 per cent companies had maternity leave of more than six months and which could be availed of in a flexible manner. A majority of 60 per cent offered their employees 3-4 months leave. Additionally, only eight of the 20 companies had crèche facility.

Not all is lost though; one does hear positive stories too, from women who worked in companies where managers recognised maternity leave as no more than a brief interlude in a person's long-term career. In those supportive company cultures, returning women reported a renewed energy, supportive environment and focus for their work, a feeling of being valued, and an enhancement of professional relationships.

Takeaways of the research for Indian Industry

It is now a trend among India Inc to spend good amounts on programs and budget well the induction and orientation of the newcomers and fresh graduate recruits. It has also been found in many studies that almost none of the industries

Current evidence points to 26 weeks as optimal for some outcomes for mothers and their babies. However, policies that allow more than six months for mothers only, and do not permit the same to fathers, appear to exacerbate the gender divide in terms of career progression¹³⁹. As India does not have mandated paid leave for new fathers, India Inc stares gender discrimination in the face.

III. Rights-based approach: Not just leave but entitlement

We vetted key changes suggested by the study (Collings et al) that can significantly improve the experience of these mothers and lead to better outcomes for parents and organisations alike. Most of the changes we propose can be implemented without significant cost. A key point of departure is to reflect on the corporate culture around maternity and paternity leave and to educate managers about how they can best work with returning mothers to ensure a smooth transition, with a focus on open conversations around their preferences.

and companies, pay the same amount of attention for reintegrating employees going for their maternity leave. Our informal interview suggests a few additions to the points from the study by Collings et al.. These are listed below.

Recommendations for Industry based on various studies

- Organisational preparedness with policies, structures and infrastructure, mandated under various statutory provisions should be invested in.
- Position maternity leave as a brief interlude, rather than as a major disruption. Equitable organisational HR policies can focus on outputs over a larger time frame.
- “How the return is handled” is far more important than typically the actual length of leave. Phased returns could be offered, during which the employee works from home, before making a gradual return.
- Design and set up support programs for returning employees, which includes crèche support and mentor support.
- Design and create an open dialogue with returning women. This should begin before maternity leave and include how to approach this special leave. Make specific provision for handovers at the start and the end of the leave.
- Formulate policies that allow flexibility of changes to their work schedule¹⁴¹.

Conclusions

This paper shows that most of the improvements have flowed to the top of the social pyramid while those at the bottom have been left out. What has enabled countries to embark on a path of higher growth has been the increasing rates of women's participation. Data from NIPCCD (2010) also corroborates that a country's economic development crucially depends upon the participation rates of its women as they constitute around 50 per cent of its human resources. And, because among other things, women's employment is crucial for raising their living standards and well-being. In developing countries like India though, women's participation in the workforce has been much lower as compared to men. The added downside to this is that the lack of participation in the formal workforce also determines their social status¹⁴².

The wage and employment inequalities do not affect the wellbeing of only women but also

children and families at large. It is this aspect that needs greater research attention for proper evidence building on the larger multiple effects on various other dependents.

It's time that the existing development paradigm is challenged and that economic reforms are complemented by social reforms (of inclusion, equality and integrational approaches). In fact, it's not only by opening the economy but by including every section, especially the disadvantaged, that the required impetus can be provided to slogans like '*Sab ka Saath, Sab ka Vikas*' (With All, Development for All). It is imperative that all sections of society must grow with special measures being provided for the inclusion of the excluded into mainstream development and growth processes in order to realise India's true potential.

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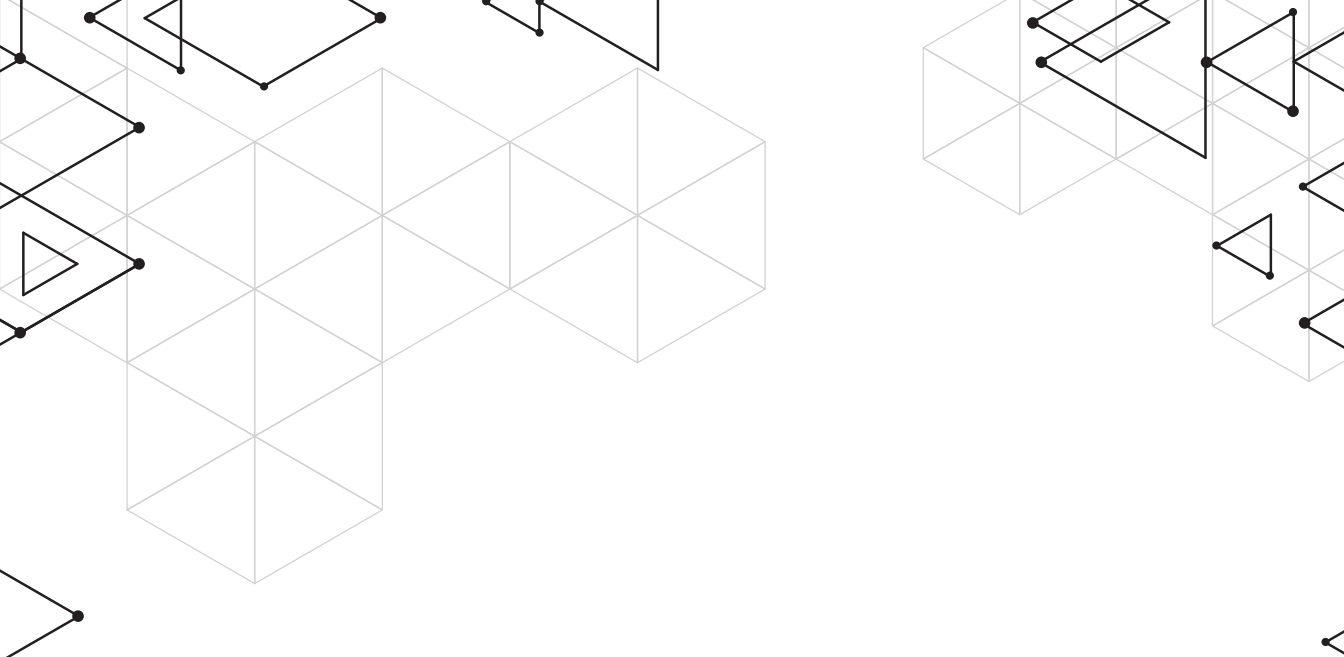
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Part 4

Mixed Bag: Lessons For Responsible Business

Chapter 7:

Indian Media: A Heady Cocktail of Paisa, Politics and Power

- Joyjeet Das¹⁴³

‘Whoever controls the media, the images, controls the culture’, said Allen Ginsberg. And that ‘culture’ can encompass our being: our living, thinking, choices; our politics.

Increasingly, the media – what we read, see and hear – is turning into a mishmash of things: A song here, a can of fizzy drink there, and a heavy dose of melodrama almost everywhere. And in the middle of all this, news fights for its space. No wonder then that it seems that some journalists bank more on their lungs than their professional acumen. They must match the melodrama, after all.

If you pause to think, you will be forced to wonder how journalism is holding its own in the melee. But, is it really holding its own? It becomes difficult to tell in this era of ‘infotainment’. There

is no doubt that the reach of the news media is increasing: despite predictions to the contrary and rising costs, newspapers have been adding readers and expanding their reach; news channels have mushroomed – a phenomenon that is now being seen on the internet with the websites dealing in news.

The ‘consumer’ of ‘content’ is now spoilt for choice. But what about quality? Is the reader / viewer being served information with objectivity, with all angles covered? It is hard to tell. With rising corporate stakes, it is only getting harder to tell.

The ‘business’ of journalism

First things first: journalism is an expensive proposition, apart from being risky. The morning newspaper that you get for Rs 5 can cost about Rs 25-30 to print. Producing and broadcasting news on the TV is a matter of crores of rupees. Yet there are so many players in the Indian news sector. Judging by the clout, most of them are organised business houses, several listed publicly but many others not. Nothing surprising in that perhaps, considering the global trend. But the fact is that the biggest mastheads are not about committed journalism alone. They are a tapestry of corporate decision making, about profits and losses, the interests of investors and advertisers; and, perhaps, also about the powers that be.

The situation assumes more importance because, of late, several senior journalists have complained about the lack of a free hand to work¹⁴⁴. Earlier, there were allegations of governments using their advertisements to stymie criticism¹⁴⁵. There have also been accusations of the news media being

more-than-willing to tailor and tweak its news for the right price¹⁴⁶.

Their corporate structures have also not been the best examples of transparency. All this calls for a hard look into different aspects of the Indian news media – one of the most influential in the world, going by its sheer reach.

Mapping the consumers – reach of Indian Newspapers

India’s 1.3 billion-plus population is an important factor in understanding the media metric. It’s just a matter of time when the country pips China to be the most populated in the world. For journalists, it is a challenge to cover this vast number and to ensure dissemination of the information it collects. For the corporates, however, it comes as an opportunity – more heads to influence and more people to sell to. In effect, more profit to make. So when journalism becomes

increasingly dependent on the corporate structure, it is but natural to be cautious.

If one looks at the demand side, the temptation of India Inc is understandable. The latest Indian Readership Survey (IRS)¹⁴⁷, claimed to be the “world’s largest continuous study”, projects a decisive trend of upward mobility among India’s households.

It lists:

- More people are opting for (more expensive) English-medium education for their children
- Most states have above 90 per cent electrification
- Nine out of ten households own a mobile phone now
- The number of homes with air-conditioners, washing machine, refrigerators, two-wheelers, colour television sets, gas stoves, ceiling fans, even agricultural land have all increased between 2014 and 2017

Why is a readership survey interested in such matrices? To demonstrate how big a market it is out there and what kind of a clout the Indian media holds on that market: the survey pegs the population of Indians above the age of 12 at just over a billion. And according to it, 39 per cent of that population – around 407 million – has read a newspaper at least once in the last one month (i.e. November 2017). The windfall is bigger for the electronic media – three out of four said they watched TV in the same period. Readership of online editions also rose – up to a quarter in the toniest parts of the country.

The reach of the media in such a market becomes extraordinary: Dainik Jagran, which tops the IRS chart, was found to have a readership of 70 million. To put it into perspective, only 19 countries have a population larger than that.

Together, the top 20 mastheads in the survey notched up a readership of 433 million – more than the number of people in the United States.

The Audit Bureau of Circulation (ABC) data backs these figures up. For July-December 2017,

Dainik Jagran and Dainik Bhaskar sold more than 4 million copies on an average. There were only three newspapers in the world – the Yomiuri Shimbun, the Asahi Shimbun (both from Japan) and the USA Today – ahead of these two in 2016, according to the World Press Trends report by World Association of Newspapers and News Publishers¹⁴⁸.

In fact, India has led total circulation figures from the start of this decade (330 million a day in 2011), displacing China. Seven of top 20 titles in the 2016 list were from India. Considering increased circulations, that number might be more now.

The top 20 newspapers in India totaled a circulation of about 36 million. Here, it needs to be kept in mind that every copy circulated – i.e. that is bought at the cover price – is generally accessed by multiple readers. That is why there is a difference in the readership and circulation figures released by IRS and ABC.

Considering that the total number of copies certified by ABC stood at 53.7 million, saying the top 20 had a lion’s share of the pie would not be an overstatement.

Television viewership and the rat race for eyeballs

Impressive as they might be, these numbers actually start to pale when you compare them with viewership of television news channels. According to the latest data by Broadcast Audience Research Council of India (BARC), Aaj Tak, the most popular of them all, alone recorded 118.7 million impressions in one week (15-21 September 2018). The top five Hindi news channels would add up to about four times that number.

While other news channels in other languages could not match the clout of Hindi, the top ones in Telugu and Tamil each still managed about half the viewership of their heartland counterpart though English lagged behind.

Impressive? Here’s the twist in the tale: When it comes to overall viewership, none of them figured in the top 10 list of television channels, which includes all types of programming. In fact, at No.10, Sony Entertainment Television had

nearly 595 million impressions – more than five times that of Aaj Tak. Sun TV led the pack with a staggering 1 billion.

What this means is that news channels are that much on a backfoot when it comes to seeking advertisements. And like it or not, the ads are what keeps the wheels of the news media running.

Consider this: Jagran Prakashan Ltd, whose Dainik Jagran topped both the circulation as well as the readership charts, reported a revenue of Rs 1,686.6 cr from advertisements in the 2016-17 financial year. From circulation, however, its revenue was only Rs 432.5 cr – way less than the company's operating profit of Rs 639.5 cr. Clearly, the cover price – Jagran typically sells for Rs 5 a paper – was just not enough. The circulation really pales in comparison with the company's total expenses of Rs 1,475 crore.

The story remains the same with Jagran's arch-competitor DB Corp Ltd, the publisher of Dainik Bhaskar: Of a total revenue of Rs 2,275 cr, advertisements brought in 1,597 cr. Smaller players would get a smaller slice of the ad-pie but the model holds considering that no newspaper can price itself at operating-cost levels.

In case a conflict of interest arises regarding the interests of advertisers and objective reporting what is the process of resolution? There is hardly any information in the public domain regarding this. Considering reports of elected governments, which have been important sources of advertisement revenue for the media, turning the cash tap off to make the Fourth Estate fall in line, a worrying premise emerges.

For those in the electronic media, the question of a cover price would hardly even arise, putting them almost completely exposed to the advertising market. TV Today Network, which runs only news channels unlike other peers that have a bouquet of products like entertainment and sports channels, posted a profit of Rs 107.9 cr for the same year, compared with Jagran's Rs 316.1 cr. Though its expenses were also less than the publisher's, it must be kept in mind that electronic ventures can involve big-ticket costs initially.

While these numbers were easily available because they are from publicly listed companies, the same is not the case for many other media houses that are privately held. There, however, is no reason to believe that their revenue and expenditure patterns will be starkly different. Bennet Coleman and Co Ltd (BCCL), which runs market leaders the Times of India and the Economic Times, is not listed on any stock exchange. Media watchdog the Hoot pegged BCCL's consolidate revenue at Rs 9,976 cr and consolidate profit at Rs 1,292 cr for 2015-16 – a year in which the Financial Times, London, called it India's largest media conglomerate¹⁴⁹.

Those numbers outshone the performances of even diversified TV companies like Zee Entertainment Network and Sun TV Network, something that the Hoot report put down to “diversification into a variety of non-print media and ploughing its surplus cash into many venture-fund like investment bets¹⁵⁰.”

The company, among others, has been known to enter into corporate holdings and vice-versa, triggering questions about their effects on the journalism coming out of its stable. For example, many many times, such media houses have taken positions, especially on matters of economic importance – openly favouring “liberalisation”, “globalisation”, “divestment” of government assets, etc. One wonders if they were all editorial calls.

Like Bennet, Amar Ujala Publications Ltd, Daily Thanthi Pvt Ltd, Lokmat Media Pvt Ltd, Rajasthan Patrika Pvt Ltd (which also holds Patrika), Malayala Manorama Co Ltd, Ramoji Group (Eenadu), Neutral Publishing House Ltd (Prabhat Khabar) – all in the top 10 of the IRS table – and countless others were privately held companies. On the electronic side, the same was the case for ABP Group (which also runs the Ananda Bazar Patrika), Independent News Services Pvt Ltd (India TV), ARG Outlier Media Asianet News Pvt Ltd (Republic TV) and others.

The ‘politics’ of journalism

With Republic TV, we come to an interesting junction. Arnab Goswami, the leading English news anchor of the day, whom some considered to be India’s answer to the ‘Fox style of journalism’, stepped out of Times Now, the channel that made him (and vice-versa?). There were rumours about all not being well between him and the management there and about him launching his own channel – nothing unusual there, but who would fund the new venture?

That was in 2017. Enter Rajeew Chandrasekhar, renowned businessman who even headed the Federation of Indian Chamber of Commerce and Industry (FICCI) at one point. It could have been just another business area for Chandrasekhar had his political leanings not been pronounced by the last general elections. Expectedly, the channel started with more than a leaning towards the right, with Goswami almost outdoing his previous avatar.

Earlier this year, Chandrasekhar, already a Rajya Sabha member, joined the Bharatiya Janata Party and now heads the National Democratic Alliance’s Kerala chapter. Goswami, meanwhile, swears by the neutrality of his channel.

Welcome to the new mix of press, power and *paisa* – a heady cocktail.

Chandrasekhar and the Republic TV are not the only examples. Across the country, several politicians have been involved in the media. To be fair, the Indian politician’s foray into journalism was a part of the independence movement, too. Gopal Krishna Gokhale did it, Mahatma Gandhi did it as did several others. For them, it was a tool for propaganda and they were upfront about it. Several party organs (Shiv Sena’s Saamna, the Communist Party of India (Marxist)’s Deshabhimani, etc) continue that tradition.

But several of the current examples are unlike those. These are regular media houses where influential politicians or their kin are involved.

Often, they are super rich, as is increasingly the case with the Indian *netas*. The board of Sakal, the second-biggest Marathi daily, is studded with relatives of Nationalist Congress Party supremo and Maratha strongman Sharad Pawar – his brother Pratap Pawar, daughter Supriya Sule, nephew Abhijit Pawar.

The editor-in-chief of Lokmat, which outperforms Sakal, is Congress Rajya Sabha member Vijay Darda, whose name has figured in irregularities regarding coal block allocations.

Chennai-based conglomerate the Sun Group, which controls influential print and electronic media products in Tamil, Telugu, Malayalam and Kannada, is controlled by Kalanithi Maran, whose father Murasoli Maran and brother Dayanithi were both Union ministers and senior DMK leaders.

Of late, the journalistic fraternity in the Capital has been abuzz about a certain senior Congress leader trying to back a new media venture in tandem with a popular face. Then there are numerous instances of former editors joining political parties, even becoming ministers or entering Rajya Sabha with their backing. There is a perceived interest in media which seems to increase among our politicians whilst, simultaneously, they add more and more crores to their kitties.

At the same time, the sector has also drawn the interest of business barons who have not been traditional investors in media. The biggest example, of course, is Mukesh Ambani – the richest Asian and the chairman and managing director of Reliance Industries, which controls Network 18 and the ETV Network that have a wide footprint across several languages in the electronic and new media.

Shrinking space for independent media

The muscle and clout of the political and business classes and the over-dependence on advertisements have arguably left little elbow room for small but dedicated media houses, especially those run by journalists or editors themselves. Add to that intimidation, even murder (remember Gauri Lankesh?), and you have a gloomy situation for independent media.

Of late, a lot of hope has been riding on the new media – the web, which requires relatively less investment. The optimism stemmed from the way the western media embraced Internet (read: survival strategy). There have been several promising starts in the last half decade in this space, some led by well-known editors, with others being the enterprise of greenhorns.

It's not all smooth-sailing though. A few big corporations, who are important channels for those wanting to get noticed, largely control the Internet. To succeed there is increasingly becoming a costly proposition even as the wave of fake news is threatening to turn into a tsunami.

E-commerce has also shown a distinct tendency to favour the first mover – be it Uber (ride-hailing app), AirBNB (letting out) or Zomato (restaurant directory). There aren't enough reasons to believe the same won't happen in the news space.

On top of this, the 'legacy' media – existing players – has moved in with all its might to exploit dotcom. Some have been around for nearly two decades now and are clearly ripping first-mover advantage. BCCL's umbrella site www.indiatimes.com has consistently been the top media site on the charts (No. 19 on SimilarWeb; #11 on Alexa), followed by similar entities such as NDTV, TimesofIndia.com, Indianexpress.com, Thehindu.com and Hindustantimes.com. Pure-play web media like the Scroll, the Wire or the Quint lag behind them despite generating quite a buzz in recent years.

Already there are signs of the so-called legacy media grouping up: In September, 10 big traditional media houses joined hands to form the Digital News Publishers Association, raising eyebrows among the web-only tribe¹⁵¹.

In such a scenario, what is the way forward for independent media? Nobody seems to have a clear answer to that. But in the face of growing corporatisation of media, increasing interests shown by career politicians and their kin and raising stakes, it is imperative to keep a close watch.

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Chapter 8:

Access to Pharmaceuticals: State-Industry-Market¹⁵²

- S. Srinivasan and Malini Aisola¹⁵³

At the turn of Independence in 1947, India's pharmaceutical production was worth Rs 10 crore. By 1952, the total turnover of pharmaceutical companies, foreign and Indian, was Rs 35 crore, of which 62 per cent (Rs 21 crore) was of Indian companies. This included Rs 1.16 crore in the public sector. In 1970, the situation was reversed. MNCs had 68 per cent of the pharma market. Of the leading 50 pharmaceutical companies in 1971, 33 were foreign. The total formulations market in India in 1972 was Rs 360 crore. There was very little bulk drug (or active pharmaceutical ingredient (API)) production in India by foreign pharma companies despite the Government's exhortations for self-reliance and saving foreign exchange. The goal of MNCs in India was minimum risk and maximum profit¹⁵⁴.

The Patents Act 1970, passed in 1972, replacing the 1911 Patents and Designs Act, changed the entire scenario. The new Act by excluding product patents for medicines, initiated a dream run for India's local pharmaceutical industry. As a result several Indian entrepreneurs and business groups started making drug intermediates and bulk drugs. By 1999-2000, most of the bulk drugs India needed were made in India¹⁵⁵ as also the machinery and the technology that were needed. Scientists at government institutions, the National Chemical Laboratory (NCL), Pune, and the Regional Research Laboratory (RRL, renamed Indian Institute of Chemical Technology, IICT), Hyderabad, played stellar roles in this saga of bulk drug revolution by synthesizing and discovering more efficient ways of making many of the bulk drugs¹⁵⁶. The domestic formulation industry grew by leaps and bounds to Rs 18,354 crore in 2000-01 which would increase to almost Rs 90,000 crore by 2015-16.

India had an enviable spread of public sector enterprises in pharmaceuticals until about 1970. Public sector pharmaceutical plants were set up to

control the "commanding heights" of the Indian economy. The Hindustan Antibiotics Limited (HAL) was set up in 1954, itself inspired by the experience of the Haffkine Institute, Bombay, and some of its leading scientists. HAL and the Indian Drugs and Pharmaceuticals Ltd (IDPL) established in 1961, would do commendable work in laying the foundations of a technological base for making APIs and formulations with the then goals of self-reliance and import substitution in mind. But after the post-Patents Act 1970 boom of the pharmaceutical industry, and the gradual whittling down of public sector undertakings by indifferent governments, IDPL stagnated and was declared a sick industry – a case under the Board of Industrial and Financial Reconstruction (BIFR). A similar fate was shared by other PSUs like HAL, Bengal Chemicals, et al¹⁵⁷. Many technocrats from IDPL moved on to chart their future in private entrepreneurship¹⁵⁸.

By the turn of the millennium India was recognized as the "pharmacy for the third world". It started supplying many of the critical medicines for HIV/AIDs to Africa and Brazil. Between 1972 and 2005, any newly patented medicine launched in the West, would be manufactured in India within 3-4 years at a fraction of the price (say, less than 10 per cent of the innovator's price)¹⁵⁹.

By 1995 however this status of India had eroded for a number of reasons, chiefly because of the predatory moves of global Big Pharma in introducing new definitions, norms and rules of behavior for international trade in pharmaceuticals. Consequently, the 'reverse engineering' of Western pharmaceutical innovations being practiced in India took the flavor of a pejorative. With words like 'property' and 'rights' it even acquired connotations of theft, piracy and violation of inalienable and incontrovertible 'rights' bestowed on the original innovators¹⁶⁰.

Underlying the WTO/TRIPS and the product patent only regime, was/is a politics of extraordinary self-interest of Big Pharma MNCs and their governments. Big Pharma cartelized, but only to have the rug pulled from under their feet in South Africa in 2000 when Cipla cited India-made AIDs drugs prices that were a fraction of those of Western pharma cartels¹⁶¹. Under massive international pressure from civil society, the cartel of 39 pharmaceutical companies was forced to withdraw their case against the South African Government over a law to improve access to antiretrovirals. Big Pharma struck back, soon enough, however, riding on the fears and disinformation they had generated, armed now with overpriced biologicals.

The damage control, post-2005 – in the aftermath of disallowing reverse engineering through process patents – was initiated by using the flexibilities wrought and won in the final version of TRIPS, and the subsequent reaffirmation in the Doha Declaration of 2001. These flexibilities,¹⁶² enshrined now in the 2005 amendments of the Patents Act, included, famously, Section 3(d) that seeks to prevent ever-greening and patent periods beyond 20 years, by raising the standards of patentability.

Part of global Big Pharma strategy now was to make it difficult for Indian pharmaceutical companies to enter and survive in EU and American markets. However, Indian companies have mostly overcome these entry barriers, defying sceptics, even as the attempts at delegitimizing the quality and efficacy of Indian pharmaceutical products in the post-2005 era continue.

Of late however, many Indian pharma companies, including entities like Cipla and Natco that have been contesting the patent worthiness of several products of Western companies in Indian courts and with some success, have become inclined to partnerships, albeit unequal, with Western pharmaceutical companies. Many have become willing partners in the voluntary licence deal of Gilead for its costly Hepatitis C product Sovaldi (sofosbuvir). We discuss more on this later.

Post 1972, as the “animal spirits” of private entrepreneurship were unleashed in the pharma industry, the scenario especially for the poor in India, has been a dismal case of poverty amidst plenty. There has been no consistent grand political vision of health services for all, except for the occasional rhetoric at the time of signing progressive international covenants related to health.

By the turn of the millennium, except for a few states like Tamil Nadu and Kerala, health care of the majority of the populace was left in the hands of the market. The market here meant the poorly regulated private sector consisting of private practitioners and private hospitals mainly let the bottom line drive the content and quality of their curative practice. For most State Governments and even the Central Government, health was/is not a political priority. The logic and the brouhaha of expanding horizons of pharmaceutical capital are too much of an alluring narrative for industry as well as Government. Price control of a broad range of medicines that came about in 1979 during the Janata Government has been gradually whittled down over the next 15 years.

Overpriced medicines are a fact of life in India. As we see, a number of historical factors, changing political economic climate, the state’s withdrawal from the social sector, especially health, in the overarching context of the rapacity of global pharmaceutical industry have contributed to whittling down access to affordable medicines in India.

We elaborate in this chapter three of the cited factors: price regulation and the proliferation of Fixed Dose Combinations (FDCs), pricing of patented drugs and the interplay of the state, industry and market therein.

1. Price Control, Affordability, Availability and Access

State Intervention and Market Failure: The argument for price regulation/control is the persistence of market failure. The pharmaceutical market is riddled with market failure – the same medicine sells at a wide range of prices, where price has no relation to the cost of production, and the market is distorted by unethical drug promotion. Stiglitz (1989) and Akerlof (1970)¹⁶³ have identified the existence of information asymmetries as a cause of market failure.

The doctor-patient-pharmaceutical industry interface is rife with asymmetries. The patient has no power and knowledge to make a decision on what medicine s/he buys as that is decided by the prescriber who, in turn, is influenced by the ‘choices’ offered by the pharmaceutical industry and its unethical drug promotion. Therefore, the higher priced brands prevail. Each company claims superiority of its brand of the same medicine promoting the general notion that the higher priced brands are of better quality¹⁶⁴.

Competition in the classical sense (of many producers entering the field resulting in reduced price of a drug) does not usually occur in the Indian pharmaceutical market. When a generic enters the market for the first time, there is competition and lowering of prices, of the API as well as the formulation, with respect to the price of the innovator. But after some time when several producers start making the same formulation, the generic formulation is sold at a wide range of prices, positioned as it were to the varying purchasing powers of its buyers. However, because the consumer has little choice, the bulk of the market is skewed towards the higher priced brands. Therefore, the principle that “many producers will bring down the price of the product” does not work. There is competition of sorts, but it does not work in favour of consumers because they are led to believe, despite actual evidence to the contrary, that the lower the price, the lesser the efficacy of the medicine.

In India, with universal health coverage still a distant dream, electoral compulsions of

market failure in medicines has resulted in the pharmaceutical market – at least some parts of it – being brought under price regulation, even if in desultory way.

Contrary Pulls of Price Control: The contentious discourse around price control of medicines in India that began in the 1960s (circa the war with China) has rolled into contemporary neo-liberal times, when the market is considered a better arbiter of prices. Today there is even a semantic hesitation to call it a price control policy – as against price regulation. The former smacks of the ‘inefficient’ socialist times and the latter is considered tempering wisely unbridled *laissez faire* in a politically sensitive arena like health care, even as we let the markets play it out.

The policy instruments for price control, the National Pharmaceutical Pricing Policy (NPPP) 2012 and the Drug Price Control Order (DPCO) 2013, have several problems. As we show below, these are at best tokenistic in their attempts at price regulation.

The actual price control, or regulation, always hovers around two factors that see a great deal of lobbying on the part of pharma companies and ‘rent collection’ on the part of the ruling elite: a) the range of drugs to be put under price control and therefore, the methodology for selecting these drugs and b) the actual formula to determine the ceiling price beyond which the formulation cannot be sold. As a result of successful lobbying over the years, the scope of price control had been successfully restricted to 74 drugs by 1995 from a high of 347 drugs in 1979¹⁶⁵.

Any ‘formula’ or ‘methodology’ based on market considerations (like market share, number of producers and therefore, presence/absence of competition) generally results in an unsatisfactory, if not absurd, list of drugs to be put under price control. Such was the case with the DPCO 1995 and the draft Pharmaceutical Pricing Policy of 2002. The latter was stayed by the Karnataka High Court and the Supreme Court. The DPCO

1995 had only 74 drugs under price control, half of which were drugs rarely in use, an eventuality resulting from the criteria adopted for selecting these drugs.

Likewise, the formula adopted for deciding ceiling prices is important. The usual norm till the onset of DPCO 2013 was cost-based pricing, that is, cost of ingredients, plus conversion costs plus margin (in the case of DPCO 1995, the margin called Maximum Allowable Post-manufacturing Expenditure (MAPE) was 100 per cent). The DPCO 2013 relied on the simple average, of price to retailer of brands with 1 percent market share, plus retailer's commission of 16 percent, as the ceiling price. The choice of the simple average formula defies logic and has been critiqued by several commentators including the authors¹⁶⁶. For instance, among statistical indices that measure spread, why simple average and not mode or median, or weighted average of the lowest 3 prices?

The current policy, NPPP 2012 and DPCO 2013, were announced hastily after the judicial reprimand in the decade old and still ongoing PIL (AIDAN and Ors Vs Union of India and Ors in WP (Civil) 423/2003). The run up to DPCO 2013 saw tremendous lobbying and resulted in modifications amounting to a 'balancing act' in the policy with the following features laden with escape hatches:

- All 348 drugs in National List of Essential Medicines (NLEM) 2011, in the specified strengths and presentations, were put under price control. (At the time of going to press, a revised NLEM (hereafter NLEM-2015) comprising around 380 medicines has been announced in December 2015.) NLEM-2015 will be the new basket of medicines for price control. In the new list, 70 medicines from the older list have been deleted and replaced with 106 other medicines. Our comments below and elsewhere in the chapter are applicable to both NLEM lists unless indicated otherwise.)
- The ceiling price is the simple average price of price to retailer of brands with more than 1 per cent market share plus 16 per cent

retailer's trade commission.

- Only 348 drugs in their specified strengths and presentations (totaling about 620) are under price control as specified in the NLEM-2011. This means the following categories are excluded from price control:
 - Strengths, dosage forms and presentations of the 348 essential drugs not mentioned in the NLEM-2011 (e.g. Paracetamol 650 mg and 1000 mg were excluded from price control as only paracetamol 500 mg tab was specified in the NLEM-2011. Paracetamol 650 mg tab is included in the recently announced NLEM-2015. In a few cases, NLEM-2015 mentions a continuous range of strengths, for example, for migraine, Acetylsalicylic acid, 300 to 500 mg.)
 - Chemical analogues of medicines listed in the NLEM-2011 are generally excluded. For example, only Atorvastatin is under price control because it is the only statin mentioned in the NLEM-2011 but all other statins, like Rosuvastatin, Simvastatin, etc. are excluded.
 - All existing combinations, of NLEM plus NLEM, NLEM plus non-NLEM, and non-NLEM plus non-NLEM medicines, are excluded.

NLEM-2015 perpetuates, with respect to price control, the problems of NLEM-2011: it leaves out all isomers, derivatives, chemical analogs, limits to specific dosages, etc. This problem arises because the NLEMs, neither 2011 nor 2015, were drafted with price control as the major focus. In fact there needs to be a separate expanded list of essential and lifesaving drugs that remedies the problems of relying on an NLEM for price control.

Many useful drugs for asthma – for example, Monteleukast – are excluded from price control. For diabetes, only Glibenclamide, Metformin and Insulin (of a certain kind only) were under price control as only these were mentioned in NLEM-2011. In the NLEM-2015 however Glibenclamide has been replaced by the more useful Glimepiride but other overpriced and useful diabetics like say

Acarbose or Gliptins continue to be excluded¹⁶⁷. Further, highly expensive drugs like Meropenem, Imipenem, Cilastatin, Tigecycline, Colistin, Abciximab, Tirofiban, and Eptifibatide are out of the NLEM-2015 and hence out of price regulation.

According to Government's affidavit filed in the Supreme Court during November 2013, only 18 per cent (Rs 13,097 crore) of the then domestic market of Rs 71,246 crore was under price control (using IMS TSA December 2012 MAT data). This means that a major chunk, of the pharma market, viz., 82 per cent, has slipped out of the DPCO-2013 purview.

According to a recent estimate (co-author Malini Aisola with Thomas Zacharias, August 2015, unpublished), about 86.6 per cent (Rs 72,730 crore) of the market is out of price control (PharmaTrac MAT January 2015 data). The therapeutic category breakdown is as follows: anti-diabetes (93 per cent), antimalarials (75 per cent), anti-infectives (69 per cent), anti-neoplastics (80 per cent), blood-related (86 per cent), cardiac (80 per cent), derma (95 per cent), gastro intestinal (90 per cent), hormones (65 per cent), neuro/CNS (89 per cent), ophthal/otologicals (95 per cent), pain/analgesics (93 per cent), respiratory (96 per cent), sex stimulants/rejuvenators (100 per cent), stomatologicals (100 per cent), urology (96 per cent), vaccines (71 per cent), vitamins/minerals/nutrients (99 per cent), others (99 per cent). Of the formulations excluded from price control, combinations account for more than 48 per cent

(around Rs 35,413 crore). This corresponds to roughly 42 per cent of the total pharmaceutical market sales (Rs. 84,017 crore), (MAT January 2015).

How can a policy that results in more than 86 per cent of the market falling outside price control basket be considered a policy controlling drug prices? Although it apparently meets the directives of the Supreme Court to formulate a price control policy for essential and life saving drugs, it does not comply with the Supreme Court order¹⁶⁸ stating that the formula for bringing medicines under price control should not be changed. It is a policy that disproportionately reflects prices of brands with a perceived and inflated brand value rather than the actual cost of production. It is a policy which, as we see from Tables 8.1-8.3, legitimizes super profits to the tune of 2000-4000 per cent even after price control. These high profits are used in turn to fuel, and are fuelled by, questionable marketing practices in the name of brand promotion.

We present some tabular data below to illustrate some of the averments on overpricing we have made previously. Table 8.1 shows the range of prices used in calculating ceiling prices. The lower prices are closer to the cost of production. If anything, it shows the irrelevance of the cost of the production in calculating the ceiling price. This fact more clearly shown in Table 8.2 comparing col.7 and col. 9.

Table 8.1: Range of Prices to Retailer (PTR) Used for Calculating Simple Average Price (in INR)

Name of drug	Lowest price with 1 per cent market share	Highest price with 1 per cent market share	Simple average price (Without 16 per cent retailer markup)*
Acyclovir 200 mg tabs per 10	32.70	148.10	62.90
Atenolol 100 mg tabs per 10	3.00	42.30	32.10
Atorvastatin 5 mg tabs per 10	13.50	52.50	32.90
Azithromycin 500 mg tabs per 10	41.6	393.3	171.2
Losartan 50 mg tabs per 10	9.20	56	37.10

Source: NPPA Working Sheets (2013). * Ceiling price is the simple average of price to retailer of brands with 1 per cent market share plus retailer's commission of 16 per cent (NPPA Working Sheets 2013).

Table 8.2: Conversion or Manufacturing Costs as Per cent of Cost Price; and Cost Price Compared to DPCO-2013 Ceiling Price

1	2	3	4	5	6	7	8	9
Name	Raw Material price per kg	No of tablets per kg of raw material	Cost of API per 10 tabs	Total raw material cost per 101 tabs	Conversion or Mfg costs per 10 tabs	Total cost per 10 tabs	Conv. or Mfg cost as per cent of total cost	DPCO-2013 ceiling price as of Aug 2015, per 10
Albendazole tabs 400 mg	1,337	2,500	5.35	5.99	2.91	8.90	33	103
Atorvastatin tabs 10 mg	16,887	89,000	1.90	2.07	1.22	3.29	37	67.40
Atenolol 50 mg tabs	1,231	20,000	0.62	0.72	0.82	1.54	53	22.80
Amlodipine 5 mg	3,136	140,000	0.22	0.36	0.59	0.95	62	31.30
Cetirizine tablets 10 mg	3,499	100,000	0.35	0.45	0.70	1.15	61	19.90

Source: Authors. Based on data sourced from the in-house records of LOCOST (Low Cost Standard Therapeutics) with which S. Srinivasan is associated.

Note: Costs and Prices in INR.

Table 8.3: Comparison of DPCO-2013 and RMSC Rates (Price in INR)

1	2	3	4	5	6	7
No.	Name of drug, strength and use	Indication	Simple avg ceiling price as per DPCO- 2013 (valid as of August 2015)	RMSC 2015 procurement rates	DPCO-2013 ceiling price/ RMSC rate	DPCO-2013 ceiling price per cent greater than RMSC rate
1.	Imatinib tab - 400 mg, 10 tabs	Anti-cancer	2,962.7	29.0	102.2	10,116
2.	Amlodipine tab - 5 mg, 10 tabs	Antihypertensive	31.3	1.0	32.5	3,150
3.	Enalapril maleate tab - 5 mg, 10 tabs	Antihypertensive	32.7	1.2	28.4	2,739
4.	Atorvastatin tab - 10 mg, 10 tabs	Blood cholesterol lowering agent	67.4	2.5	27.0	2,596
5.	Cetirizine tab - 10 mg, 10 tabs	Antiallergic	19.9	0.8	26.2	2,522
6.	Alprazolam tab - 0.5 mg, 10 tabs	Sedative, sleep inducer	22.2	0.9	25.3	2,428

1	2	3	4	5	6	7
No.	Name of drug, strength and use	Indication	Simple avg ceiling price as per DPCO- 2013 (valid as of August 2015)	RMSC 2015 procurement rates	DPCO-2013 ceiling price/ RMSC rate	DPCO-2013 ceiling price per cent greater than RMSC rate
7.	Domperidone tab - 10 mg, 10 tabs	Antivomiting agent	24.9	1.1	22.7	2,174
8.	Diclofenac Sodium tab - 50 mg, 10 tabs	Painkiller	21.5	1.2	18.3	1,730
9.	Atenolol 50 mg for 14 tabs	Antihypertensive	31.92	1.7	19.2	1,817
10.	Olanzapine tab - 5 mg, 10 tabs	Antipsychotic	32	1.9	16.8	1,580

Source: Prices available at: <http://rmsc.health.rajasthan.gov.in/content/raj/medical/rajasthan-medical-services-corporation-ltd-en/home.html#> and <http://www.nppaindia.nic.in/>. Accessed on November 2017. Data analysis by Aisola and Zacharias (2015).

Table 8.2 shows that in the case of relatively low priced material, the cost of conversion is almost as much as the cost of the raw material. In the case of amlodipine, the raw material cost is less than the conversion cost. A comparison of the cost price (Col. 7) and DPCO-2013 ceiling price (Col. 9), columns shown in bold, shows that the ceiling price methodology legitimizes high margins, making price control an eyewash.

Table 8.3 compares the tender procurement rates of the Rajasthan Medical Services Corporation (RMSC) with the DPCO 2013 ceiling prices. A comparison with that of the Tamil Nadu Medical Services Corporation (TNMSC) reveals similar results of margins of 1000-3000 per cent and in the case of Imatinib (Table 8.3, Sr No 1), generic equivalent of Novartis' Glivec, it is 10,116 per cent! This is not to argue that medicines be sold in the retail market at the prices of the TNMSC/RMSC. Instead, based on the evidence there is room for advocating reasonable cost-based pricing plus sufficient margins so that the prices reflect the cost of production. The tender prices are merely a base and an index of comparative overpricing of the retail market prices of medicines.

To use a minimal list like NLEM for price control is a flawed idea. The basic purpose of minimalistic lists like NLEM is that Essential Medicines included in it should be available at

all times in various public health care facilities. Any essential list is a guide for use mainly for procurement in government health services - if the Government restricts its purchases and prescriptions to a limited essential drug list like the NLEM - which are available to about 20 per cent of the population. Even here, as studies and reports have shown the availability of essential medicines is poor¹⁶⁹. In rational medical practice, many medicines beyond the NLEM are used. For example, chemical analogues and therapeutic equivalents and life saving drugs depending on special needs for a patient are also used. If treatment were confined to only the drugs mentioned in the NLEMs 2011/2015, cure and management of chronic life-threatening problems like diabetes and asthma would become impossible for many patients.

The National Pharmaceutical Pricing Policy (NPPP) 2012 is a minimalistic interpretation by policy makers of the Supreme Court order to put all essential and life-saving drugs under price control. The DPCO 2013, in turn, has therefore, limited impact. Nevertheless if justice is to be done to the poorer sections of the population, a separate list for price control, larger than the NLEMs 2011/2015 needs to be formulated, supported by a free universal public health care system that matches the United Kingdom or Canada or the Scandinavian countries.

2. Fixed Dose Combinations and Access to Medicine

The large availability of irrational medicines – mostly in the form of Fixed Dose Combinations (FDCs) – comes in the way of patients receiving adequate and appropriate treatment. Initially not many in number, FDCs today are in several thousands, a large proportion having no therapeutic rationale.

What kind of FDCs should be approved? The WHO recommended guidelines for acceptability of FDCs are summarized here:

- Clinical documentation justifies the concomitant use of more than one drug.
- Therapeutic effect is greater than the sum of the effect of each.
- The cost of the combination product is less than the sum of individual products.
- Compliance is improved (that is, when two or more medicines are to be taken separately, as in the case of TB, the user tends to avoid one or two medicines after sometime. This can be avoided if all three medicines are combined into one).
- Sufficient drug ratios are provided to allow dosage adjustments satisfactory for the majority of the population.

FDCs that do not satisfy these guidelines should be considered irrational.

Proliferation of FDCs: Why has India's pharmaceutical industry been manufacturing and marketing FDCs – many of them irrational and harmful – for the last five decades? How, in the first place, did it get licenses for marketing and/or manufacturing these?

Part of the reason for the uncontrolled growth of FDCs is the pressure of competition and new products. Marketing heads of pharmaceutical companies in collaboration with their medical directors, invent combinations of two or more drugs, often launching them without a critical, scientific assessment of their therapeutic benefits and rationale. Moreover, before 1988 the Drugs and Cosmetics Act did not contain the legal

provisions relating to FDCs¹⁷⁰. Between January 1961 and November 2014, the number of FDCs approved by the CDSCO/DCGI was 1193¹⁷¹, not all of them rational.

Before September 1988, it was a free for all, and manufacturing and marketing of FDCs was not limited to just the list of FDCs approved by the DCGI since 1961. As per these provisions introduced in 1988, FDCs were included in the definition of new drugs (per Rule 122-E), under which they remain new drugs up to four years after the date of its first approval. Notwithstanding the new provisions, there was considerable murkiness with regard to the role of state and central authorities that clarified only in 2002 when Rule 69 (6) and 75 (6) were added to the Drugs and Cosmetics Rules. These rules inserted on May 1, 2002 stated that all new drugs including FDCs that qualified as *new drugs* were to have prior approval of the DCGI after which a license for manufacture may be sought from the state licensing authorities (SLAs). In the absence of this clarificatory rule, a large number of FDCs have been licensed for manufacture by SLAs without being approved for marketing by the DCGI at the centre. Approval by DCGI involved, after 1988, production of proof of safety and efficacy. Part of the problem was also that during Indian pharma boom during 1998-2002, neither the centre nor the states strictly enforced the laws on that had been passed for FDCs.

FDCs are, of course, necessary in some select circumstances. These are few in number and cover FDCs for AIDS, TB, malaria, ORS, iron plus folic acid for anemia, trimethoprim + sulphamethoxazole, etc. In the National List of Essential Medicines 2011, out of 348 medicines, only 18 (5.2 per cent) are FDCs. An editorial in *MIMS India* (August 2012) mentions that in an analysis of 1,811 commonly sold products, 43 per cent (that is 773 products) were combinations. Other estimates of number of FDCs vary between 40 to 60 per cent of the number of formulations in the Indian domestic market; the latter number is

estimated around 50,000 (*PharmaTrac* Jan 2015).

An analysis, done by one of the authors (Aisola with Zacharias 2015) of the 50,000 plus branded medicines in *PharmaTrac* (MAT June 2015), shows about 43 percent of the market are combinations and more than 50 per cent of which are likely to be irrational. In another study by the authors, in August 2015, of the top selling 300 formulations accounting for Rs 58,452 crore (which is 69.6 per cent of the total domestic market of Rs 84,017 crore (*PharmaTrac*, 12 months ending Jan 2015)), FDCs assessed to be outright irrational and unscientific accounted for Rs 12,757 crore (21.8 per cent) of Rs 58,452

crore. This comprised 72 items of the top selling 300 drugs. Extrapolating the percentage of the irrational and unscientific FDCs to the total market of Rs 84,000 crore, irrational FDCs would account for approximately Rs 18,500 crore.

Yet, this is likely to be a gross underestimate. A large proportion of these irrational FDCs contain at least one NLEM medicine. But none of these are under price control. There are numerous similar examples as shown in Table 8.4 In most cases FDCs of an essential drug form 50 to 80 per cent (see Col.6) of the total market involving the essential drug. Almost all these FDCs are likely to be irrational.

Table 8.4 Market for NLEM-2011 Drugs and Combinations

Name of NLEM drug	Therapeutic category	Total annual sales (MAT Jan 2015, Rs. cr)	Sales of formulations coming under price control (Rs. cr)	Sales of formulations excluded from price control (Rs. cr)	
				Non-NLEM additional strengths and dosage forms	Non-NLEM formulations (combinations, isomers & others)
Ceftriaxone	Anti-Infectives	1,129.9	535	132	462.9
Ofloxacin	Anti-Infectives	1,477.3	151.8	283.3	1,042.2
Domperidone	Gastro Intestinal	1,532.8	33.5	14.9	1,484.4
Pantoprazole	Gastro Intestinal	1,328.8	167.6	460.3	700.9
Paracetamol	Pain/Analgesics	3,285.5	181.6	437.5	2,666.5
Chlorpheniramine	Pain/Analgesics	1,547	0.2	12.5	1,534.2
Amlodipine	Cardiac	1,809.7	299.1	31.5	1,479.1

Source: Data analysis by Aisola and Zacharia (2015).

Note: New formulations involving essential drugs would come under price control on a brand-by-brand basis post-implementation of DPCO 2013. These formulations are not expected to have significant market sales during the time period considered for the analysis.

The pervasive prevalence of unnecessary combinations hits the patient in multiple ways: the patient is burdened with unnecessary extra medication and mostly irrational ones, that cost more (as most of them are out of price control and the patient has to pay for unnecessary extra ingredients) and the patient is put at the risk of avoidable side effects and adverse drug reactions.

Government Response to the Problem of Unscientific FDCs: The Government of India, through the Central Drugs Standard Control

Organization (CDSCO) and its successive Drug Controller Generals (DCGIs), has been intermittently trying to solve the problem of the FDCs, rational, irrational, legal and illegal, etc., over much of the 2000s.

We will not here elaborate on the chequered history of the relationship and the encounters between the FDC manufacturers and the Government since the early 2000s. This includes stay orders by three State High Courts on the attempts by the Government to resolve the

problem. These stay orders, initiated by affected pharma companies, have still not been lifted, in the absence of moves by the Government to challenge the stays.

The current state of these efforts was initiated with a letter on January 15, 2013, from the DCGI again requesting SLAs to instruct manufacturers to send to the DCGI within 18 months, data on safety and efficacy of FDCs permitted by SLCs but not approved by DCGI before October 1, 2012. In response, the DCGI received approximately 7000 applications. A Committee under the Chairmanship of C. K. Kokate was constituted to examine approximately 6320 applications in a timely manner. In March 2016, on the basis of the committee's recommendations the Government of India banned 344 FDCs totaling about 1080 applications as several brands had the same FDC. Some well known top selling brands like Corex, Phensedyl, Vicks Action 500, etc., were recommended for ban. Almost immediately several manufacturers of the banned products approached the Courts, especially the Delhi High Court that issued stay on the ban order even as the court heard the case over the next two months¹⁷². On December 1, 2016, the Delhi High Court gave an order quashing the ban. The reason given was that the Drug Technical Advisory Board

(DTAB) was not consulted in the process leading up to the ban. The order is likely to be appealed by the Government in the Supreme Court. Surprisingly realizing the weakness of the order quashing the ban, the affected pharma companies are talking of negotiating with the Government!¹⁷³

The Kokate Committee also set aside 944 FDCs (corresponding to 1730 applications) for further deliberation, declared 1493 FDCs (corresponding to 2650 applications) as rational and asked manufacturers of 126 FDCs (corresponding to 390 applications) to furnish further data.

While these attempts by the DCGI are to be welcomed, it must be kept in mind that the Kokate Committee examined FDCs licensed for manufacture by the SLCs without prior approval for safety and efficacy by the Central Government. The Government has the more onerous task of weeding out all other remaining irrational FDCs in the market that do not necessarily meet this criteria, of irrational FDCs approved wrongly by the Central Government. Till such an eventuality, all FDCs in the market that contain one or more of the m-saving medicines marketed in India should be brought under price control. This will at the least minimize the economic burden on patients.

Concluding Note

India's pharmaceutical industry has come a long way from 1947, and from 1972. But, access issues remain, along with the challenges of affordability, availability and rationality of products. Allowing the market to regulate itself will not work. Proactive state intervention is necessary in pricing and provision of medicines and health care services to deal with the extraordinary crisis of public health in India. But for a few of state governments like that of Tamil Nadu, Rajasthan

and Kerala, the availability of medicines in the public health system is erratic and uncertain¹⁷⁴.

The dilution of key flexibilities in India's patent laws, at the behest of Big Pharma lobbies, will put the clock back. Nor is such dilution necessary as India is fully TRIPS compliant. Efforts at opening up India to international trade must build on, not undo, the enormous strides made in the domestic pharma sector over the last 40 years.

152. Excerpts from S. Srinivasan and Malini Aisola; *Access to Pharmaceuticals: role of state, industry and market*, published in *Equity and Access: Health Care Studies*; Edited by Purnendra Prasad and Amar Jesani; Oxford University Press; 2018. Reproduced with permission from authors

153. Co-convenors, All India Drug Action Network (AIDAN)

154. For more detailed history, see Chapter 2 in: Sudip Chaudhuri.

155. As of writing, India is dependent for 60 per cent of its APIs on imports, mostly from China. The Government of India appointed Katoch Committee whose recommendations are available at <http://pharmaceuticals.gov.in/document/salient-features-recommendations-katoch-committee-report-apis-0> (accessed March 3, 2016), has targeted API self-sufficiency of India on par with India's formulations industry.
156. Interview with Yusuf Hamied, interviewed by Tarun Khanna, Bombay, India, April 29, 2013, Creating Emerging Markets Oral History Collection, Baker Library Historical Collections, Harvard Business School. Accessed Sep 27, 2015 at http://www.hbs.edu/businesshistory/Documents/emerging-markets-transcripts/Hamied_Yusuf_Web_per_cent20Transcript.pdf. "Indian Pharma Industry: Decades of Struggle" by Y.K. Hamied on the occasion of AV Rama Rao's 70th birthday, April 2, 2005. Accessed Sep 26, 2015 at <http://www.arvindguptatoys.com/arvindgupta/avra-hamied.pdf>
157. For details see, <http://pharmaceuticals.gov.in/cpses>. Accessed September 30, 2015.
158. For a first person account of these transitions, see: Reddy.(2015).
159. See Table 1, in Chapter 6 of this book, "Globalization, Intellectual Property Rights and Pharmaceuticals" by Amit Sengupta.
160. For the politics in the run up to WTO/TRIPS, see Bhagwati (2004.) pp.182 ff. The author, a leading economist and international trade theorist, has been adviser to the WTO, and GATT.
161. See Lofgren (2013), Chapter 3, p.55ff.
162. These flexibilities include:
- Section 3 (d) of the Patents Act was amended to exclude patentability of new forms (including derivatives of old drugs or combinations of old drugs) of known substances unless there is significant enhancement of efficacy;
 - New use of an old drug, is not to be considered an invention and hence not patentable;
 - Pre-grant opposition to patents applications was retained;
 - Post-grant opposition to granted patents was introduced.
 - In addition, definitions related to patentability criteria were modified by the 2005 amendments, especially definitions of 'invention,' 'inventive step'. Other safeguards against patent abuse were introduced/modified through the 2005 amendments as well as earlier amendments of the 1970s law: Compulsory license, Bolar exception (preparation for generic launch, i.e. production for marketing approval, and marketing approval) and parallel importation. See also Chapter XX in this book on IPR.
163. Akerlof, George A. (1970). "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism". *Quarterly Journal of Economics* (The MIT Press) 84 (3): 488–500.
Joseph E. Stiglitz (1989). "Markets, Market Failures, and Development". *The American Economic Review*. Vol. 79, No. 2.
164. On Pharmaceutical Market Failure, see Public-Private Roles in the Pharmaceutical Sector - Implications for Equitable Access and Rational Drug Use. *Health Economics and Drugs Series*, No. 005, (WHO, 1997; 115 pages).
165. For a more complete history of price control since 1962, see Chapter 8 in Chaudhuri, op.cit. Also: LOCOST/JSS (2004). *Impoverishing the Poor: Pharmaceuticals and Drug Pricing in India* (Vadodara/Bilaspur: LOCOST/JSS).
166. See: Srinivasan et al (2013) and Srinivasan et al (2014).
167. We should add that some anti-diabetics not mentioned in NLEM-2011 - like glimepiride, gliclazide, migitol, repaglinide, pioglitazone, sitagliptin, voglibose and acarbose - were sought to be brought under price control on July 10, 2014, by the NPPA by special notification under Para 19 of DPCO-2013 but many leading manufacturers have not complied with it and have taken the Government to court on the issue.
168. In the order passed on October 3, 2012, in WP(Civil) No. 423 of 2003, AIDAN and Ors. Versus UOI and Ors., the Supreme Court ruled: "While adjourning the case, we make it clear that the Government should not alter the price structure of the drugs as notified vide Notification dated 13.07.1999 and similar notifications which may have been issued thereafter." An order completely ignored in the formulation of DPCO 2013.
169. Anita Kotwani. "Where are we now: assessing the price, availability and affordability of essential medicines in Delhi as India plans free medicine for all." *BMC Health Services Research* 2013, 13:285.
170. Specifically, Rules 122 A, B, D and E and Schedule Y in Part X-A related to requirements and guidelines for import and manufacture of new drugs including FDCs. Appendix VI of Schedule Y gives requirements for approval of various categories of FDCs.
171. Source: http://www.cdsc0.nic.in/writereaddata/Approved_per_cent20FDC_per_cent20list_per_cent20till_per_cent20november_per_cent202014.pdf. Accessed January 18, 2015.
172. For a backgrounder on the context of the case filed by pharma companies on the ban of the 344 FDCs, see: Srinivasan et al 2016.
173. See <http://timesofindia.indiatimes.com/india/Delhi-high-court-sets-aside-Centres-decision-to-ban-344-fixed-dose-combination-medicines/articleshow/55719568.cms>, Accessed January 14, 2017.
174. At the time of going to the press, a free drugs initiative (http://nrhm.gov.in/images/pdf/in-focus/Shimla/Guidelines/Free_Drugs_Service_Initiative.pdf) has been initiated to provide support to the states to initiate delivery mechanisms like the Tamil Nadu and Rajasthan Medical Service Corporations. The details of financial support to the states are not clear. The Jan Aushadhi scheme (<http://janaushadhi.gov.in/>) for availability of affordable essential drugs at the retail level has also been streamlined and 3000 outlets are to be opened.

Chapter 9:

Environment and Social Risk Assessment and its Importance for The Indian Financial Sector

- Digvijay Singh Bisht¹⁷⁵

Even when the global financial crisis happened in the year 2008, the slowdown experienced by the Indian economy was much less compared to its impact on the economy of other countries. How then, did the present crisis of Non-Performing Assets¹⁷⁶ (NPAs) manifest?

Before we discuss that, we take a look at the exponential growth of NPAs within the Indian

banking sector (Table 9.1). Starting from 2008 until the year of the release of RBI's latest Financial Stability Report i.e. 2018, NPAs have multiplied by a factor of 18, in gross terms (as judged by the values of Gross NPAs), and by around 4.2 times, relative to the rise of banks' total gross advances (GA), (as judged by ratio values of gross NPAs to the gross advances).

Table 9.1: Growth of NPAs in the indian banking sector (amount in Rs. Crores)

All Scheduled Commercial Banks						
Year	Gross Advances ⁱ	Gross NPAs ⁱⁱ (Crores)	Gross NPAs Ratio SCBs	Net Advances ⁱⁱⁱ	Net NPAs ^{iv}	Net NPAs Ratio SCBs
2008	25,07,885	56,309	2.2	24,76,936	24,730	1.0
2009	30,38,254	68,328	2.2	29,99,924	31,564	1.1
2010	35,44,965	84,698	2.3	34,97,092	38,723	1.1
2011	40,12,079	97,900	2.4	42,98,704	41,700	1.1
2012	46,65,544	1,42,903	3.0	50,73,559	65,019	1.3
2013	59,88,279	1,94,074	3.2	58,79,773	98,609	1.7
2014	68,75,747	2,64,195	3.8	67,35,213	1,42,383	2.1
2015	75,60,665	3,23,345	4.2	73,88,160	1,75,841	2.4
2016	81,67,344	6,11,607	7.5	78,96,467	34,98,200	4.4
2017	84,76,705	7,91,800	9.3	81,71,698	4,33,100	5.3
2018	~88,36,206	10,25,000	11.6	~84,91,803	5,18,000 ^v	6.1

Source: RBI

- i. **Gross Advances** - Gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration. (https://definedterm.com/gross_advance_amount)
- ii. **Gross non-performing assets (GNPAs)** - Gross NPA is the amount outstanding in the borrowal account, in books of the bank other than the interest which has been recorded and not debited to the borrowal account (<https://www.gktoday.in/gk/what-is-the-difference-in-gross-npa-net-npa/>)
- iii. **Net Advances** - means the principal amount of the outstanding Advances (inclusive of Advances that have been requested for any outstanding Purchase Commitments which have traded but not settled) minus the amounts then on deposit in the Accounts (including cash and Eligible Investments) representing Principal Proceeds (<https://www.lawinsider.com/dictionary/net-advances>)
- iv. **Net non-performing assets (NNPAs)** is the amount of gross NPAs less –
 - a. interest debited to borrowal and not recovered and not recognized as income and kept in interest suspense
 - b. amount of provisions held in respect of NPAs, and
 - c. amount of claim received and no appropriated (<https://www.gktoday.in/gk/what-is-the-difference-in-gross-npa-net-npa/>)
- v. <https://www.firstpost.com/business/banks-bad-loans-pile-crosses-rs-10-lakh-crore-up-rs-1-39-lakh-crore-in-march-quarter-the-npa-mess-explained-in-7-charts-4496431.html>

Also, the GNPA-GA ratio was relatively stable from the year 2008 until 2011 (fluctuating merely between 2.3 and 2.4). However, starting 2012, this ratio saw an upward trend reaching almost 4 within a span of three years (2011 to 2014); and in the next three years (i.e. approaching 2017), the same ratio was sitting at 9.6. Presently, this ratio stands at 11.6 for the Indian banking sector. So, it gives us an idea of how the trend has shown a progressive rise of the NPAs in the past decade.

In 2016, Raghuram Rajan, the ex-Governor of RBI, while addressing the Public Accounts Committee¹⁷⁷, highlighted the following as some of the main reasons for the growing NPAs within the banking sector¹⁷⁸:

1. Overall economic slowdown
2. Willful default, loan frauds and corruption
3. Delays in statutory and other approvals for projects under implementation
4. Aggressive lending practices during upturn as evidenced from high corporate leverage
5. Laxity in credit risk appraisal, loan monitoring in banks
6. Lack of appraising skills for projects that need specialized skills

In terms of project-related financing by banks and financial institutions (FIs), four of the six highlighted causes—delays in statutory and other approvals for projects under implementation, aggressive lending practices during upturn as evidenced from high corporate leverage, laxity in credit risk appraisal and loan monitoring in banks,

Credit appraisal process

There is not much information available about the general format of credit appraisal process that has been specified by the Reserve Bank of India (RBI) for scheduled commercial banks (SCBs) in India. However, the process for credit appraisal is broadly similar for all SCBs.

and lack of appraising skills—highlight some of the major gaps existing currently in the appraisal and monitoring process of banks as well as their lack of internal capacity.

In many cases, the four issues that are stated above could have been addressed if the internal credit appraisal process of banks and FIs was sound and unbiased. However, that is currently not the case in most of the banks and FIs. Lack of adequate provisions to address environmental and social (E&S) risks prior to the financing of the projects is one of the major gaps that exist within the current project loan appraisal process (aka internal credit appraisal process) within the Indian banks and FIs.

A three-year long analysis done by Centre of Science and Environment (CSE) through various meetings/consultations with banks officials and from the review of other published documents, reports, articles, etc., available in the public domain, has revealed the lack of E&S assessment as a major gap in the existing credit risk appraisal process of the banks. Majority of the E&S issues arise as a result of improper checks; lack of importance given to the delays in obtaining project-related statutory and other approvals; inadequate project planning; poor assessment especially of environmental and social risks; concealing critical issues; and land-related conflicts originating from inadequate compensation, poor Resettlement and Rehabilitation (R&R) benefits and ownership rights settlement.

In the most basic scenario, for a loan, a bank officer considers the following 5 Cs of credit at the preliminary stage before proceeding to the process of credit approval.

BOX 1 – 5 CS OF CREDIT ASSESSMENT

1. **Character** – An investigation into the character of the borrower during the screening process
2. **Capacity** – Assess the management capability (by assessing factors like qualification, experience in the sector, leadership qualities, etc.) that is indicative of the capacity of the business/borrower, to ensure that the investment is safe and sound.
3. **Capital** – Assesses the vested stake of the prospective borrowers in the business, the amount of capital that borrower has in the form of assets (liquid, fixed, etc.), represents his/her repaying capacity.
4. **Collateral** – The quality of security accepted as collateral against a prospective loan that is evaluated in terms of title, marketability and its present and future value.
5. **Condition** – Evaluating the position of the prospective borrower’s business in terms of the business cycle before considering the proposal.

Source: <https://www.pwc.in/assets/pdfs/publications/2018/demystifying-credit-assessment-in-banks-an-indian-perspective.pdf> (viewed on 25 September 2018)

All banks and financial institutions (FIs) that are engaged in the lending process have their own panel of officials for assessing the credit worthiness of the borrower. Even though the 5 Cs¹⁷⁹ mentioned are kept in mind and followed, there are significant gaps that exist.

And once the 5 Cs of credit assessment checks out, the officer moves on to the next step, that is the credit appraisal process¹⁸⁰.

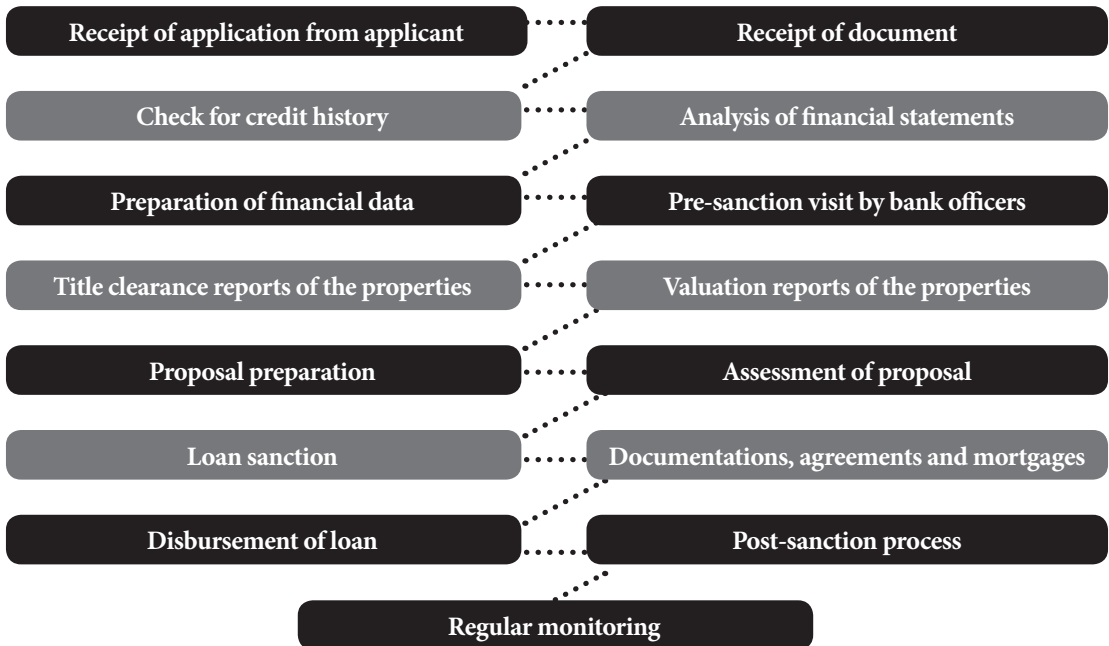


Figure 9.1: General process to credit appraisal process¹⁸¹

Simply stated, credit appraisal is a process that is used as a tool to assess the overall feasibility of the proposed project. Each stage within this process further corresponds to more detailed and specific appraisals.

- a) **Receipt of application from the applicant** is the first step where the borrower submits an application, which has comprehensive details about the project as well as the borrower¹⁸².
- b) **Receipt of documents** is the part where specific documents are required to validate the borrower and the authenticity of his/her business(es).
- c) **Check for credit history** which is necessary for the bank managers to conduct credit investigation of the prospective borrower.
- d) **Analysis of financial statements** which is required to identify the financial strength and weakness of a business establishment including the assessment of the working capital of the borrower.
- e) **Preparation of financial data** that includes aspects like market demand projections, production capacity, sales cost of production and profit covering the period of repayment, breakeven point in terms of sales value, rates of return, security margin, cash flow and fund flow statements which are some of the financial data that needs to be prepared by the credit managers and submitted to the bank officials¹⁸³.
- f) **Pre-sanction visit by bank officers** that involves a site visit to the prospective borrower's properties – either business/firm premises and/or factory premises as well as residential premises.
- g) **Title clearance reports of the properties** which includes legal reports by an approved advocate on the properties, which are to be obtained as collateral, cleared as per the banks approved format indicating a clear, absolute and marketable title.
- h) **Valuation reports of the properties** include valuation reports, by approved valuers /

engineers, on the properties charged to the bank.

- i) **Proposal preparation** which usually includes a report that specifies the Technical, Financial and Market feasibility as well as a sensitivity analysis of the project in order to prove its viability.
- j) **Assessment of Proposal** by the designated authority in the bank (like the Credit Risk Management Group, Appraisal Team, etc.) who studies the proposal to analyse the feasibility of the proposed project and assign a credit rating to the borrower and the project using internal risk matrices/models.

Prior to the assignment of a credit rating of the prospective borrower, a detailed assessment of the feasibility of the proposed project is undertaken, which aims to capture the various risk parameters associated with project lending such as managerial competence, technical feasibility, commercial viability and financial viability, etc¹⁸⁴.

- k) **Loan Sanction** happens once all queries relating to the project/proposal are resolved and the viability is verified, at which point the designated authority communicates the loan approval along with relevant Terms & Conditions to the borrower.
- l) **Documentation, agreement and mortgage** formalities are undertaken once the borrower acknowledges the Sanction Terms & Conditions; an application to comply with them is signed after which the bank and borrower execute a loan agreement.
- m) **Disbursement of loan** is done as per the terms agreed upon, and the sanctioned amount is disbursed from the designated branch office either in full or in tranches to pay for approved costs as the project progresses.
- n) **Post-sanction process** involves follow up, supervision and monitoring to ensure proper credit management to ensure compliance to terms and conditions, to undertaken supervision of the working of the project¹⁸⁵.
- o) **Regular monitoring** is undertaken at regular

intervals to keep a check over the activities of the borrower.

At present, the credit appraisal process gives more importance to checking the overall viability of the proposed project in terms of commercial, financial & technical viability, including its funding pattern. For other aspects of the appraisal process, including the environmental and social (E&S) risks, banks follow a simple checklist based approach that is merely a “Yes” or “No” questionnaire for all the listed environmental and social clearances mandated by the banks to sanction the desired loan. This approach lacks thorough background checks on the E&S issues,

thereby, clearly pointing towards lack of specific provisions for a thorough E&S due diligence within Indian banks.

Among other major gaps in the current credit appraisal process, adequate E&S risk still remains one of the major gaps. Even though, in many cases, the importance of the E&S component as part of the credit appraisal cycle is known to the credit officers within banks and FIs, they usually choose to avoid it due to many reasons, including lack of expertise among the credit officers, addition to the total cost of the credit appraisal and therefore the subsequent cost of running the bank or the FI, etc.

E&S risk assessment and credit appraisal process

The main challenges lie in pushing the banking regulators to mandate a comprehensive E&S risk assessment during project financing for the entire financial sector, and to make banks and FIs adopt E&S risk assessment as part of their existing credit appraisal process in order to correctly examine and thoroughly evaluate the proposed projects. Due to lack of E&S risk assessment, many banks and FIs have faced financial losses owing to project delays and cancellations resulting from one of more reasons like land conflicts, improper environmental assessment, inadequate compensation, poor R&R, etc. An audit report

of Comptroller and Auditor General (CAG) of India which has pointed out several irregularities relating to allotment of land by the Government of Andhra Pradesh during 2006-11, also validates the aspect of lack of E&S consideration during project financing. In this case, the CAG report revealed that the Government of Andhra Pradesh alienated/allotted 88,492 acres of land to 1,027 beneficiaries, and many of these have resulted in land conflict issues¹⁸⁶.

Table 9.2 lists some of the widely known projects that have been delayed due to E&S issues.

Table 9.2: Projects affected due to environmental & social conflicts

S. NO.	PROJECT	TOTAL PROJECT COST (Rs. CRORE)	EC GRANTED & DATE	DELAY	CURRENT STATUS
1.	Gare Palma Sub Block IV/6 Coal Mining Project, Raipur, Chhattisgarh	479	Yes (18 May 2009)	6	Suspended
2.	East Coast Energy Thermal Power Plant, Kakrapalli, Andhra Pradesh	Rs. 6571 cr, (which increased to Rs. 9443 cr)	Yes (9 April 2009)	8	Stopped ¹⁸⁷
3.	Nagarjuna Thermal Power Plant, Sompeta, Andhra Pradesh	Rs. 12,000 cr	Yes (9 December 2009)	8	Scrapped
4.	Nirma Cement Plant, Gujarat	Rs. 894 cr	Yes (11 December, 2008)	7	Under construction

S. NO.	PROJECT	TOTAL PROJECT COST (Rs. CRORE)	EC GRANTED & DATE	DELAY	CURRENT STATUS
5.	Coastal Andhra Power Limited Ultra Mega Power Project, Andhra Pradesh	Rs. 17,400 cr	Yes (23 October 2007)	11	Stopped
6.	Athena Damwe Hydroelectric Power Project, Arunachal Pradesh	Rs. 13,145 cr	Yes (12 February 2010)	5	Stopped ¹⁸⁸
7.	Lavasa Hill City Project, Maharashtra	Rs. 30,000 cr ¹⁸⁹	Yes (09 November 2011)	6 (Phase I)	Operational but on the verge of facing insolvency ¹⁹⁰
8.	Dhamra Port Project, Bhadrak, Odisha	Rs. 3,200 cr	Yes (01 April 2000)	8 (Phase I)	Currently operational
9.	Vedanta Bauxite Mining Project, Odisha	Rs. 4,000 cr	Yes (22 September 2004)	10	Scrapped
10.	Kalinganagar Steel Project, Odisha	Rs. 10,000 cr	Yes (07 November 2006)	8	Currently operational
11.	Bhaironghati Hydro Power Project, Uttarakhand	Rs. 296.82 cr	No	2	Scrapped
12.	Jindal's Tamnar Thermal Power Plant, Chhattisgarh	Rs. 13,410 cr ¹⁹¹	Yes (18 March 2011)	6	Currently operational
13.	Loharinag Pala Hydro Project, Uttarakhand	Rs. 2,895.1 cr ¹⁹²	Yes (8 February 2005)	NA	Scrapped in 2010
14.	Posco Steel Plant, Odisha	Rs. 52, 810 cr	Yes (7 January 2014)	7	Scrapped

Source - <https://www.downtoearth.org.in/news/banking-ordinance-a-bold-step-but-silent-on-considering-environmental-and-social-risk-management-to-reduce-57873> (Viewed on 25 September 2018)

Looking at the various RBI Financial Stability Reports from 2016 to the latest one published in June 2018, it has been seen that sectors like infrastructure, mining, iron and steel, power, textile, and telecommunication have the maximum contribution towards the NPAs. And since most of the loans given in these sectors are by PSBs, they account for most number of the NPAs¹⁹³.

Although there is no absolute figure of NPAs resulting due to E&S issues, many such NPAs can be attributed to the rising number of developmental projects facing closure or halt by the National Green Tribunal (NGT) and/or other

government authorities, due to regulatory non-compliance and/or other conflicts. In an interim report by Rights and Resources Initiative (RRI) in 2016, which analyzed 289 land-related conflicts in 185 districts across the country, it was observed that these conflicts affected 32 lakh people, encompassing about 12 lakhs hectare (ha) of land and stalled roughly ~12 lakh crores. According to another analysis in the same report, 378 projects were stalled due to land acquisition issues and 345 projects were stalled due to clearances issues¹⁹⁴.

Therefore, there is an urgent need to incorporate E&S risk assessment within the existing credit appraisal process of the banks. It can be a vital

tool for banks and FIs as it can be incorporated within their existing current credit appraisal process without any change in any of their internal processes.

E&S risk assessment also has a potential to provide numerous benefits to the banks and FIs. It can help them to understand E&S risks management and use it as a tool for safeguarding the public money that they are responsible for and also for maximise their profit by minimising the rate defaults. Banks and FIs may incur additional cost in carrying out E&S risk assessment but that cost is paltry in comparison to the cost of the project

Way forward

Even though there is no guarantee that the borrower will not default, a strict credit appraisal process implemented from creditor's side will help reduce the probability of default on the repayment to the bare minimum. It is also important for the banks and FIs to keep in mind that getting an Environmental Clearance (EC) from the MoEFCC does not guarantee adequate addressal of E&S risks for a given project as can be seen from the list of projects mentioned in Table 9.2. Therefore, it is imperative for lenders to safeguard their money and interests by carrying out detailed investigations of projects as well as the project proponents. To achieve this, the Indian banking sector and the banking regulators should work

and the benefits it would provide.

Further, it would provide banks and FIs an opportunity to develop internal expertise and skills to identify E&S risks, which would help them run their business operations, both effectively and efficiently. It will also allow the banks and FIs to practice sustainable and responsible banking, and address issues related to NPAs. On a global scale, these good practices will allow Indian banks and FIs to solidify their position in the global market—allowing them to penetrate the market in the West.

together and with other relevant stakeholders.

Banks and Financial Institutions¹⁹⁵

Banks and FIs can pursue the following to ensure that they reduce their bad loans in the future:

1. Mandate E&S risk management as part of their internal financial due diligence process. This can be done by developing internal policies on how to carry out E&S assessments, and reducing the dependence on the government and thoroughly verifying the information that is prepared and submitted by the borrower appointed environmental impact assessment (EIA) consultants (**Box 2**).

BOX 2 – GUIDELINES FOR ENVIRONMENTAL AND SOCIAL RISK MANAGEMENT

Many attempts have been made and many are still being made towards incorporating E&S risk management within the Indian financial sector. However, nothing has been done on a scale that would include all the banks and FIs in order to develop a document that is comprehensive and uniform across the sector.

However, Centre for Science and Environment will, very shortly, be coming out with a guideline document which would be helpful for the Indian financial sector in addressing and managing the environmental and social issues with regards to project financing.

2. Promote sustainability in the financial sector by participating in various initiatives like Equator Principles (EP), United Nation Environment Programme Finance Initiatives

(UNEPFI) and United Nation Global Compact (UNGC) as some of the banks like IDFC and Yes Bank have done.

3. Banks and FIs should disclose their investment details in the public domain. This will ensure transparency and accountability for corporate as well as project-specific loans.
 4. Participate in financial as well as non-financial reporting, by adopting any process that is convenient for them. Voluntary frameworks like the Basel Accords (Basel III Pillar 3) can be useful for financial reporting. They also ensure timely classification of NPAs, which is important because if large portions of NPAs are unreported, banks can face a technical bankruptcy. For non-financial reporting, frameworks like UNGC, Global Reporting Initiative (GRI) and National Voluntary Guidelines (NVG) can be used.
 5. They should also ensure capacity building of their staff, which would help them understand E&S issues and how these can be addressed.
2. The banking regulators should mandate E&S risk management uniformly within financial due diligence practices for all banks and FIs (public, private and foreign). Currently, EIA is not required for railway, transmission and wind energy projects, unless multilateral banks finance them. Therefore, mandating a uniform E&S risk management system across all banks will help to ensure no project proponents are granted any special favours when getting their loans sanctioned, enhancing the global competency of the Indian banking sector and minimising the bad loans cases.
 3. Many countries such as Bangladesh, China, Brazil and Kenya have enacted banking regulations to address E&S risks. Regulatory frameworks of some countries also encompass regulating and monitoring the components of transparency and accountability within the banking sector through proper disclosure. This should include full disclosure for transparency, stakeholder engagement and a mechanism for grievance redressal. Regulators must also push to adapt a similar practice within their existing framework by developing standard guidelines and mandate them for all banks and FIs. This will help ensuring the up-scaling of Indian financial sector's contribution towards the Sustainable Development Goals (SDGs).

Banking Regulators¹⁹⁶

As Indian banks are focused on fixing their balance sheets, the government is also taking various measures to address the distressed industrial sectors. However, RBI and Ministry of Finance will have a pivotal role to play in the coming years. In 2007, RBI released a circular, titled, Corporate Social Responsibility, Sustainable Development and Non-Financial Reporting–Role of Banks, which indicated that Indian banking regulators were headed in the right direction. However, it was only an advisory document, aimed at raising awareness and to get banks to focus on Corporate Social Responsibility (CSR), Sustainable Development and Non-Financial Reporting. Thus, banks and FIs have not done much to follow these guidelines. Unlike CSR, which is mandated under section 135 of the Companies Act, 2013, E&S risk assessment and management is not a regulatory requirement, giving it minimum importance in banks and FIs' existing loan appraisal process. Therefore, the following steps can be taken by regulators to streamline E&S management within banks.

1. For addressing bad loans, they must adopt

more preventive measures and strategies rather than focusing on the mitigation of bad loans.

4. Push banks and FIs to undertake capacity building work for their officials in the credit appraisal team so as to develop internal expertise in environmental and social issues as well as sector specific knowledge and understanding.

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175. Centre for science and environment
 176. A non-performing asset (NPA) is a loan or advance for which the principal or interest payment remained overdue for a period of 90 days.(<https://economictimes.indiatimes.com/definition/non-performing-assets>) (viewed on 25 September 2018)
 177. <http://www.rediff.com/business/report/rajan-asked-to-explain-real-causes-of-bad-loan-menace/20160501.htm> (viewed on 25 September 2018)
 178. <https://www.downtoearth.org.in/news/banking-ordinance-a-bold-step-but-silent-on-considering-environmental-and-social-risk-management-to-reduce-57873> (viewed on 25 September 2018)
 179. A detailed matrix on 5Cs has been formulated in Annexure for the reference.
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Chapter 10:

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

- Pradeep Narayanan¹⁹⁸ and Dheeraj¹⁹⁹

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.

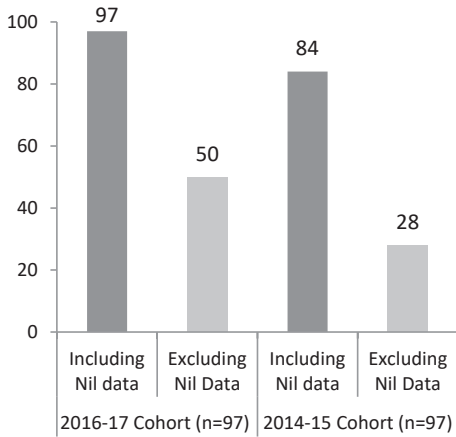


Fig 10.1: Sexual Harassment Cases Reporting

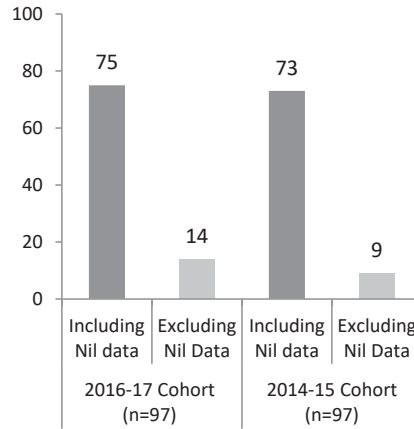


Fig 10.2: Human Rights Violations Reporting

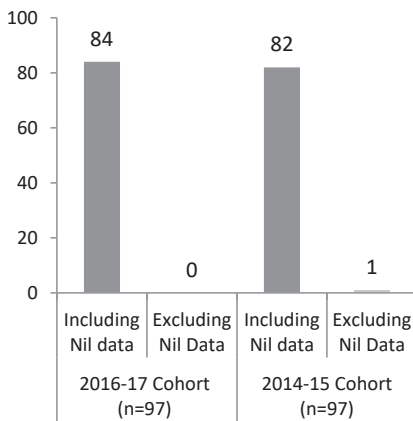


Fig 10.3: Child Labour/ Forced & Involuntary Labour Reporting

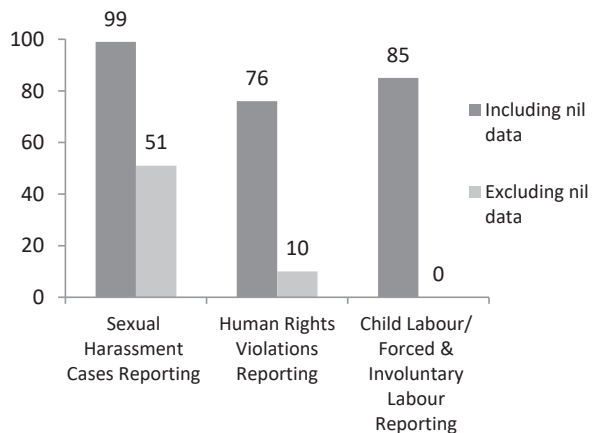


Fig 10.4: Data for 2016-17 (top 100, n=99)

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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