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CONTEMPORARY ISSUES INVOLVING HUMAN RIGHTS IN THE LIGHT OF CORPORATE AFFAIRS WITH THE PRISM OF COMPANY LAW IN INDIA

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ABSTRACT

Since today's corporations have transnational and supra-territorial characteristics, it is necessary to examine the emerging international legal framework. This research paper addresses current issues linked to corporate human rights breaches. The legal framework for corporate social responsibility has been reviewed both domestically and internationally. The Indian legal system was examined in light of the UN Guiding Principles on Business and Human Rights. Unrestricted access to remedy mechanisms and swift redress are key components of justice. Human rights are not a government-granted privilege. They are every human's right by virtue of being human. As the world's largest democracy, protecting human rights is a culture in India. This is also to mention that business has a demonstrated impact on the growth of a country and the lives of individuals both directly and indirectly. If the country truly intends to preserve human rights, the state and corporations must act fast. Any stakeholder, including the general public, can affect a corporation's human rights. This regime has been criticized for being too "shareholder specific". So much so that it lacks a meaningful clause dealing with corporate human rights breaches. An analysis of the relationship between company law and the need to avoid human rights breaches by corporations and businesses is discussed in this paper.

Key Words- Liberalisation, Privatisation and Globalisation (LPG), Universal Declaration of Human Rights (UDHR), UN Guiding Principles on Business and Human Rights (UNGPs), National Action Plan on Businesses and Human Rights (Zero Draft 2019), The Companies Act 2013 (CA 2013), Securities and Exchange Bureau of India (SEBI), Business Responsibility Reports (BRRs), Business Responsibility and Sustainability Reporting (BRSR).

I. INTRODUCTION

In recent decades, globalization and liberal economic policies has harmonized the commercial atmosphere throughout the global market. There is a significant increase in cross-boundary commercial activities and in turn large corporations with state-like financial resources burgeoned, consequently affecting the milieu of different sections of the society. The primary motive of any business entity is profit, and many times this sheer orientation towards profit along with State complicity causes deprivation and gross abuse of human rights on different aspects. Though hitherto unnoticed, the growing incidences of human rights violations around the world by large corporate entities have come under scrutiny, and many international organisations like the UN and OECD have emphasised the making of judicial and quasi-judicial norms that are adept and in coherence with today's world with its vastly spreading commercial activities of trans-national corporations. Examining noteworthy incidents of corporate human rights abuse reveals the link between economic expansion and abuses. These case studies represent the significant challenges discussed here, such as corporate culpability for terrible human rights abuses and rising tendencies of laissez-faire and social welfare principles, among others. Current domestic rules on human rights violations lack pace with the ever-changing modern economic system, hence this study discusses numerous modifications.

Since, corporate consists of transnational and supraterritorial characteristics in today's world, so it is of utmost concern to look into the international legal framework, which happen to emerge in the present perspective. This research article explores on the various contemporary issues pertaining to human right abuses in light of corporate affairs. The corporate social responsibility sphere has been studied in light of the legal framework in domestic as well as universal perspectives. Taking the UN Guiding Principles on Business and Human Rights as a benchmark, an assessment of the Indian legal framework has been done. Unimpeded access to remedy mechanisms and expeditious redressal of grievances are indispensable part of justice, hence the issues regarding the effective implementation of policies are discussed and contemplated herein. Concludingly, the article presents some recommendations in view of the discussion.

The problem persists in the fact that while managing the corporate affairs, and the relevant framework, various concerns in and around the violations of the human rights does emerge. It is in that sense the international law regime provides justification for the same. The same justification is being utilized in the Indian perspective as well. The problem forms its core because of the contemporary issues entrenched in the framework of human rights concerns in light of the corporate affairs.

Governments don't grant human rights. As the world's largest democracy, India has always protected human rights. Business has a key part in a country's development and affects individuals directly and indirectly. Here come the companies. If the country wants to defend human rights, the state and corporations must act first. A corporation can effect employees', partners', shareholders', and the public's human rights. Company law has been criticised for being "shareholder-specific." It lacks a strong provision to address corporate human rights breaches. This study investigates the link between company law and preventing human rights violations by corporations, follows trends, and suggests a change.

The Company Law Regime in India is “shareholder oriented” and not “stakeholder oriented”. As a result, the Companies Act 2013 fails to address and remedy the utter disregard of human rights by corporations and business houses.

II. Tracing the history of human right violations by corporations

Human rights are inalienable rights everyone has simply by existing. Regardless of age, gender, nationality, religion, or origin, they have these rights. The National Human Rights Commission was founded in 1993 under the Protection of Human Rights Act¹. Section 2 of the act defines Human Rights as “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International covenants and enforceable by courts in India.”² Thus, they form the very essence of a person’s meaningful life.

In the post liberalisation, privatisation and globalisation (LPG) world, corporations have taken over various aspects of our lives and continue to influence us, both directly and indirectly. They today, wield the power to positively and negatively impact the human rights of various stakeholders. But only recently have we appreciated this relationship between corporations and violations of human rights. History has it that corporations have, at several times, grossly disregarded the human rights of people and have escaped from liability very easily. In fact, the State itself, blinded by considerations of LPG, has let the perpetrators roam free, carrying on business with them as if nothing happened.

Companies and business houses fall into a variety of categories that might contribute to human rights violations. Human rights breaches may be committed by:

- Indian firms and/or subsidiaries;
- Indian subsidiaries of international companies
- Government agencies (during procurement and development projects)
- Public Sector Undertakings (PSUs)
- Government agencies and private corporations in collusion situations
- Public and private Indian companies
- Any of the above firms' supplier chains
- Business and the informal sector

¹ The Protection of Human Rights Act 1993 (Act no. 10 of 1994)

² Id., Section 2.

III. Liberalization of Market-Emanation and Impact

The policy of liberalism pertaining to trade and commerce has gradually become a preeminent principle in today's global economic scenario. It purports to make trade and commercial activities obstacle-free and cost-effective through integration of and mutual participation of the business entities as well as States and its economic policies. Globalization of commerce, assimilation of means of productions, and unhindered development of global commerce and business; are some of the different methods that come under economic liberalization policies. These procedures lie at the core of free commerce of services and products. The primary motive of trade liberalization is to coalesce and harmonize the domestic market and economies with the developments and policies of international economy by the taking several considerable steps such as establishing integrated economic institutions, bringing in transparency and efficacy in legal framework across borders, thus creating a universal industrial governance which includes, inter alia, regulating the economies and global market, managing trade-related activities among different cultures, involvement and employment of human resources at large. These actions have pervasive and profound impact on the human rights of the society as a whole.

Economic liberalization includes the universal embracement of trade-liberalism as the fundamental economic mechanism for the formulation and efficient management of a global market. The development in communication technologies and information circulation mechanisms has obliterated the physical barriers and geographical boundaries and made the international market more accessible and assimilating in nature. This has caused the proliferation of the corporations, which have securely established themselves in the global economic milieu, thus tightening their grip on the commerce and trade. The emergence of this universal economic system has made the unilateral domestic trade policies inadequate, implausible and discrepant in effect. This inconsistency of economic dependency of various states has affected such states differently. The countries who are technically advanced and have robust infrastructure, are reaping the benefits of the policy of liberalization, whereas others nations, oftentimes developing and under-developed who rely primarily on agricultural sector and possess outdated or weak industrial infrastructure, are exposed to new kinds of risks and consequences. Disparity between the intended framework of free economic market and its current application and utilization has culminated in inequitable liberalization, which is explicitly biased against some nations. This also has far-reaching effects on the fabric of social and human rights of the population

Lately, there has been a rapid increase in instances of human rights abuses by business entities. In many cases, there is complicity between the government and large corporate houses that cause the gross violation of human rights of the subjects. The relationship between corporation and human rights involves human rights violation from various aspects, some are more conspicuous than others.

IV. Gross Human Rights Abuses: Determining the Scope

The corporate activities bore various effects on the human rights of the concerned people, ranging from environmental repercussions, labor law violations, weak health and safety mechanisms, etc. Some of them are substantial and blatant in nature, and conversely, some are lateral and imperceptible. Without any universally acknowledged definition of human rights violation in place, it is inconvenient to elaborate various incidents of human rights violation. Besides, it is very crucial to have an understanding and discernment of the sweeping purview of human rights for comprehensive discussion on human rights violations. As noted in the UN Guiding Principles, the range of human rights violation is broad and likely influences “virtually the entire spectrum of internationally recognized rights”.³

For adequate remedy in cases of human rights breaches and for firms to be obligated to preserve these rights, a definition must be in place that is universally accepted by all communities whose members are directly or indirectly affected by the acts of such companies. Various international quasi-judicial instruments developed by various human rights agencies serve as a compass when determining the scope of human rights and their infringement. Notable international rules include, among others, the Universal Declaration of Human Rights (UDHR), the Optional Protocol to the International Covenant on Civil and Political Rights, and the UN Guiding Principles on Business and Human Rights (UNGPs).

There is also a significant definitional gap between gross human rights abuses and less extreme and insignificant human rights infractions. This is essential for proving the criminal case against the involved corporations, but the distinction has been difficult to exactly define. The 1992 Maastricht Seminar on Human Rights attempted to provide a uniform definition of grave human rights violations, taking into account compensation commitments as-

“the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination. Violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and must consequently be given all due attention in connection with the right to reparation”⁴

OHCHR has discussed the present concept of significant human rights violations. In its Interpretative Guide to UNGPs, it explains severe human rights abuses as-

“There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights,

³ UN Guiding Principles on Business and Human Rights ,Commentary, 12

⁴ “Conference on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms” (1992 : Maastricht, Netherlands)

can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.”⁵

This is one of more recent and comprehensive definition, which encompasses myriad gross forms of human rights violations. The article discusses various issues regarding human rights violations within the purview and scope of the above-mentioned definition.

India has been a victim of mass violations of human rights by corporations. Some cases are as follows:

- 1. The Bhopal Gas Tragedy Case**⁶- A Bhopal pesticide industry leaked methyl isocyanate on December 2 and 3, 1984. High-concentration leaks killed instantly. Gas killed several in the city. Survivors' offspring suffered genetic degeneration. The disaster's breadth and quantity of victims demonstrate the huge scope of human rights violations in a single night, highlighting firms' propensity to harm people's lives. UCIL, a US subsidiary, owned the pesticide plant (UCC). UCC's subsidiary controlled 50.9% of UCIL. UCC's 1350-page subsidiary operations manual helped it govern its subsidiaries.⁷ UCC struggled for years with the Indian government and RBI to keep its majority stake in UCIL after FERA threatened to revoke its subsidiary status.⁸

The Bhopal Gas Tragedy struck four years after UCC won this legal battle against FERA. However, within hours of the tragedy, it issued a stern public notification absolving itself of all liability for the incident. The notification read:

*“Bhopal Plant is owned and operated by UCIL, an Indian company, in which UCC held just over half the stock. Other shareholders included Indian financial institutions and thousands of private investors in India. UCIL designed, built, managed and operated the plant using Indian consultants and workers.”*⁹

Hence, UCC scapegoated UCIL and escaped liability for the actions of its subsidiary. This was nothing but corporate falsehood. After the case was transferred from USA to India, the Government of India acted in a lax manner and did not engage in a serious litigation. Even the Supreme Court pushed for reaching a settlement. Even though India did not have a law to deal with the situation at that time, given the magnanimity of the disaster and the number of victims, a special law could have been made and applied in retrospect. Instead, the Supreme Court absolved the corporation on 14 February 1989 for \$470 million. All pending cases were also closed. This was a miscarriage of justice.

Later on, the order was challenged several times when criminal charges were reinitiated against a selected few. Even then, Warren Anderson managed to flee and live a lavish life abroad, and the

⁵ OHCHR, ‘The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, United Nations, 2012, HR/PUB/12/02, p. 6

⁶ Union Carbide Corporation v Union of India 1989 SCC (2) 540

⁷ *Corporate Responsibility for Bhopal: How Union Carbide Exploited a Government Loophole*, K Subramania, Economic and Political Weekly, Vol.50, Issue 3, 17th Jan 2015. Accessed 02/11/2021.

⁸ Section 29 of the FERA limited UCIL's equity shareholding to 40% of the non-resident UCC. Only companies who manufactured more than 75% of their products in high-tech items were allowed to hold equity shares up to 74%. Others have to lower non-resident equity to 40%.

⁹ Union Carbide Corporation: Bhopal Gas Tragedy Information. Accessed 02/11/2021. Accessible at <https://www.bhopal.com/>.

UCC was later on taken over by Dow Chemicals, which continued to carry on business shrugging off all liability associated with the UCC. Thus, yet again the loophole of subsidiary and holding company and the argument on the power of control was exploited to escape liability.

Hence, even after 37 years of the disaster, victims are still wandering north to south to seek justice that they were “never” promised and to go against a settlement that they “never” wanted to reach.¹⁰

2. The Oleum Gas Leak Case¹¹- It was only a year after the Bhopal gas tragedy that the nation was again jolted by the Shriram Gas Leak from a Chlorine Plant in Kriti Nagar, New Delhi, on 4th December, 1985. The caustic chlorine plant's gas tank ruptured when the structure supporting it fell, causing the leak. . “A large number of persons, including workmen and the public, were affected, and an advocate practising in the district courts which was in the line that the gas travelled died on account of inhalation of the gas. Within two days, on December 6, 1985, there was a further, even if more minor, escape of gas from the plant. It was then that the plant was ordered to be closed down.”¹² M.C Mehta, who initially files a petition for the closure of the plant even before the leak happened, now asked for compensation to the victims of the leak. Even though the Supreme Court shut down the plant and held Shriram Food and Fertilizers strictly liable, this case just highlights the propensity of corporations and companies (foreign as well as Indian) to commit human right violations on a large and impactful scale.

3. Enron Dabhol Power Corporation Case¹³- At the end of the 1990s, Enron's Dabhol power plant in the state of Maharashtra was accused of gross violation of human rights. It was criticised for not being open and for breaking people's rights to free speech, peaceful assembly, protection from arbitrary detention, and not using enough force. In 1999, Human Rights Watch released a 166-page report called "The Enron Corporation: Corporate Complicity in Human Rights Violations."¹⁴ Enron subsidiaries hired local police to suppress protests against its Maharashtra power plant. The Indian Trade Union (CITU) appealed to the Bombay High Court judgement preserving Enron's 1993 Power Purchase Agreement in 1997. After the Supreme Court accepted the petition, a number of committees and judicial commissions were formed to investigate the human rights claims. No significant findings were made, and the case was closed in 2019, citing excessive delay.¹⁵ This was another case of corporations colluding with the state to violate human rights.

4. Vedanta Corporation Case¹⁶ Vedanta Alumina Limited submitted to the Indian Ministry of Environment and Forests (MoEF) for environmental approval to build an alumina refinery in Orissa

¹⁰ *SC to begin hearing in Bhopal gas tragedy: All you need to know about 36-yr-old case*, Debayan Roy, The Print, 11th February 2020. Accessed 02/11/2021. Accessible at <https://theprint.in/india/sc-to-begin-hearing-in-bhopal-gas-tragedy-all-you-need-to-know-about-36-yr-old-case/362531/>.

¹¹ M.C Mehta and Anr v. Union of India and Anr 1987 AIR 1086

¹² *Business and Human Rights: The India Paper*, Usha Ramanathan, International Environmental Law Research Centre. Accessed 03/11/2021. Accessible at <http://www.ielrc.org/content/w0102.pdf>.

¹³ Maharashtra Power Development Board vs Dabhol Power Company And Ors. on 2 April, 2003, 2003 117 CompCas 467 CLB, (2003) 4 CompLJ 429 CLB, 2003 48 SCL 135 CLB

¹⁴ The Enron Corporation: Corporate Complicity in Human Rights Violations, Human Rights Watch. Accessed 03/11/2021

¹⁵ Enron-Dabhol power project: Supreme Court closes case of alleged corruption, Economic Times, April 11, 2019. Accessed 03/11/2021.

¹⁶ Orissa Mining Corporation Ltd vs Ministry Of Environment & Forest on 18 April, 2013 WRIT PETITION (CIVIL) NO. 180 OF 2011

in 2003. It received the necessary clearance in 2004. It asserted that there would be no deforestation as part of the project. However, in the Niyamgiri hills, the refinery was later changed to a mining cum refinery project. Those hills are inherently inhabited by the Dongria Kondh tribe. “The project’s opponents alleged it would destroy the Dongria Kondh tribe’s way of life (due to their spiritual and cultural attachment to the Niyamgiri hills) and that work on the projects had begun without the requisite clearances. Further, they alleged that many people had been forcibly removed from their homes, at times violently, and that the mining has already caused extensive environmental damage and will cause more.”¹⁷ In 2010, the Environment Ministry commissioned a study of the mine’s impact on local tribes and wildlife. The corporation shouldn’t mine in the Niyamgiri Hills. The Ministry of Environment and Forests said Vedanta would be prosecuted for forest conservation and environmental protection violations related to the Niyamgiri Project. Vedanta appealed the government’s decision. The Supreme Court decided in favour of the government in April 2013, preserving the rights of the indigenous tribes and maintaining the mining prohibition in the Niyamgiri hills. It also advised that a referendum should be conducted among the members of the 12 tribal village who are major stakeholders in the area. All of them voted against the Vedanta project. In 2016, the local government again took the matter to the SC, alleging that the referendum was flawed. However, the SC upheld its 2013 decision and maintained a ban on mining in the Niyamgiri area. In this case, even though the rights of the tribals were saved by the Supreme Court, however, the tactics that companies and corporations may apply to get certain operational clearances is brought to light. Hence, they have an unregulated and inherent power to commit human right violations.

These cases are just a few examples of how companies can commit human right violations and how difficult it can become to handle the repercussions of the same. It highlights the utter need of a framework that may direct/regulate the actions of corporations, so that such miscarriages of justice can be prevented.

V. Corporation and Human Rights- A Complex Connection

There are multifarious ways through which the corporate entities and human rights violation are associated. Although there are many instances of human rights abuse that follow a particular trend, yet the policies of trade liberalization impact diverse nations in their own distinct ways. There are many situations in which a direct or indirect involvement of corporate entities in grave human rights violations, namely-

- Operational and Monetary Aid- The first situation which is commonly seen is when the corporation, directly or indirectly, has been involved in human rights violation by providing the main perpetrators with logistical, financial or operational aid. This is oftentimes done to gain a secure grip on the resources as well as curbing the outcry against the corporation’s activities. For example, in Yadana Pipeline case

¹⁷ Vedanta Resources Lawsuit (re Dongria Kondh in Orissa), Business and Human Rights Resource Centre, Jan 1, 2005. Accessed 03/11/2021. Accessible at <https://www.business-humanrights.org/en/latest-news/vedanta-resources-lawsuit-re-dongria-kondh-in-orissa/>.

in Myanmar, a France-based corporation named Total was involved in providing financial and operation assistance to the military regime of Myanmar in their acts of various gross human rights violations such as torturing, murder, enforced labor etc, for constructing the gas pipeline.¹⁸ Similarly, in Papua New Guinea, concerns have been raised on the activities of an English mining firm Rio Tinto, which include substantial human rights violations with the domestic government's support to tighten its hold on mining resources.

- **Furnishing technological assistance, service and goods-** Another situation where the corporations are found to be violation human rights is when it furnishes the primary violator with goods and technological aid for their undemocratic and arbitrary activities. The lawsuit against Riwal Corporation, based in Netherlands, demonstrates such collusion between private entity and State in human rights violation. The company provided technological support by giving machines for construction of a controversial wall in Palestinian region, thus assisting the Israel's government in their acts of gross violation of human rights through war crimes.¹⁹ Furthermore, in China, the various accusations put forward in the lawsuit named Doe v. Cisco Systems²⁰ against business entity Cisco for assisting the domestic regime in curbing nonconformist activities and dissenting opinions is a typical example of a corporation's assets and technology being utilized for aggravating human rights violations. The number of such cases is increasing day-by-day.
- **Commercial Investment-** Many times, the corporations collaborate and hugely invest in joint ventures with the States who are infamously known perpetrators of human rights violations, or with autocratic regimes. In a notable redressal lawsuit in 2002,²¹ some residents of South Africa brought a suit against several business entities in the court in US, accusing the corporations of being involved in serious human rights violations, like murder, physical and sexual assault, torture committed in the times of apartheid. The main accusation of the plaintiffs is that these companies encouraged the human rights violation of the native Africans by investing in the industries that are the primary abusers of human rights. A group of South Africans sued 20 banks and firms in US courts, claiming they were involved in human rights offences during apartheid. Plaintiffs claimed defendants' investments and participation in key areas made them culpable in future atrocities against black South Africans.
- **Direct Involvement-**In addition to the circumstances mentioned above, another frequent sort of corporate engagement in human rights abuses occurs when the firm actively participates as a primary perpetrator. It is mostly seen that the actions of a company makes it an active participant in the cases of violation of

¹⁸ The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma (Myanmar)

https://lib.ohchr.org/HRBodies/UPR/Documents/Session10/MM/ERI_EarthRightsInternational_Annex3_eng.pdf

¹⁹ Al Haq Complaint: Report of War Crimes and Crimes against Humanity by Rival
https://www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf
https://www.alhaq.org/cached_uploads/download/alhaq_files/images/stories/PDF/accountability-files/Complaint%20-%20English.pdf

²⁰ Case No. 5:11-cv-02449-EJD (N.D. Cal. Aug. 31, 2015)

²¹ Apartheid Reparations Lawsuits (re South Africa) <https://www.nftc.org/default/ussabc/DAE8515.pdf>

human rights. The most noteworthy example of this is the human rights abuses done by the enterprise British Petroleum. It has been accused of investing money in the raising of 'death squads' in Columbia to exterminate political dissenters.²² Also, the world was shocked by the infamous Nisour Square Massacre in 2007 in which a private military harbored by the Blackwater Consultancy Company killed 17 citizens of Iraq by shooting them. All these incidents clearly showcased the involvement of corporations in substantial human rights violations, and more often than not the State's complicity in it.

The complicity of corporations in numerous cases of human rights violation has prompted the global community to examine their activities with greater scrutiny and to demand accountability and reparations from the business entities. Native citizens from all over the world have now been raising their voice against the oppression purported to be committed by corporations to be restrained.²³

However, companies aren't required to explicitly protect human rights. The operating country is better able to protect citizen rights. Considering how powerful companies are today, they must be held accountable for human rights violations. Even though businesses don't have a legal obligation to respect human rights, they must not violate them.

VI. Development in Judicial and Quasi-Judicial Tools

The introduction of newly-propounded concept of Corporate Social Responsibility (CSR) has transformed the traditional idea of affiliation between corporations and human rights. It refers to the policy of adopting the non-binding ethical and moral obligations for the betterment of the overall fabric of the society through corporate activities. CSR is a policy that illustrates in which way a corporation should operate to bring about a comprehensive positive influence on the society as a whole in terms of being receptive to sustainable development, showing moral and ethical conduct in economic activities, protection of the rights of all the stakeholders, among others.²⁴ It puts a voluntary commitment on part of the corporations towards their stakeholders and public. Provisions of CSR are also incorporated in the Companies Act in India.²⁵ However, this concept contains a significant flaw. It is not binding in nature hence most of the times, the corporations merely does activities under CSR only for publicity, and without having any actual effect on the lives and rights of the stakeholders.²⁶

How to demonstrate the corporation's accountability for human rights breaches is another major question. Transnational corporations raise concerns like liability, jurisdiction, etc. International organizations such as

²² John Madeley, 'Big Business, Poor Peoples' (1999), p 1-18

²³ "Concept Paper, 2009 International Expert Workshop on 'Indigenous Peoples' Rights, Corporate Accountability and the Extractive Industries" http://www.un.org/esa/socdev/unpfii/en/EGM_IPCR.html

²⁴ Mallen Baker, 'Definitions of Corporate Social Responsibility- What Is CSR?' (June 8, 2018) <http://mallenbaker.net/article/clear-reflection/definitions-of-corporate-social-responsibility-what-is-csr>

²⁵ The Companies Act, 2013, Section 135

²⁶ Aneel Karnani, 'Why the CSR law is not a success' Live Mint (June 9, 2018) <https://www.livemint.com/Opinion/1wIQwFPRyRckBMg5IugW1K/Why-the-CSR-law-is-not-a-success.html>

the UNGPs, OECD Guidelines on Human Rights, Global Sullivan Principles, and others have made tremendous headway in addressing human rights violations and economic culpability.

VII. Evolution of UN Guiding Principles on Business and Human Rights (UNGPs)

The UNGP is an international legal instrument for human rights. They are also called as Ruggie Principles as the professor John Ruggie has developed and written these principles. These include the 31 fundamental principles provided under the United Nations framework "Protect, Respect and Remedy" on the matter of human rights violations multinational business entities, thus implementing the same. The UN Guiding Principles for the first time put forwards a comprehensive and universally accepted definition of human rights and the obligations it ensues. It has provided a generalized global framework for resolving the issues pertaining to corporate abuses of human rights. The UN Guiding Principles are essentially based on three principles, thus elaborating the approach in which way these regulations should be made applicable by the governments and the corporations alike-

- ❖ The duty of the State to act as a guardian for the safeguard of human rights.
- ❖ The obligation of the business entities to respect the human rights of all the stakeholders.
- ❖ Access to redressal mechanism for the victims of human rights violations by companies.

The UNGPs on Business and Human Rights are widely acknowledged as the most exhaustive and updated policies regarding human rights, and has earned the approval of different countries, private business entities, and international institutions.

VIII. Determination of The State's Duty Under International Law to Act as A Guardian for The Safeguard of Human Rights

The foremost principle developed by Professor Ruggie is that government's responsibility to safeguard and prevent the violations of human rights by private entities, corporations included. The UN Guiding Principles on Business and Human Rights enumerates the fundamental legal responsibilities of all States- *"As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy"*²⁷

It further provides that- *"States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption*

²⁷ UN Guiding Principles on Business and Human Rights, Commentary, 25

*of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that legitimate and peaceful activities of human rights defenders are not obstructed”.*²⁸

It can be accomplished through the introduction of stringent policy reforms and development of neoteric judicial and quasi-judicial tools that can aid in affixing the liability on the perpetrators of human rights violations. This principles elaborates that it is the state who have a significant control over daily activities of the subjects, hence its position is more appropriate for maintaining a greater adherence towards human rights of the citizens. The primary onus to resolve any issue pertaining to human rights violations should rests on the government itself as it is they who affirms the position of guardian for securing and respecting the human rights under various international instruments and treaties regarding the abuse of human rights.²⁹ Albeit there are manifold ways in which the interaction between corporations and the state takes place, the legal and regulatory framework for the judicious administration of the interrelationship of commerce and human rights violations are inadequate.³⁰ In spite of the recent developments in the overall legal mechanism, the laxity shown by the domestic governments in the implementation of the same has caused considerable statutory imbalance and inconsistency in determining the damage suffered by the victims, its reparation, and the accountability of the perpetrating corporation. Moreover, the State’s lack of success in the implementation of the currently existing regulations also adds to the legal incongruity as the authorities that are primarily responsible for enforcing the liability under human rights are usually left secluded from the workings of the bodies that are involved in regulating the commercial activities in the country. As per the opinion of Professor John Ruggie, there are some certain decisive methods by which the government could effectively curb the rising instances of the human rights violations committed by the business entities- endeavoring to attain better policy clarity, consistency and efficacy across authorities working in tandem with commercial entities, which involves the protection of the government’s capability to safeguard human rights when signing the commercial contracts and agreements; promotion of the respect for human rights when government do business with corporations, whether as promoters, shareholder, lender, or even as owners; cultivating and encouraging economic environment that is solicitous of human rights violations; formulation of inventive regulations to aid and manage corporations working in conflict-prone regions; and proper examination and redressal of human rights abuses committed by multinational corporations.³¹ As discussed earlier, the primary and leading universal bills and conventions on human rights impose numerous direct as well as indirect obligations for the protection and reparation of human rights abuses³² on the States. Furthermore, the decisions in many international lawsuits also highlight the obligation of the state to protect the human rights of its subjects against the actions of a private entity, including a corporation,

²⁸ Ibid, Commentary, 26

²⁹ Simon Chesterman, “The Turn to Ethics: Disinvestment From Multinational Corporations for Human Rights Violation: The Case of Norway’s Sovereign Wealth Fund” 23 AM. U. INT’LL. REV. 577 (2008)

³⁰ Swatee Yogesh, “Corporate Human Rights Violations in India- Critical Analysis” National Seminar: Dialectics and Dynamics of Human Rights, Dayanand College of Law, Latur - ISBN 978/93/81849/66/8, (July 2012)

³¹ The UN “Protect, Respect and Remedy Framework for Business and Human Rights” (19-10-2012) <http://www.business-humanrights.org/SpecialRepPortal/Home>

³² International Council on Human Rights Policy, *Beyond Voluntarism* (2002), p .52

such as, in the landmark cases of *Social and Economic Rights Action Center v. Nigeria*³³ and *Mayagna Awas Tingni Community v. Nicaragua*³⁴, the State was held liable for its ineffectiveness to protect the human rights violations committed by private business entities. Henceforth, it can be deduced that the contemporary universal legal mechanism incorporates the prevention of the human rights violations as one of the primary duty of a state.

The principles of protect, respect and remedy as outlined by Professor John Ruggie could become an important instrument to establish a uniform mechanism for the redressal of human rights violations.³⁵ It will also help to assure the fulfillment of the obligations by both, states and corporations. The UN Guiding Principles manifest a paradigm shift in the contemporary outlook towards the challenge of human rights abuses. It has now a widely accepted presumption that besides commercial activities, the corporations are also under an obligation to respect and abide by the human rights of all the people; whether affected directly or indirectly.

IX. Ascertaining the Obligation of Corporations

Currently, a lot of people's daily activities are influenced by the corporations' pervasive presence. Consequently, they must be held accountable for their deeds. The domestic government is a crucial institution for the defense and prevention of violations of human rights.³⁶ Any entity, be it state-owned or private, shall be made accountable for human rights violations. Thus, the corporations, as an integral part of the society, should be held liable and accountable for human rights violations.³⁷

The obligations of business entities in relation to human rights violations are stipulated in the all the three organs of the International Bill of Human Rights. As mentioned in UDHR, every individual has an obligation towards the community's human rights violations.³⁸ The other two instruments i.e. ICESCR and ICCPR also enumerates the liability of private entity by specifying that "the individual, having duties to other individuals and other community to which he belongs is under a responsibility to strive for the promotion and observance of the rights recognized in the present covenant."³⁹ The UNGPs defines corporate responsibility to respect human rights as "*it is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfill*

³³ *Social and Economic Rights Action Center v Nigeria Comm*, 155/96 (African Commission on Human and People's Rights, 27 May 2002), as cited in SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 9 (2004)

³⁴ *Awas Tingni Community vs Nicaragua*, Petition No. 11577, https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf

³⁵ UN Human Rights Council, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Rights to Developments, Protect, Respect and Remedy: A Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie", 8th Session, Agenda Item 3. A/HRC/8/5, 5-6 (7-4-2008)

³⁶ International Council on Human Rights Policy, *Beyond Voluntarism* (2002), p .52

³⁷ Surya Deva, 'Human Rights Violations by Multinational Corporations and International Law: Where from here' 19 Connecticut Journal of International Law 1, 53 (2003)

³⁸ The Universal Declaration of Human Rights, Article 29

³⁹ International Covenant On Civil and Political Rights, 999 UNTS 171, Mar. 23, 1976, Preamble and International Convention on Economic Social and Cultural Right, Dec. 16, 1966, 993, UNTS 3 Jan. 3, 1976, Preamble

their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights".⁴⁰

Nevertheless, in spite of the rising number of academicians who seem to hold an otherwise opinion,⁴¹ the obligations mentioned under these two bills are not considered as directly mandatory in nature.⁴² Corporations are usually held liable under local laws.⁴³ In the case of *Iridium India Telecom Ltd v. Motorola*, the Indian Supreme Court ruled that business firms can no longer seek exemption from criminal prosecution on the grounds that they lack mens rea in any jurisdiction that upholds the rule of law.⁴⁴

However, since the turn of the century, the economic environment of the whole world has adopted policies of globalization and liberalization. This in turn has made the nature and character of many corporations as trans-national. Now the corporation, under international law, has acquired the status of a legal person. They can invoke some particular rights provided under public international law, for instance, a corporate can move to any international dispute resolution mechanism in certain cases. Professor Steven Ratner stated likewise- "*If states and international organizations can accept rights and duties of corporations in some area there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area.*"⁴⁵ Moreover, companies' human rights obligations arise from the state's liability. Many firms exercise state-like functions due to globalisation and market privatisation. Human rights safeguard individuals from arbitrary government action. If companies perform some government functions, they should be held accountable in the same way as the government. Current international law incorporates directions and principles for corporate human rights abuses, although the obligations are indirect. Nations must defend their citizens' human rights from economic operations.⁴⁶

XII. Evaluation of Indian Legal Framework

The legal framework in India has adopted the principle of dualism in cases of application of international statutes and treaties. Although India is a party to several universal legal conventions, treaties and regulations for the protection of human rights abuses by business entities, yet it is not mandatory for the corporations to abide by such rules and regulations unless they are given statutory position by enacting a domestic legislation.⁴⁷ Therefore, discerning and enforcing the accountability of the business entities for the violations of human rights under the global human rights legal regime is almost ineffective save with the attempt of

⁴⁰ UN Guiding Principles on Business and Human Rights, Commentary, 11

⁴¹ Human Rights Standards and the Responsibility of Transnational Corporations (1999), p. 265; Beyond Voluntarism (2002), p. 85 for the ICSECR

⁴² Clapham (2006), p. 195; Beyond Voluntarism (2002), p. 64

⁴³ Human Rights Committee, General Comment No. 31 par. 8

⁴⁴ *Iridium India Telecom Ltd vs. Motorola Inc* (2011) 1 SCC 74

⁴⁵ Steven R. Ratner, "Corporate and Human Rights: A Theory of Legal Responsibility", 111 YALE LAW JOURNAL 443488 (2001).

⁴⁶ Human Rights Committee, General Comment No. 31 para 6

⁴⁷ The Genocide Convention, which was ratified on August 27, 1959, the Geneva Convention, the Abolition of Forced Labor Conventions, which was approved on May 18, 2000, and the Convention on the Rights of Persons with Disabilities (ratified 1 October 2007)

the Indian judiciary to incorporate and implement these international judicial and quasi-judicial tools whenever there is an inadequacy in domestic laws.⁴⁸ Following this approach, it was held in the judgment of *Standard Chartered Bank vs. Directorate of Enforcement*⁴⁹ that a corporation can be prosecuted and penalized for any criminal offence committed by it.

Under Section 11 of Indian Penal Code, a corporation is held as a legal person,⁵⁰ hence can be prosecuted for the crimes committed by it.⁵¹ Hence, even though there are provisions in IPC which prescribe for the punishment of the companies for their offences, it does not, however, categorically and explicitly provide for the human rights abuses committed by the business entities.

The United Nation Working Committee in 2017 has submitted a proposition in its report that “*States should conduct an inclusive and transparent human rights impact assessment before concluding trade-investment agreements and insert explicit substantive human rights provisions in those agreements to preserve adequate policy space to discharge their human rights obligations.*”⁵²

Consequently, the Indian government, in its 2015 draft of Model Text for the Indian Bilateral Investment Treaty (BIT), has stipulated the rules for corporations to comply with the municipal human rights legislations. As per the Indian Government, the purpose and intent of the Model Text of BIT is “*to provide appropriate protection to foreign investors in India, in the light of the relevant international precedents and practices, while maintaining a balance between the investor’s rights and the Government obligations.*”⁵³

According to Article 12 of the Model Text for BIT, “*investors and their investments shall be subject to and comply with the Law of the Host State*”. This consists, inter alia, the legal provisions related to human rights violations, the provisions relating to conservation and protection of natural resources, and the application of environment law on the economic and commercial activities of the corporations. But the use of the term “should” in lieu of the “shall” has left an uncertainty about its mandatory nature. Still, the Model Text for BIT accords some room for enforcement by providing that any state entity, in case of violation of regulations given under Article 12 by any business entity, can take action against such corporation in front of a Tribunal provided under Article 14.⁵⁴ Notwithstanding the provisions given under Article 12 and Article 14, the Model Text fails to live up to the level of development attained by global human rights framework. The phrasing of the clauses linked to corporate obligations for human rights violations under the Model Text is confusing about statutory compliance. Also, it lacks to evolve an exhaustive framework for redressal mechanism. For the comprehensive enhancement in the human rights legal structure, the Model Text should

⁴⁸ A PROJECT OF THE INTERNATIONAL COMMISSION OF JURISTS, “Access to Justice: Human Rights Abuses Involving Corporations”, 2011, www.icj.org/dwn/.../AccesstoJustice-India-ElecDist-July2011.pdf

⁴⁹ AIR 2005 SC 2622

⁵⁰ Indian Penal Code 1860, Section 11

⁵¹ Indian Penal Code 1860 Section 2

⁵² Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises https://ap.ohchr.org/documents/dpage_e.aspx?si=A/72/162

⁵³ Model Text for the Indian Bilateral Investment Treaty <https://pib.gov.in/newsite/PrintRelease.aspx?relid=133412>

⁵⁴ Ibid, Article 14 Clause 1

insert a clause requiring the corporations to show human rights impact valuation in their annual reports. Furthermore, conformity with the international judicial and quasi-judicial tools like the International Bill of Rights and the UN Guiding Principle for Business and Human Rights should be made mandatory. It should establish an effective redressal mechanism for the victims.

In pursuance of the UNGPs, India has introduced the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (NGV).⁵⁵ It comprises several directives to regulate the conduct of the business entities within India. Principle 4 of the NGV stipulates corporations “*to respect the interests of and be responsive to all its stakeholders, including the marginalized groups of the society.*”⁵⁶ Once more, the nature of this principle is not binding due to the use of the term “respect” and “responsiveness”. Another principle states that corporations should “*respect and promote human rights.*”⁵⁷ As can be deduced, the principles provided under NGV, considering their non-binding nature, cannot adequately regulate and control the activities of the business entities.

A commercial entity can be held criminally liable for human rights abuses. The law regarding the liability of corporations for human rights violations committed by them is universally well established, and derives its legitimacy and substance from international conventions and instruments. Yet, the legislations regarding human rights in India, and also in many other countries, are inconsistent and anachronistic in nature. Additionally, the weak implementation and voluntary nature of the regulations coupled with laxity by the concerned authorities has made the determination and prosecution of human rights violations a herculean task, let alone fair and speedy reparations to the victims.

XII. Access to Redressal Mechanisms for Human Rights Victims Via Judicial and Quasi-Judicial Instruments

Last but foremost; the third principle proposed by Professor Ruggie is developing an efficient redressal mechanism. Expedient and equitable access to redressal forums and ideal implementation to the human rights norms is the link between state’s responsibility and corporation’s obligation to prevent human rights violations. Many international conventions and instruments have emphasized on the significance of providing fair and speedy remedy to the victims of human rights abuses. The 2005 UN Basic Principles states that- “*Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation. States should take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy*

⁵⁵ NGV, http://www.nfcg.in/pdf/national_voluntary_guidelines2011.pdf

⁵⁶ Ibid, Principle 4

⁵⁷ Ibid, Principle 5

as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims”⁵⁸

It plays a crucial function as each the administration’s responsibility to safeguard and the commercial obligation to uphold human rights norms can only be achieved and secured by providing swift access to remedy. At present, however, this particular domain seems to be lacking in most the countries. This has made the overall progress in international human rights framework futile.⁵⁹ Both remedies and rights two ends of thread; one cannot be said to exist without the other.

The process of trade liberalization has seen massive expansion in the recent decades. With growing economic activities, the number of multinational corporations has surged. They have gained a significant position in a society, and with their immense financial resources and international status, they have the capability to substantially affect human rights of large parts of the population in many countries, which could be seen in numerous cases, including Vizag Gas leak and Bhopal Gas tragedy.⁶⁰ Legally, corporations can be held liable under international judicial and quasi-judicial instruments. Having said that, the chief concern in form of the establishment of an effective implementation and redressal framework remains overlooked by the policy-makers in many countries. Still, some solutions for ensuring the accountability of the corporations for human rights violations were dwelt upon by the policy-makers in recent times. With the utilization of municipal laws, governments can regulate commercial activities of trans-national corporations with regards to universal human rights principles. The efficacy of domestic redressal mechanism is mutually related with the jurisdictional ambit of such state. There two most prominent principles in this aspect- the territoriality principle and the second is nationality principle. Principle of territoriality asserts that a nation could introduce, regulate and implement legislations that extend to the governance of the activities of all the subjects within its physical boundaries. On the other hand, the principle of nationality affirms that a state has jurisdiction over citizens and entities of its nationality, regardless of where the concerned act has been committed. Usually, majority of the domestic legislations are founded on the territoriality principle. Yet, the process of harmonization of domestic legal framework established on distinct principles is complicated and requires exigent efforts along with greater understanding of the responsibilities by all the concerned persons. As observed by Steven Ratner- *“States would agree that each State can regulate the human rights abuses that take place on its territory (even by foreign-based MNCs) as well as the activities of MNCs headquartered on the territory (even if the abuses take place overseas). If both the state of nationality and the territorial state (which is also likely to be the state of any victims of abuses) choose to regulate the activity, the result may well be an effective regime if the two states did not*

⁵⁸ Resolution 60/147 of 16 December 2005, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”.

⁵⁹ Policy Department for External Relations Directorate General for External Policies of the Union, ‘Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries’ PE 603.475 - February 2019 [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)

⁶⁰ Nityanand Jayaraman, ‘Vizag gas leak very similar to Bhopal tragedy. India must probe before blaming workers’ (May, 2020) <https://theprint.in/opinion/vizag-gas-leak-similar-bhopal-tragedy-india-probe-workers/416610/>

place different demands on corporations. But the developing world States might well place fewer requirements on businesses, in which case companies would seek to challenge the more restrictive laws. Litigation or diplomatic disputes over the limitations of jurisdiction-in particular the relevance of the reasonableness test-would inevitably arise."⁶¹

Prosecuting authorities and policy-drafters have encountered further challenges that are particularly related to trans-national and inter-border acts of human right violations, instances in which the corporation based and registered under the jurisdiction of one country, is carrying out its activities and committing human rights violations in some other country. With the technological developments and growing acceptance of trade liberalization policies, trans-national corporations have experienced vast expansion of their commercial activities in many different countries. Business is augmenting perpetually; even so, the development in human rights legislations has failed to keep abreast of with this economic expansion. There are issues regarding extra-territorial application of jurisdiction and implementation of domestic laws to international private entities that remain unresolved. This legislative lacuna has facilitated in evolving a system under which multi-national corporations can evade liability in cases of causing gross human rights violations and similar offences. This situation becomes worse when the responsible authority in the host nation is disinclined towards prosecuting and punishing the alleged corporation due to many reasons, one of them being that such corporation holds significant financial and political prowess. Additionally, there are also some operational challenges. Sometimes, the corporation that is responsible for causing the violation of human rights is carrying out its activities in the country where such abuse has occurred. Moreover in many cases, after committing the violations, the corporations have left the jurisdictional boundary of such state. There are circumstances in which though there is a substantial basis for exercising the jurisdictional power remains present, the enforcement authorities in the host nation may be unaware whether they can exercise such jurisdictional power, or it may be the case that such authority is unwilling to take action against such corporation due to the fact that the damage has been caused in another state. Also, sometimes there are specific procedural impediments that the prosecuting authority experiences. These could be; the mandatory provision that stipulates that the concerned activity must be a crime in both the host as well as home country, statutory limitations on the prosecuting authority in cases involving another nation, the delay involved in cases where there is a necessity to acquire prior permission from administrative officers, and provisions that necessitates the presence of the alleged entity within such state's jurisdictional boundaries.

These complexities can be addressed by employing certain policy changes as well as amending the legal framework according to the recent developments. In ascertaining whether or not the host nation should assert the jurisdiction, prosecuting authorities should examine certain specific possible grounds for exercising jurisdiction, which are as follows:

⁶¹ Steven R. Ratner & Jason S. Abrams "Accountability for Human Rights Atrocities in International Law" (2d ed.), Oxford University Press, New York, 2001, p.165

- Physical location and nationality of the alleged corporation and the person offended by the acts of such company
- Place where the damage has been caused or human rights have been abused.
- Place where the evidences and other important links could be found
- The complicity of the corporation in the commission of human rights violations and the geographical location where such company's affiliates, commercial and economic activities, and where chief operations were managed. If the prosecuting authority thinks that it is statutorily or operationally untenable to assert jurisdiction, it should send the case to proper and formal authorities in concerned jurisdiction. They should start communications with the appropriate authority as soon as possible to ascertain which of the authority is most suited for the effective inspection and prosecution of the case. Inter-departmental co-operation could be of great help in the investigations of the cases involving multi-national corporations.

XIII. A Critical Appraisal of the National Action Plan on Businesses and Human Rights (Zero Draft 2019)

After more than a decade of endorsing the UNGPs, India finally published the zero draft of its National Action Plan on business and human rights⁶² in 2019, and was committed to publishing a final draft by 2020. However, the final draft has yet not been framed.

The NAP follows the UNGPs' protect-respect-remedy methodology. It underscores India's commitment to human rights and socially responsible enterprise. It has been drafted after several rounds of consultation between the various stakeholders and relevant ministries of government of India. The NHRC, the SEBI, domain experts, representatives of industry associations and other relevant stakeholders were the participants of these consultations.

NAP's zero draft discusses India's domestic legal framework for human rights protection. It enumerates constitutional demands for the protection of rights, such as equality and equal treatment under the law, freedom of speech, and the right to seek legal action if these rights are violated. It also summarises the rights afforded to citizens by the expansive interpretation of the judiciary, such as privacy, medical care, and a clean environment. DPSPs also appear. It examines the 2013 Companies Act and CSR's legal recognition. Environmental protection, worker rights protection, and protection of women, children, Divyangs, STs, and SCs have their own sections in the NAP. The mandate on transparency (particularly financial transparency) and accountability in corporate operations is examined in depth. Under the Whistle Blower Protection Act of 2011, human rights defenders and whistleblowers are protected. The consumer protection framework and laws have been examined. In addition to community consultation responsibilities, the NAP details the 2011 National Voluntary Guidelines on Social, Environmental, and Economic Responsibilities of Business and the 2018 National Guidelines for Responsible Business Conduct. Regarding access to remedy, the NAP highlights state-based legal and quasi-judicial systems to resolve human rights abuses. The Supreme Court,

⁶² Zero Draft, Ministry of Corporate Affairs (2019)

High Court, specialised commissions (like the National Commission for Women), Labour Courts, dispute resolution under the Arbitration and Conciliation Act 1996, Lok Adalats under the Legal Services Authority Act 1987, Nyaya Panchayats and Gramme Nyayalayas under the Gram Nyaylay Act 2008 are examples of such mechanisms.

The Zero Draft of the NAP is having several issues and the same can be pointed out as follows:

Pillar I- State's duty to protect Human Rights

- Instead of experimenting with higher legal standards on a soft law basis, this part continues to be dominated by hard law, with no drive toward more strict legal requirements.
- It makes no reference to India's extensive rights-based jurisprudence beyond environmental law and confines its examination to statutory law.
- It does not address the state's role, which in India is a regulator and an enabler of enterprise. The state must decide how to balance these contradictory modes of functioning.
- There is a lack of critical engagement with the numerous statutes and India's political economy. The state must respect human rights and establish a business-friendly environment. This NAP must be founded on a realistic assessment of state function, related laws, and political economics.

Pillar II: Corporate Responsibility to Respect Human Rights

- In the whole section the issue of enforceability of these standards, on the corporations remains largely unaddressed.
- Corporate accountability and responsibility are complicated issues that must be addressed within the intricate structure of organisations. As the Bhopal Gas Tragedy demonstrated, attribution of liability is complicated when parent and subsidiary corporations are involved.
- It should have a section on multinational and transnational corporations' responsibilities and how India will handle jurisdiction in such matters.
- It doesn't discuss tools like human rights due diligence. In the European Union, efforts are being made to develop a due diligence framework from which the NAP can draw.⁶³

Pillar III: Access to Remedy

- The NAP confines its understanding in this section to courts and other legal avenues established by the state. There is a need to broaden this to include internal grievance redressal mechanisms that businesses can establish while keeping the communities they impact, in mind.
- This section only lists the existing legal and quasi-legal redressal mechanism. It does not try to bring forth a suggestive change in the Companies Act 2013 for the redressal of human right violations by corporations.

⁶³ The UNGPs talk about due diligence, but the NAP fails to draw a framework on the same.

XIV. The Companies Act 2013 lacks a framework for corporate human rights abuses

The Companies Act 2013 (CA 2013)⁶⁴ is the main framework of company law in India, that deals with the incorporation of a company, its regulation, duties of directors etc. It is a document that is periodically revised by the government in response to changing circumstances and fashions. The term "human rights" does not appear anywhere in the entire statute. However, the Companies Act of 2013 comes closest to this concept in two situations.

Firstly, it is known that under Section 149 of the CA 2013, the companies are to have a board of directors. Clause (8) of the same provision mandates that "company and independent director shall abide by the provision specified in Schedule IV."⁶⁵ Schedule IV includes a code of conduct for independent directors that compels them to "protect the interests of all stakeholders, particularly minority shareholders," as well as "balance the competing interests of the stakeholders."⁶⁶

The term stakeholder, can be judicially widened here, to include people whose human rights maybe affected by the operations of the company.

"Furthermore, Section 166 of the CA 2013, talks about the Directors' fiduciary duties to not only the shareholders but also the employees, communities, and for the protection of the environment."⁶⁷ Although, nowhere in the provision do we find the use of the term "fiduciary duty", however the same can be concluded from judicial interpretations in various cases. The term originated from the English case of *Percival v Wright*⁶⁸, wherein the court held that the director are two relationships with the company one is agent and second is trustees. This was further affirmed by the Indian case of *Globe Motors Ltd. vs Mehta Teja Singh*⁶⁹, wherein it was determined that a director's duties to the company are virtually identical to those of a trustee, and they are required to behave in the best interest of the company in all of their contacts with the company or on its behalf.

Thus, the directors while working bone fide for and on behalf of the company also have to keep in mind the interests of the larger community, as well as the protection of the environment.

Secondly, under the provisions of CSR, the CA 2013 comes the closest to fulfilling its commitment to respect the human rights of various stakeholders. India was one of the first few countries to make CSR mandatory under its corporate law. CSR is dealt with under Section 135.

"The Companies Act mandates companies (*having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the*

⁶⁴ The Companies Act 2013 (Act no. 18 of 2013), hereinafter CA 2013.

⁶⁵ Id., § 149(8).

⁶⁶ Schedule IV, CA 2013.

⁶⁷ Id., § 166.

⁶⁸ *Percival v Wright* [1902 (2) Ch. 421]

⁶⁹ *Globe Motors Ltd. vs Mehta Teja Singh* (1984 55 Comp Cas 445 Delhi) para.7

immediately preceding financial year) to spend at least 2% of their average net profits of the preceding three years towards socially beneficial activities such as:

- eradicating hunger, poverty and malnutrition, promoting healthcare including preventive healthcare, and sanitation including contribution to the Swachh Bharat Kosh set up by the Central Government for the promotion of sanitation and making available safe drinking water;
- promoting education, including special education and employment- enhancing vocation skills especially among children, women, elderly and the differently abled, and livelihood enhancement projects;
- promoting gender equality, empowering women, setting up homes and hostels for women and orphans, setting up old-age homes, day care centres and such other facilities for senior citizens, and measures for reducing inequalities faced by socially and economically backward groups;
- ensuring-environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro-forestry, conservation of natural resources and maintaining quality of soil, air and water, including contribution to the Clean Ganga Fund set up by the central government for the rejuvenation of river ganga;
- protection of national heritage, art and culture, including restoration of buildings and sites of historical importance and works of art, setting up public libraries, promotion and development of traditional art and handicrafts;
- measures for the benefit of armed forces veterans, war widows and their dependents;
- training to promote rural sports, nationally recognised sports, Paralympic sports and Olympic sports;
- contribution to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio-economic development, and relief and welfare of the schedule caste, tribes, other backward classes, minorities and women;
- contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;
- rural development projects;
- slum area development.”⁷⁰

The same can be used to deal with the possible human rights impact that a company may involuntarily end up causing.

Apart from this, the Securities and Exchange Bureau of India (SEBI)⁷¹ in its (listing obligation and disclosure requirement) regulations 2015, mandates the top 500 listed companies (in terms of market capitalization) to prepare Business Responsibility Reports (BRRs) describing the initiatives taken by them from an environmental, social and governance perspective. The BRR, which is part of a company's Annual

⁷⁰ Supra note 26, § 135.

⁷¹ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 34(2)(f) read with SEBI Circular dated 04 November 2015. Accessed 04/11/2021. Accessible at [The circulars may be defined in two parts, one to convey background, rationale, objective of a decision and the other to commu - 1446638214636.pdf \(sebi.gov.in\)](https://www.sebi.gov.in/circulars/1446638214636.pdf).

Report, seeks to assess the company's implementation of the 2011 NVGs. Business Responsibility and Sustainability Reporting (BRSR) is new mandate added to ensure the Sustainability element with more focus on abovementioned aims.

However, even with the existence of all these legislative mandates, the companies act lacks a sturdy framework specifically dealing with the violations of human rights by companies and corporations.

XV. Conclusion and Suggestions

As a community, every stakeholder and person affected either indirectly or directly, should regard greater significance to the human rights violations. With the business activities under economic liberalization increasing with rapid pace, so the incidents of gross human rights abuses are rising as well. The state is responsible of the prevention and prosecution of human rights violation. As per the principle of territorial jurisdiction every nation has the jurisdiction to govern all activities and persons, corporate and other private entities within the boundaries of its territory.⁷² The developing nations should use this principle for the safeguard of human rights of their citizens. Moreover, various international conventions and instruments has emphasized on the state's duty to provide protection as well as an effective remedy framework. In many countries, due to the loopholes and inadequacy of municipal legislations, the culprit entities go scot free. It is therefore proposed in this article that the international regulations regarding human rights like UN Guiding Principle, UDHR, OECD Guidelines etc. could be made binding by the introduction of the appropriate domestic legislation by the States. These universal judicial and quasi-judicial instruments could be utilized by giving them enforcement via development of effective remedy mechanisms.

It is very crucial that the new framework works without having any influence or coercion by the multinational corporations, national authorities or any other entity. Finally, practical improvements in real life cannot be done without the co-operation and persistent collaboration with all the concerned authorities and institutions, ranging from countries at the domestic and universal level. The biggest concern regarding the human rights framework is efficacious implementation of the redressal mechanism. If national authorities fail to establish an effective and universally-accepted remedy framework, and if corporations fall short to act within the norms of international human rights instruments, there is threat that the cases of exploitation on a vast scale by the business entities without being held accountable. Concluding, rights and remedies are co-existence, thus one cannot exist without the other. After studying in detail, the history of the relationship between companies and human right violations caused by them via case studies, the researcher strongly believes that there is a need to address this issue specifically. Till date, the country has dealt with various (often massive) human right violations by companies, using general laws and

⁷² Higgins (1993), p. 89

constitutional mandates. However, these fail in cases where intricacies of corporate structures are used to their advantage by companies. The best example of the same is the Bhopal gas tragedy.

The UNGPs is good for setting a standard that the state as well as the companies should follow in protecting and respecting human rights and remedying their violations however the NAP fails us, in the implementation of the same. It can be harshly said that there is no “plan” in the NAP, instead it is a mere reiteration of the principles and the existing legal framework in India.

Had the NAP drawn a possible structure dedicated wholly towards affixing accountability in cases of human right violations by companies, the Companies Act could have adopted the same via an amendment in the future. It totally misses the question of the effectivity of all the “A-to-Z provisions” that it lists.

As far as the Companies Act 2013 is concerned, it can be safely said that even after the existence of provisions like Section 135, Section 149(8) [Schedule IV] and Section 166, the company law regime in India is still largely “shareholder specific”. It is high time and efforts need to be drawn to make it more “stakeholder oriented”, as it is a proven fact that operations of companies affect various stakeholders from all walks of life.

Suggestively, a caveat should be drawn from the discussion and the company law should be molded and amended in such a way that it addresses all the intricacies of the corporate structure in a shared context of the protection of human rights and affixing liability on the perpetrator corporations. Right from the complex relationship between subsidiary and holding companies to the very issue of lifting the corporate veil, the whole company law regime should be made “human rights proof”.

In the light of growing multinational corporations, high valued investments of the 21st Century or the very lucrative “*Make in India Project*”, the policy makers should be all the more careful. They should gather a full picture of such industrial projects and the hazards associated with the same. It may not be easy but it is necessary to ensure that corporate disasters like the Bhopal Gas Tragedy are never repeated again.

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