

Emerging Dimensions of Business and Human Rights in India



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Global Snapshots: Overview

- Why: SDG emphasis on Private Sector in development and onus, corporate and business
- Use and abuse of corporate power : environment
- Farmers in Vidarba, Nandigram, access to medicine, access to vaccine
- NHRC report: asbestos, health, clinical trials, environment, displacement, industrial products, silicosis-stone crushing, Nyam giri Hills, pharma pricing, bonded-migrant-child labor; Labor law crisis
- Tear drops on the cheek of time: The Taj
- Carpets and the Nobel Laureate

- Alien tort claims: US, Canada: Clearview AI Law Suit 2020, Illinois, court denied objections in 2021: Photos of citizens down loaded
- EPZs in Mexico, Malaysia, Mexico: Oct 2020 electrical company FDF going against french vigilance laws and indigenous people Zapotech Indigenous people by atrocities and environmental pollution, Superholdings vs Soy Sros, Cambodia, April 2020, drop criminal charges after social media campaign
- Inversiones Cobra and CXI law suit 2017, Guetamala: 2019, Chub's charges dropped
- Bertha Caroces of Lenca people, Honduras and EUs Sustainable Corporate Governance Directive for due diligence on Environment and Human rights (the Netherlands: not only contribution but admin enforcement and duty of care with civil liability: remedy and onus missing in EU directive); continuous risk analysis
- Gender responsive corporate governance, environmentally vigilant supply chain (watch list of products and company)

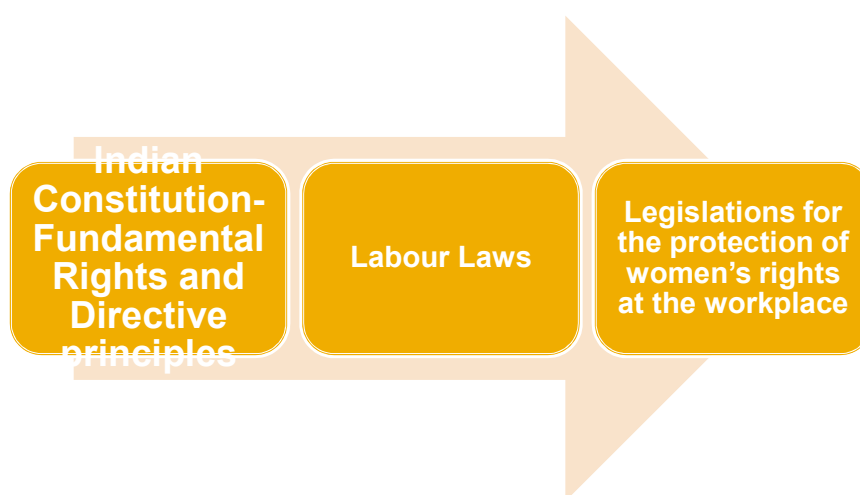
Concept of human rights: Natural, Inalienable

- Right to life
- Right to liberty
- Right against exploitation
- Right to equality
- Right against discrimination
- Right to justice

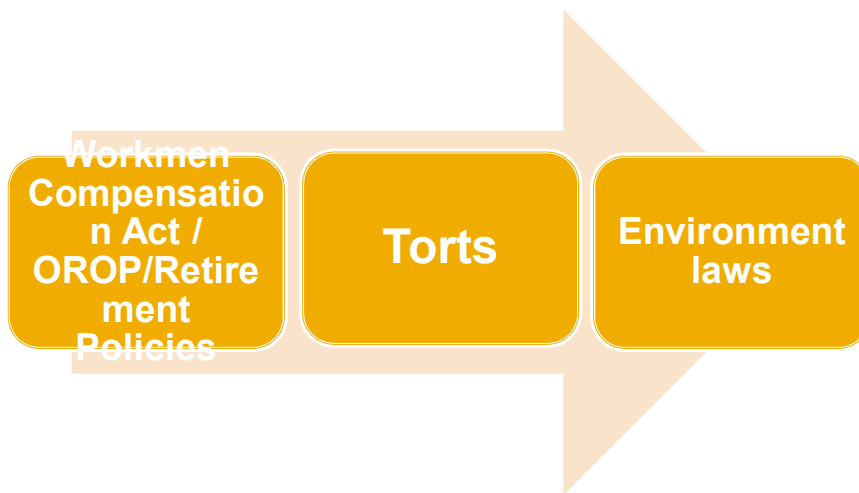
Human Rights...

- Right to accepted as a person
- Right to security of person
- Capacity to decide or act on her own behalf –
- Equal access to property and other resources
- Equitable socioeconomic and political support
- Exercise right as a full human being
- Support development of others

Enforcement of Human Rights and running a business in India



Enforcement...



The Role Of Business In Respecting Human Rights

- International law applies to states and responsibilities.
- Human rights law gives rights to individuals; but duties remain with state
- What duties do business have?
- Ruggie report, 2008: 'Protect, Respect and Remedy' (E.g): New gc



What is the role of business in respecting human rights?

- Corporations are wealthier than the host state : imbalance of power.
- Businesses taking advantage of conflict to gain control of natural resources (POSCO, Monsanto in India)
- Businesses operating in states Involved in human rights violations (eg Burma, Shell in Nigeria)



Race to the bottom

- Elimination of boundaries : Globalisation
- Freedom of foreign direct investment (FDI)
- Competition between states to attract investment

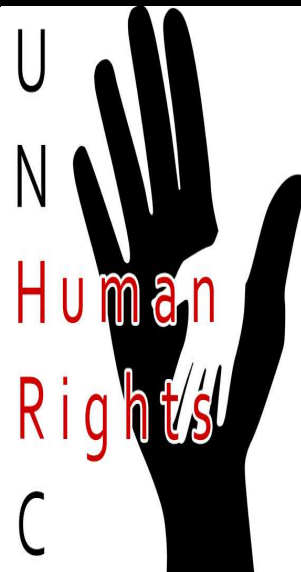


Accountability Gap

- Not subject to one legal system
- One brand and one profit but limited liability
- Rights but no duties under international law
- States unable or unwilling to hold companies accountable
- Market provides ineffective accountability mechanism

Filling the gap?

- International mechanisms to hold companies responsible.
- Voluntary codes of conduct & industry specific initiatives.
- The UN and OECD Guidelines.



The Indian context

- 86% of the workforce was in the unorganised sector
- 6.2% was informally employed, without contracts
- Therefore 92.6% was not in the employ of organised businesses

2012 :

- More than 90% : not much has changed
- Informal sector cannot afford commitments to corporate social responsibility

Therefore, a focus on the corporate responsibility to protect would cover less than 10% of the workforce

Source : Report on a National Commission on Enterprises in the Informal Sector , 2006 & NHRC Report 2012

Indian Companies Act 2013 :CSR

- **Section 135** : Every company, private limited or public limited, of Rs 500 crore or a turnover of Rs 1,000 crore or net profit of Rs 5 crore should spend at least 2% of its average net profit for the immediately preceding three financial years on corporate social responsibility activities
- Schedule VI contains activities that can be held as CSR
- **Ambit** : the holding and subsidiary companies as well as foreign companies whose branches or project offices in India

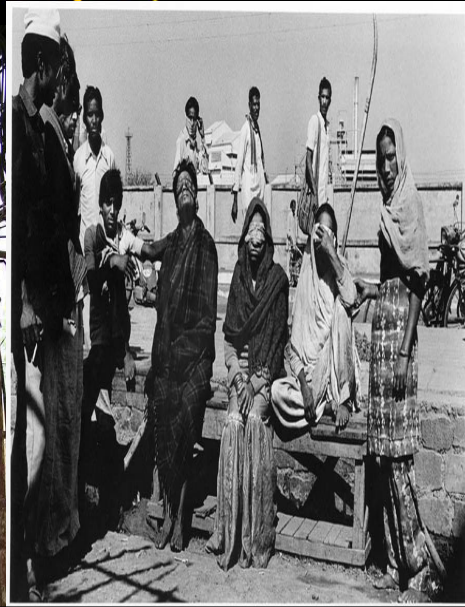


Impact of Business on the Environment

- Degradation of environment and ecological imbalances raised with these corporations.
- Due to over- exploitation of natural resources and industrial wastes, the human generation is in danger.
- Examples : Bougainville Island or the Ogoni people of Nigeria, and similar instances of violence and human rights violations by Africa's oil tycoons and firms like *Exxon and Shell*



Union Carbide (Bhopal)



The Bhopal Holocaust

- Explosion in 1984, leakage of MIC gas
- 16.000 killed, 50.000 permanently disabled
- Lawsuits in New York and India
- \$470 million out of court settlement
- Similarly , Love Canal Incident of USA (1978) :
Seveso Incident in North Italy (1976) , Methyl-mercury poisoning in the Minamata Bay (Japan, 1956-80) ,
- Nuclear accidents at The Three Mile Island, nuclear power station of the USA in 1979 and Chernobyl in the then USSR are threat to the present generation and to posterity by the industrialization

The response of the Indian law

- M.C. Mehta vs. Union of India (1988)¹ SCC 471 (**Ganga Pollution Case**), A.Q.F.M. Yamuna vs. CPCB (2000) 9 SCC 440 (**Holy river Yamuna.**)
- M.C. Mehta vs. Union of India, 1996 (**Taj Trapezium Case**)
- Indian Council for Environment legal Action and Others vs. Union of India (2011) 3 SCC 212 : fines, costs: Agro chemicals:oleum: Jaipur: **The Polluter Pays Principle, precautionary**
- Orissa Mining corporation V. MOEF, 2011 (**Niyamgiri**)

Who is responsible under int. law?

1. Host state
2. Home state
3. Multinational enterprise
4. Alien torts?

Three types of corporate liability

1. Direct abuses (e.g. by security guards)
2. Taking advantages of abuses (e.g. involuntary resettlement or abuses in supply chain)
3. Failing to speak out against abuses (sphere of influence)

International codes of conduct

- ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977)
- OECD Declaration on International Investment and Multinational Enterprises (1976, revised several times)
- UN Global Compact (2000)
- But vague language and limited supervision systems

UN Special Representative : John Ruggie

- Mandate (since 2005): “**identify and clarify**” international standards
- Fantastic networker
- Managed to establish global consensus
- Ruggie framework: Protect, Respect and Remedy
- Guiding Principles (2011)

Guiding Principles on Business and Human Rights (2011)

- Adopted by UN Human Rights Council without any change : Not binding
- Don't cover home state obligations
- Corporate due diligence obligation: ticking the boxes; obligation of effort

Lawsuits :

- Purpose: relief for victims and establish precedents by bottom-up approach
- So far mainly in USA
- But increasingly also in other countries required

The OECD Guidelines for Multinational Enterprises

- 'adhering states undertake to ensure that their corporations respect certain standards in their activities, whether **at home or abroad**'
- In existence since 1976, specifically human rights since 2000.
- Unlike Global Compact and other codes of conduct, it does have a grievance mechanism, provided by a system of National Contact Points (NCPs)

The Hurdles

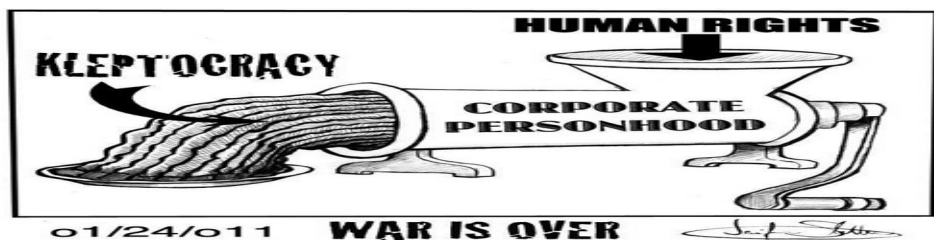
- Jurisdiction and Enforcement of Judgments in Civil Matters : company may be sued where it has its statutory seat
- Customary international law : Kiobel v. Shell
- Limited liability of subsidiary
- Lifting corporate veil
- corporate group liability

Out of court settlements

- Union Carbide/Dow Chemicals (India): \$470 million
- Unocal (Myanmar/Burma): secret amount
- Trafigura (Cote d'Ivoire): app. \$250 million
- Wiwa v. Shell (Nigeria): \$15.5 million
- Texaco/Chevron (Ecuador) next?
- Problems with settlements

The future: *Human Rights Due diligence*

- Disasters needed?
- Demand for level playing field?
- A convention codifying international corporate obligations
- With a binding enforcement mechanism: create policy, assess impact, review risks, integrate, report



Sustainable Devt Goals (UNDP) & CSR: the Human Rights way

- ABB: access to electricity in Tanzania
- Ericsson: Mobile connectivity and access to health and education in Africa through Millennium Villages
- Novartis: Creating access to medicines in rural India through the Arogya Parivar Initiative
- The Coca-Cola Company: Eradicating child labor in sugar cane harvesting in El Salvador
- Newmont Mining: A rights-aware approach to Ahafo Mine in Ghana; xayaburi dam in Thailand
- Gold mines in Papua Newguinea and sexual violence

Emerging Issues

- EU's Corporate Sustainability Directive, 2021: energy, emission, double materiality (inward and outward impact), disclosures, risks, <https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2FCOP26%2520EU%2520side%2520event%2520-%25204%2520Nov%2520-%2520PTF%2520ESRS%2520overview%2520%28slides%29.pdf>
- (UNWG) encouragement to develop, enact and update' a national action plan (NAP) on business and human rights (BHR) - states' responsibility to disseminate and implement the GPs. - June 2014, HRC resolution calling upon states to develop NAPs.
- As of 29 February 2016, ten states have drawn up NAPs, while several others are in the process of doing so.
- Against this background, this paper examines two broad questions:
 - first, **whether India needs a BHR framework** at the national level to implement the GPs;
 - second, assuming that such a framework is needed, **what the content of such a framework should be** and what **principles should be followed** to make the process transparent, inclusive and legitimate

Business and Human Rights National Action Plan (NAP) zero draft - with a commitment to publish the final NAP in 2020.

- The **NAP 2020 is a policy document by which a government articulates** its action to fulfil its commitment to implementing the UNGPs
- The Indian Ministry of Corporate Affairs led the process of drafting the NAP in consultation with other Central and State ministries.
 - listing of **relevant existing legislations and policies categorised under the three pillars** outlined in the [UN Guiding Principles for Business and Human Rights](#) (UNGPs): protect, respect, and remedy.
- It **does not present an analysis of the statutes or existing gaps** in these legislations and policies

Business and Human Rights National Action Plan (NAP) zero draft 2020

- India 2018: remove 'voluntary'
- India's Domestic Legal Framework for Protecting Human Rights
 - Pillar I –The State Duty to Protect Human Rights
 - Part III of the Constitution of India, that guarantees the fundamental rights, forms the bedrock of India's commitment to human rights
 - Transparency and Accountability - Right to Information Act, 2005 (RTI Act)
 - Rights of Persons with Disabilities Act, 2016 (RPD Act) - protection for persons with disabilities
 - Prevention of Corruption Act, 1988
 - SEBI Circular on "Business Responsibility and Sustainability Reporting by listed entities" – Business Responsibility Reports (BRRs)
https://www.sebi.gov.in/sebi_data/meetingfiles/apr-2021/1619067265752_1.pdf

Business and Human Rights National Action Plan (NAP) zero draft 2020

- India's Domestic Legal Framework for Protecting Human Rights
 - Pillar II - The Corporate Responsibility to Respect Human Rights
 - Companies Act, 2013 and Statutory Recognition of Corporate Social Responsibility
 - 2018 NGRBC - National Guidelines on Responsible Business Conduct -
https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf

Business and Human Rights National Action Plan (NAP) zero draft 2020

- India's Domestic Legal Framework for Protecting Human Rights
 - Pillar II - The Corporate Responsibility to Respect Human Rights
 - The Industrial Relations Code, 2020
<https://prsindia.org/billtrack/the-industrial-relations-code-2020>
 - Closure, lay-off and retrenchment
 - Prior permission of the government
 - Disputes relating to termination of individual worker
 - Work hours and employment conditions
 - Social Security – Migrant Workers Unorganized workers
 - Issues in the Code

Business and Human Rights National Action Plan (NAP) zero draft 2020

- India's Domestic Legal Framework for Protecting Human Rights
 - Pillar III - Access to Remedy - victims of business-related human rights abuses as a responsibility of both the State and businesses.
 - State-Based-Judicial/Quasi-Judicial Mechanism to Redress Human Rights Violations
 - Supreme Court and High Court
 - National Green Tribunal
 - Specialized Commissions –
 - The National Commission for Women - National Commission for Women Act, 1990, Section 10.
 - The National Commission for Protection of Child Rights - Commissions for Protection of Child Rights Act, 2005
 - Protection of Human Rights Act, 1993

Business and Human Rights National Action Plan (NAP) zero draft 2020

- India's Domestic Legal Framework for Protecting Human Rights
 - Pillar III - Access to Remedy
 - State-Based Non-Judicial Mechanism
 - Arbitration and Conciliation Act, 1996 (self-limitation?)
 - Legal Services Authorities Act, 1987 (LSA Act): Quality?

Business and Human Rights National Action Plan (NAP) zero draft 2020

- Key Issues failed to have been addressed in NAP 2020:
 - *land rights, extractive industries and rights of marginalised, vulnerable and poor communities*
 - Forest Rights Act, 2006 - rights of forest dwellers being impacted by businesses
 - development of areas affected by extractive industries, the responsibility of investors

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021

<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>

- media platforms welcome to do business in India but they need to follow the Constitution and laws of India
- peoples' varied concerns while removing any misapprehension about curbing creativity and freedom of speech and expression
- difference between viewership in a theatre and television as compared to watching it on Internet
- fake news, rampant abuse of social media, misuse of social media for settling corporate rivalries, blatant disrespect to religious sentiments has compelled many media platforms to create fact-check mechanisms.
-

National Human Rights Commission Advisory on 'Impact of Covid 19 pandemics: Business & Human Rights and Future Response"

- <https://nhrc.nic.in/sites/default/files/Advisory%20on%20Business%20and%20Human%20Rights.pdf>: covid 19
- Protect informal workers during COVID19 pandemic
- Urge companies to use (emergency) funds to support stakeholders not shareholders
- Human Rights Due Diligence Framework for Businesses to manage the COVID-19 shocks
- Business Continuity and Risk Management
- Mitigating employee and infrastructural risks and resolving workplace issues

Rights and Gender Justice

- Gender Justice is a comprehensive goal
- Scheme of protection from exploitation and denial.
- It includes :
 - participation in decision-making in all spheres, finding equitable solutions in family and society,
 - desisting from stereotyping of gender roles.
 - Historical, multifold discrimination should be eliminated because everyone is a right-bearing autonomous being

Legal Framework

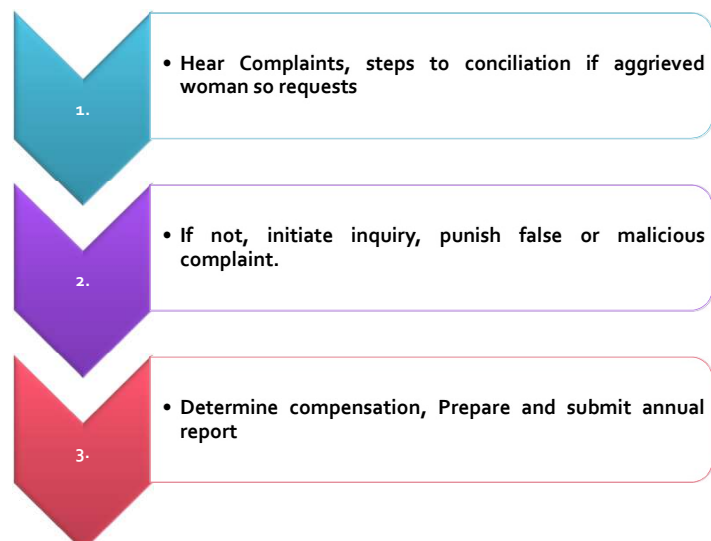
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSHA Act)
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (POSHA Rules)

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013	
Object	• Protection, Prevention, Redressal
Definition	• Sexual Harassment, Aggrieved Woman, Work place (Govt., private, other places incl. transport, visited)
Internal Complaints committee	• Members, Duties, Appeal, removal, Penalties, cognizance by Courts
What is sexual harassment	• Unwelcome behaviour, or act, direct or by implication (Promise, threat), interference, hostile, humiliation
Aggrieved Woman	• Employed (includes unorganised, domestic, casual, temporary), unemployed: students, clients, patients, customers, interns
Duties of the Employer	• Provide (safe envt and assistance), constitute ICC, display: Order of ICC, penal consequences
Duties of the employer...	• organise workshops and awareness to sensitize, initiate action under IPC if the aggrieved desires even if perpetrator is outsider • treat and take action as if misconduct under service rules
Internal complaints Committee (ICC)	• If 10 workers or more. District officer does it if no 10 workers or for district and if complaint against employer
Internal Complaints Committee	• Senior Woman employee to preside over, half are women, 3 years, allowances for NGO or outside member, 2 from employees

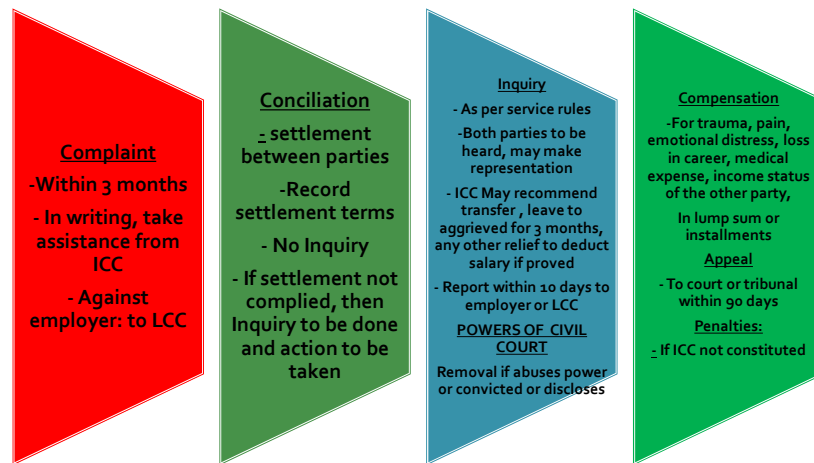
Dispute Redressal Mechanism

- POSHA Act
 - Section 9 - complaint of sexual harassment
 - Section 11 - Inquiry into complaint
 - Section 12- Action during pendency of inquiry
 - Section 13- Inquiry report
- POSHA Rules
 - Rule 7- manner of inquiry into complaint
 - Rule 8- Relief to complainant during pendency
 - Rule 9- Manner of taking action for sexual harassment

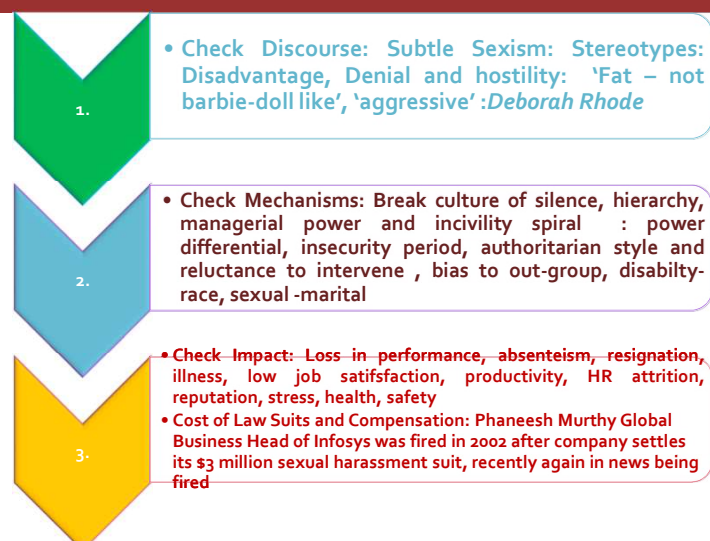
Duties...



ICC and compliance



Ideas in strategizing...examples of a male colleague as target, another as reformed with intervention – silhouettes of abuser



Summary: Coincidence or collaboration?

- Creation and operation: environment, compliances:
Product: eg: Electrical chairs, hazardous materials
- OSHE (mental health, trauma) and Human Resources, welfare: Labor law; No to discrimination, no to harassment: Family based business, death on the property
- Protect rights on parting: smooth parting

HR in Governance: PMs address

- Principles of justice and rule of law: notice, hear, enquire, act: Disha ravi case 2021: no conclusive link to conspiracy in Red Fort violence
- Gender reflections: safe work place as PM said
- Work from home: transport, timing, facility
- Human rights at home and work: Where do universities/organisations need soul search?

References

- <http://business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled>
 - Menno Kamminga , Business and Human Rights, Business and Human Resource Center
 - Robert D. Haas , BUSINESS'S ROLE IN HUMAN RIGHTS , Berkeley Journal of International Law ,2008
 - James P. Kelly, MULTINATIONAL BUSINESSES AND THE MATRIX OF HUMAN RIGHTS GOVERNANCE NETWORKS. 2011
 - Anna F.S. Russell, Incorporating social rights in development: transnational corporations and the right to water, Int.J.L.C. 2011, 7(1), 2011
 - Harvard Report: Business Leaders ' Initiative on Human Rights: 2010
 - [Business & Human Rights | Human Rights @ Harvard Law](#); *Unocal*, *Wiwa*, *Kiobel v. Royal Dutch Petroleum Co.*, and *In re South African Apartheid Litigation*.
 - <https://nhrc.nic.in/sites/default/files/Advisory%20on%20Business%20and%20Human%20Rights.pdf>
 - Surya Deva, Background Paper for India's National Framework on Business and Human Rights, https://www.ethicaltrade.org/sites/default/files/shared_resources/india_national_framework_bhr_background_exec_summary.pdf
- <https://mobile.twitter.com/i/broadcasts/1zqJVBmWAeYJB> (Prime Minister's address, 28th NHRC foundation day)