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Rights Protection Regime for Internally Displaced Women and Children: Towards the Formation of A Metaframework

Dr. Rathin Bandyopadhyay¹ & Chandrani Das²

In the contemporary world, defining development has been a quagmire. This paper is an effort towards understanding the dilemma of internally displaced women and children, the questions of rehabilitation, resettlement, and reparation, while in the process, trying to draw useful and legitimate distinctions between the economic and social rights of internally displaced women and children due to communal violence, large scale projects, and natural disaster. The study is focused on the larger issues involved in development projects, making a comparative cost benefit analysis of the development on the social and individual welfare and the long term impact thereon. The paper envisages an insight to the projects, specifically on the physical forms of development, i.e. projects which require land expropriation and call for displacement by decree. Noticeably, such catastrophic development projects cause upheaval and displacement of communities. The paper scrutinizes such projects, including Dams, Industrialization, Mining (natural resource extraction), distributive policies, and other mega infrastructural projects, besides the lop-sided Disaster Management and reconstruction programs that cause misery to the masses in case of Natural disaster, looking on to the greater policy issues related to displacement, rehabilitation and the consequences thereof, especially on the women and children.

*'No man is an island, entire of itself:
Every man is a piece of the continent,
a part of the main.....
Any man's death diminishes me,
Because I am involved in the mankind;
And, therefore, never send to know*

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For whom the bell tolls:

It tolls for thee.'

- *John Donne*

Introduction

The popular paradigm of development has ruled the whole post War era. Irrespective of the social economic and political ideologies of the nations, each one aspired to run past the other in this race of development. Unfortunately, six decades later, we are as near to the goal as to a mirage. Internal displacement has become one of the most pressing humanitarian, human rights and social and economic security problems confronting the international community today. Though it is not a new phenomenon, what has changed is the number and severity of the conditions of Internally Displaced Persons (hereinafter IDPs). The better understanding of the acute suffering endured by the millions affected and the lack of a comprehensive international regime providing for the protection and assistance of IDPs, has resulted in a growing concern within the international community. This concern about IDPs is amply justified. Very often, women and children who are in flight, adapting to life in camps are heavily impacted. They suffer extreme deprivation that threatens their very survival and are often exposed to considerable danger which includes separation from their families, exposure to gender violence, trauma, impaired health, loss of property, depression and most importantly, physical deterioration.

United Nations High Commissioner for Refugees (hereinafter UNHCR) indicates that women represent approximately half of displaced populations overall. The balance of male to female displaced varies from situation to situation. When men lose their livelihoods and their resources, the implied loss of status may result in depression and self-harm, as well as a backlash against women and an escalation of domestic violence. The additional responsibilities women take on may have positive psychological impacts for them. Many gain greater self-confidence and pride as a result. However, the burden of extra work places serious constraints on women's health and welfare, and the contrast between men's and women's responsibilities can put huge strains on family relationships.

Women and children are entitled to the same protection as men in international humanitarian and human rights law. In addition, recognising their specific needs, international humanitarian law grants women additional protection and

right often related to their child-bearing role.³ Under the international law the obligation to prevent arbitrary displacement and to protect and assist those who have been displaced is preferentially given to the women and children who fall squarely within the purview of states. Though, in many countries the very governments responsible for the protection of the displaced were and still are either directly or indirectly the force behind arbitrary internal displacements. At least about 18 governments were involved in the arbitrary internal displacement of civilians. The UN Guiding Principles on Internal Displacement (Guiding Principles) offer a comprehensive and authentic basis for providing protection and assistance to IDPs.

The Indian Constitution guarantees justice, liberty and equality to all citizens of the country which means men and women are equal in all perspective. For this our constitution codifies these rights as fundamental rights and include Judicial Intervention through Writs, Part IV of the Indian Constitution lists out the Directive Principles of State Policy (DPSP) for creating positive obligation on the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio economic justice in a reality.

Thus the study analyses the phenomenon of internal displacement of women and children, responses to the problems and what needs be done to improve the legal framework for their protection and assistance. It is based on the assumption that states can no longer hide behind the veil of sovereignty and non-intervention principles and claim that their treatment of their citizens is solely a domestic matter.

Who Is An Internally Displaced Person?

The more recent definition is offered in the Guiding Principles on Internal Displacement, which define IDPs as:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.⁴

³ Charlotte Lindsey, *Women Facing War* (Geneva: ICRC, 2001).

⁴ See para 2 of the Guiding Principles on Internal Displacement.

The inclusion of natural or human-made disasters in the definition of IDPs has generated debate - some are in favour while others are not. Nils Geissler⁵ argues that persons who leave their homes or places of habitual residence due to natural or human-made disasters face only part of the problems encountered by persons displaced as a result of armed conflicts or systematic human rights violations. They do not find themselves in refugee like situations, but rather face problems relating to the field of economic and social rights.⁶

An Overview of International Law for Internally Displaced People

The phenomenon of internal displacement occurs particularly during internal disturbances and upheavals, as well as in non-international armed conflicts. However not being the beneficiaries of a specific convention, as is the case of refugees, internally displaced persons (IDPs) are protected by various bodies of law, principally, human rights law and international humanitarian law. Although no specific international treaty or UN (United Nation) agency exists to protect internally displaced women and children, UN has been working since 1992 to develop protection mechanisms to help internally displaced persons. But under UN, several agencies, including the UNHCR, are actively involved in providing assistance to many internally displaced groups. The UN Office for the Coordination of Humanitarian Affairs (hereinafter OCHA) is charged with coordinating the UN's policy, advocacy and response to all humanitarian emergencies. Additionally, a UN inter-agency committee, the 'Inter-Agency Standing Committee' made up of seven UN agencies such as UNHCR, the United Nations Development Programme (hereinafter UNDP) and the World Food Programme (WFP) exists to enhance communication among humanitarian organizations that provide emergency aid. Despite the seemingly large amount of UN activity, issues of internally displaced persons are present.⁷

International protection of human rights regime is relevant to IDPs because internal displacement raises a wide range of human rights issues. IDPs, like any other human being, benefit from the legal protection of international human rights law without distinction and in almost all circumstances.⁸ This right aims

⁵ N Geissler, 'The International Protection of Internally Displaced Persons' (1999) 11(3) *International Journal of Refugee Law*, 455.

⁶ ILA, Committee on Internally Displaced Persons, *Report and Draft Declaration for Consideration at the 1998 Conference*, 5.

⁷ Malinda M. Schmiechen, 'Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps' (2004) 22(473) *Public Law Review*, Saint Louis University 477.

⁸ C Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press 2004) 42.

to prevent displacement and to ensure basic rights which should occur. The prohibition on torture, cruel, inhuman or degrading treatment or punishment, and the right to peaceful enjoyment of property and to home and family life are of particular importance for the prevention of displacement. The right to personal safety, home, as well as the rights to food, shelter, education and access to work offer vital protection during displacement.

In certain situations like displacement, the violation of one particular right can lead to a whole series of other rights violations. In many cases, the fact of being constrain to leave one's home itself entails violations of certain rights, such as the right to make secure from any kind of anxiety of person and the freedom to choose one's residence. Very often, the factors which led to the displacement - discrimination, armed conflict, other forms of generalized violence, etc. themselves are violations of human rights. Displacement from one's place to another may make the internally displaced particularly vulnerable.

The Global Overview outlines the particular challenges faced by internally displaced people trapped in situations of chronic conflict and violence. In these highly complex security environments, persons in displacement not only risk their lives in the midst of armed violence, but also struggle to meet their basic needs and access their human rights. In the international community, there is often minimal focus on IDPs beyond the acute humanitarian emergency. Protracted displacement situations, in places require sustained commitment and engagement by governments to respond to the needs and risks faced by IDPs. Only through effective government action can responses be devised that provide effective, long term protection of IDPs, which ultimately need to enable IDPs to reach the durable solution of their own choice. In a majority of cases, governments lack the capacity, resources and sometimes the will to enable such choices to be made. Consistent support is therefore required to assist governments in meeting their responsibilities towards their own internally displaced populations.

Statistics and analyses of available figures can be found in the Internal Displacement Profiles in the IDP database which are linked from the country IDP figures in this table. An overview facts and figure of global IDP of the year 2010 is available [here](#). IDMC (Internal Displacement Monitoring Centre) publishes updated IDP figures in its annual Global Trends in March 2011.

Table 1: Global Overview of People Displaced by Different Facts in 2010⁹

Number of people internally displaced by conflict or violence as of December 2010	27.5 million
Most affected region	Africa (11.1 million IDPs in 21 countries)
Regions with an increase in the number of IDPs since 2010	The Americas; Europe and Central Asia; Middle East; South and South-East Asia
Countries with over a million people identified as IDPs	Colombia, Democratic Republic of the Congo (DRC), Iraq, Somalia, Sudan
Countries with over a million people identified as IDPs throughout the decade ending in 2010	Colombia, DRC, Sudan
Number of countries with new internal displacement in 2010	20
Countries with at least 200,000 people newly displaced in 2010	Colombia, DRC, Kyrgyzstan, Pakistan, Somalia, Sudan
Countries with at least 200,000 people reported as returning in 2010	DRC, Kyrgyzstan, Pakistan, Uganda
Number of countries with legislation or policies specifically addressing internal displacement	17
Number of countries with people living in protracted displacement	At least 40
Number of countries in which internally displaced children faced threats to their physical security while exercising their right to education.	At least 18

The Displaced Women and Children: The Key Issues

Sexual and gender-based violence is one of the most heinous violations of the rights of women and children during conflict of war and displacement, which is in need of address through international protection. The gender dimensions of their problems and special vulnerability to infringement of human rights have often not received attention. The complex nature of their problems and the

⁹ IDMC; as reported in 'Internal Displacement- Global Overview of Trends and Developments in 2010', 8

difficult issues they raise must be examined carefully in order to formulate special initiatives at the national, regional and international level.

Risk of Displacement of Women and Children

a. *Discrimination:*

Members of minority groups are often at risk of displacement due to the discriminatory policies of a government. Discrimination often adds to the vulnerability of groups of IDPs with particular needs, such as children, members of female headed households, older and disabled people. Women heading internally displaced households face major obstacles in their search for livelihoods with which they support their families, due in part to prevailing gender discrimination. Displaced widows continued to face social discrimination and a similar lack of employment. For the most part those whose husbands were killed by Maoists, rather than security forces, were reported to have received compensation for the deaths of their husbands, and many had encountered significant barriers in recovering property or obtaining compensation.

b. *Absence of Physical Security*

People internally displaced by conflict, human rights violations or generalised violence have faced immediate threats to their physical safety. Gender-based violence, including sexual violence, continue to be a major problem during displacement. The killing and rape of IDPs and other civilians continue at a very high rate. The incidence of rape against refugee and internally displaced women is higher than that reported; women IDPs often fear to report the incident of rape. Other forms of sexual coercion are rife in IDP settings; young girls are often abducted, forced to get married, sold, or forced into prostitution. Special programs are needed to reduce the likelihood of such occurrences. Thus, the programme of displaced women and children needs to be paid special attention to situation where these groups of people are highly mobile.

c. *Violation of housing, land and property right*

Protection and access to housing, land and property (HLP) rights continue to be a major concern throughout the displacement cycle. Violations of HLP rights pertain to both IDPs and those who are left behind. People displaced by conflict and violence lose their homes and land which the displacement entails;

this has an enduring impact on their situation.¹⁰ The capture of land may be motivated by a dominant group's intention to take land and settle on it. The impact of this loss of land and housing is severe and enduring fact. The first impact is on the quality of shelter which displaced people and families subsequently have access to settle. Shelters in organised camps or in collective centers often lack privacy, security and adequate access to water and sanitation. This presents the risks of sexual violence and the spread of diseases. Many IDPs join informal urban settlements in search of safety or livelihood opportunities.

d. Impact of Land Loss

IDPs have traditionally depended on agriculture for their livelihoods, the loss of land threatens their access to food and an income with which they ensure their self-reliance and look after their families. When the displaced people flee to other rural areas, the increased pressure on limited resources and their encroachment on land can create tensions with host communities. Due to such situation, the head of the family fails to become self-reliant in urban areas. In these circumstances, some vulnerable and marginalised internally displaced groups such as widows and children may be left with no choice but to engage in economic activities that threaten their physical security and integrity. Many displaced children in urban areas have to continue to work as domestic servants, remaining vulnerable to exploitation and physical or psychological abuse. Due to increase of land loss, the women and girls are pushed into the profession of prostitution which has been reported over the years in many cities.

Legal Assistance Available For Internally Displaced Women and Children

Measures and steps, in line with UNHCR Sexual Violence against Refugees Guidelines on Prevention and Response and Geneva Convention on Protection of Civilian Persons in Time of War should be taken to protect the safety and physical integrity of displaced women and children from violence and sexual assault against them by refugee camp administrators and refugees. Adequate social support services like health, counseling, and education should be provided to these displaced women and children.

The principal sources of existing standards for protection, as well as the foundations for articulation of future of further protections, are found in international human rights law. Among the international instruments, the

¹⁰ IDMC, *Internal Displacement Global Overview of Trends and Developments in 2010* (Norwegian Refugee Council 25 March 2011)

noteworthy ones are : the Universal Declaration of Human Rights (UDHR);¹¹ the International Covenant on Civil and Political Rights (ICCPR);¹² the International Covenant on Economic, Social and Cultural Rights (ICESCR);¹³ the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);¹⁴ the Convention on the Prevention and Punishment of the Crime of Genocide;¹⁵ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);¹⁶ the Convention on Elimination of Discrimination Against Women (CEDAW);¹⁷ and the Convention on the Rights of the Child (CRC).¹⁸ ICCPR, in particular, declares certain fundamental rights as non-derogable, including the right to life, freedom from torture or cruel, inhuman and degrading treatment or punishment, freedom from slavery or to be held in servitude, recognition as a person before the law, and non-discriminatory treatment.¹⁹ Where derogation may not be precluded, ICCPR requires that the ‘public emergency which threatens the life of the nation’ should be officially proclaimed and the derogation must be strictly required by the exigencies of the situation and the relevant state must report such declaration to the UN.²⁰ Economic, social and cultural rights are implemented progressively. The states should use the maximum of available resources from the above instruments; otherwise the duty remains in vein.

The jurisprudence of the International Court of Justice has laid out the application of human rights law in situations of armed conflict, occupation and the obligations that arise from occupation,²¹ which are of prime importance to the protection of IDPs by states, armed groups and non-state actors. The African Commission has held that displacement is unlawful and that it

¹¹ UDHR, UNGA Res 217A (III) UN Doc A/810 (1948).

¹² ICCPR, UNGA Res 2200A (XXI) UN Doc A/6316 (1966), (entered into force 23 March 1976) 999 UNTS 171.

¹³ ICESCR (entered into force 3 January 1976) 999 UNTS 3.

¹⁴ CAT, UNGA Res 39/46 UN Doc A/329/51 (1984) (entered into force 26 June 1987) 1465 UNTS 85.

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res 260(III) UN Doc A/810 (1948) (entered into force 12 January 1951) 78 UNTS 277.

¹⁶ CERD, GA Res 2106(XX) UN Doc A/6014 (1965) (entered into force 4 January 1969) 660 UNTS 195, entered into force 4 January 1969.

¹⁷ CEDAW, UNGA res 34/180 UN Doc A/34/46 (1979) (entered into force 3 September 1981) 1249 UNTS 13.

¹⁸ CRC, UNGA Res 44/25 UN Doc A/44/49 (1989) (entered into force 2 September 1990) 1577 UNTS 3.

¹⁹ ICCPR (n 10) art4(2).

²⁰ ICCPR (n 10), art 4(2).

²¹ *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) 8 July 1996; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory* (advisory opinion) 9 July 2004; *Armed activities on the territory of the Congo, Democratic Republic of the Congo v. Uganda*, (Judgment) 19 December 2005.

constitutes a breach of freedom of movement and residence as well as the right to peace and security. Mauritania's responsibility for failing to prevent the forced eviction of persons by armed groups acting on its territory was upheld by the African Commission.²² The Inter-American Court has taken a similar but far more incisive approach, upholding the legal responsibility of Columbia for massacres and acts of displacement caused by paramilitary or armed groups on the basis of Columbia's failure to act promptly to prevent displacement and create the necessary conditions for displaced persons to return to their homes in safety. It also endorsed the importance of freedom of movement as a standard for providing protection against forced displacement.²³ The European Court of Human Rights has affirmed the protection of civilians fleeing Russian military operations in Chechnya under the label of displaced person and asserted that the killing of such civilians by Russian armed forces breached its obligation to protect the right to life under the European Convention on Human Rights.²⁴

These decisions show that the phenomenon of displacement is spread widely, engaging human rights protection mechanisms in Africa, Europe and Latin America. Looking at all the decisions, they illustrate the variety of contexts in which the need for the protection of internally displaced persons and the accompanying responsibilities for states arise.

In April 1998, the first international standards for IDPs were introduced into the UN Commission on Human Rights and were unanimously adopted by the 53-member commission.²⁵ Titled Guiding Principles on Internal Displacement, they were developed by a team of international lawyers under the direction of the RSG (Representative of the Secretary-General on the Human Rights of IDPs). Displaced women and girls are often in a especially vulnerable situation and should be granted adequate protection and treatment according to Guiding Principles 4, 18 and 23.

In the light of the above, the Guiding Principles have been described as the basic international norm for protection of IDPs. The principles reflect and are consistent with existing international human rights and humanitarian law. In restating existing norms, they also seek to address grey areas and gaps in the protection of IDPs. The Principles identify the rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. They provide protection against arbitrary displacement, offer a basis for protection

²² *Malawi Association and Others v. Mauritania* (2000) AHRLR 149.

²³ *Case of Mapiripan Massacre v. Columbia* (7 March 2005) Inter-AmCtHR (ser C) no 122.

²⁴ *Isayeva v. Russia* (24 Feb. 2005) ECtHR App No 57950/00.

²⁵ R Cohen, 'The Guiding Principles on Internal Displacement: A new instrument for International Organisations and NGOs' (August 1998) *Forced Migration Review* 2, 31.

and assistance during displacement, and set forth guarantees for safe return, resettlement and reintegration. Although they do not constitute a legally binding instrument, they guide the conduct of States. Principle 6(C) of UN Guiding Principles prohibits arbitrary displacement in cases of large-scale development projects.²⁶ These Principles have acquired a wide range of recognition and acceptance.

Mapping the Displaced in India

In 2010, there were several unrelated situations of internal displacement persons who abandoned their homes for a range of emergency and non-emergency reasons (conflict, natural disaster, economic impoverishment, environmental crisis, poorly designed development projects, ethnic tension, political violence) that not only affects women but the children and their physical and psycho-social well-being, sense of community continuity, their adaptability to new surroundings, and their attitudes toward and preconditions for return or resettlement. The internally displaced people who are found living in camps and registered there, a conservative estimate of at least 650,000 people were displaced due to the above reasons. However, the real number, including people dispersed in India's cities and others living in displacement outside camps, is likely to be significantly higher.

There is no such kind of national policy, legislation or other mechanism to respond to the needs of people displaced by these conflicts or developments and the national government has generally left their protection to state governments and district authorities, who are often unaware of IDPs' rights or reluctant to offer support, particularly in cases where they played a role in causing the displacement. As a result, the IDPs have struggled to assert their rights.

Effects of Displacement

a. Displacement by Communal violence or Conflict

From the period of 2009 and during the first half of 2010, at least 650,000 people in central India, north-east India, Jammu and Kashmir, Orissa and Gujarat were living in displacement from one place to another due to armed conflict and ethnic or communal violence among the people themselves related to various reasons. An unknown number of displaced people were living in Indian cities.

²⁶ UN Guiding Principles on Internally Displaced Persons 1998.

In Central India, armed conflict over land and mineral resources in tribal forest areas is going on. In 2009, government security forces launched 'Operation Green Hunt' against Naxalite insurgents. The conflict led to new displacement of more than 100,000 tribal people from Chhattisgarh to Andhra Pradesh between mid-2009 and mid- 2010. Of those displaced prior to 2009, 20,000 were still staying in camps in Chhattisgarh and another 20,000 in Andhra Pradesh. In addition, 8,000 people were displaced within West Bengal state, with many of them staying in makeshift camps.²⁷

In Assam, about 170,000 people who had been displaced by ethnic violence are living in camps in deplorable conditions. In 2009 and 2010, new violence in Assam displaced more than 16,000 *Dimasas* and *Zeme Nagas* and 4,000 Nepali-speakers. 30,000 *Brus* displaced from Mizoram state in 1997 and living in difficult conditions in camps in Tripura state had not been able to return and the new Mizo-Bru violence in November 2009 displaced another 5,000 *Brus*.²⁸ In Manipur, 1,500 to 2,500 people had to flee their homes in May 2009 due to counterinsurgency operations by security forces. In May 2010, clashes between security forces and *Naga* protesters displaced 500 *Nagas* from Manipur to Nagaland.

250,000 Kashmiri Pandits displaced from the Kashmir Valley since 1990 because of conflict between the Indian army and Muslim insurgents were still living in displacement in Jammu, Delhi and elsewhere in India. In addition, military border fencing separated 15,000 people from their land in Jammu and Kashmir State in 2009.²⁹ In Orissa, at least 10,000 people who had to flee their homes due to Hindu-Christian violence in 2007 and 2008 remain displaced, and in Gujarat 19,000 people who had been displaced by Hindu-Muslim violence in 2002 are still staying in camps.

The Government of India has no national policy to respond to internal displacement caused by armed conflict and ethnic or communal violence owing to different reasons. The responsibility for protecting the displaced and providing assistance to them generally falls on state governments and district authorities. This has resulted in wide disagreement between responses from

²⁷ 'Maoist insurgents in India: More bloody and defiant' (*Economist*, 22 July 2010) <<http://www.economist.com/node/16650478>> accessed 27 February, 2012.

²⁸ 'Reangs flee Mizoram' *The Telegraph* (India 17 November 2009) <http://www.telegraphindia.com/1091117/jsp/frontpage/story_11749716.jsp#> , accessed 27 February, 2012.

²⁹ 'Displaced Kashmiri Pandits seek special status' (Indo-Asian News Service, 20 June 2010) <http://www.thaindian.com/newsportal/uncategorized/displaced-kashmiri-pandits-seek-special-status_100383428.html> accessed 26 February 2012.

one state to another and even from one situation to another within the same state.

Thus, it is very difficult to estimate the total number of internally displaced persons in India as there is no government agency that are responsible for monitoring the numbers of people displaced and returning, and also humanitarian and human rights agencies have limited access to them. Those whose numbers are known are generally those living in camps and registered there. A conservative estimate of the total number of people displaced by conflict and violence would be at least 650,000 as of 2010, but the real number, which would include displaced people outside of camps and dispersed in India's cities, is likely to be significantly higher.

A good number of examples related to land cases can help to trace that there are a rising number of protests against compulsory acquisition of land for construction of manufacturing units such as Tata's Nano Car in 13 Singur, in which 997 acres of agricultural land was acquired to set up a factory for one of the cheapest cars in Asia (the project was subsequently shifted to Gujarat) or for developing Special Economic Zone such as *Nandigram* or construction of large dams like *Sardar Sarovar Dam* on the river Narmada, which famously led to a cancellation of grant by World Bank due to protests under the argument that the tribal population was getting displaced under unfair conditions among other reasons such as environmental impact of the project.³⁰ The effects of displacement spill over to generations in many ways, such as loss of traditional means of employment, change of environment, disrupted community life and relationships, marginalization, a profound psychological trauma and more.

Development induced displacement is not a new phenomenon. This phenomenon is becoming more serious and grave with liberalisation, privatisation and globalisation ruling the roost. The present development processes are now supported by neo-liberal policies of the government and therefore have a strong backing of State and Central governments. Any attempt made by the poor and the marginalized communities to raise their voices against violation of their basic human and democratic rights is being put down by the powerful market-led forces and also by the State Authorities. Indifference and apathy of the State is compounded by its harsh practices to curb civil protest.

³⁰ 'World Bank Report'
<<http://lnweb90.worldbank.org/oed/oeddoelib.nsf/DocUNIDViewForJavaSearch/12A795722EA20F6E852567F5005D8933>> assessed 26 February 2012.

b. Displacement due to Mining and Industries

For the economic growth, industrial development is considered to be important. After the period of 1960, there has been fast increase in the number of large-scale industries all over the country. These industries are witnessing sharp growth because of the liberalization of economic policies and opening up of trade and business in the 90s. Although this process of industrialization has brought in benefits in the form of infrastructural facilities and employment generation to some extent, most of these benefits are realized by those who are not affected by the setting up of such projects. It is largely the people belonging to the poor and the marginalised sections - the indigenous population or the Dalits who are first displaced from their habitation of years thereby losing their sources of livelihood.

Impact of Internally Displacement on Women and Children

Women and children, especially girl children, are the worst victims of such displacement and destruction of livelihoods. The impact of neo-liberal forces is resulting in powerlessness and denial of human rights for women and girls. It is not surprising that women stand to lose the most and benefit the least from so-called development projects. Women's roles as producers, providers, organizers, care givers are undermined in several ways and they find themselves once again bound to the home in a situation of economic dependence. Resettlement or rehabilitation is seen as the least important aspect of the development project and hence little attention is paid to the existing fabric of gender and social relations. Women lose their share of livelihood; they plan for a new location but, do not factor in alternative supplementary sources of income. Women are hit the hardest by displacement because they are more likely to derive income from small businesses located at or near their residences. In rural areas, women can be more adversely affected because they are often more dependent than men on common property resources for income sources. With men migrating in search of livelihood, the high incidence of HIV and AIDS deaths and farmer suicides, women are left to fend for themselves. More frightening is the power dynamics in the society making women more vulnerable to various forms of violence and exploitation and this lowers their self-esteem and autonomy.

Among the Internally displaced women and children staying in camps, pregnant women have to suffer more. They are compelled to sleep on the ground, lack nutritious food and have only limited access to health services. They are traumatised by the violence, several delivered miscarriages. An Auxiliary Nurse-Midwife (ANM) and several health workers catered to the needs of pregnant and

lactating mothers and their children in every camp, but no female doctor ever visited the camps. Not all have not yet received National Rural Health Initiative (NRHI) cards, a precondition for receiving food supplements and ante- and post-natal care, nor have they received the delivery report cards. They did not even receive fruit, vegetables or milk and had to live on rice and dal only.

Added to this is the lack of privacy, water and sanitation and extreme insecurity that characterize the resettlement colonies. Women who protest against those are vulnerable to sexual harassment and rape. Often these women become destitute and easy prey for traffickers. Development induced displacement also brings in social evils like alcoholism and violence against women. It has been evident that, as a consequence of displacement, there is a marked rise in cases of alcoholism, prostitution, gambling and theft. Rise in alcoholism leads to marked increase in domestic violence. For children, resettlement often interrupts schooling. In many households, owing to drops in income and living standards, children may never return to school, instead are drafted into the labor market earlier than might otherwise have occurred. It needs to be pointed out that most of the displaced persons live in the interior where they have little interaction with market forces. Resettlement only in terms of cash leaves them at the mercy of market forces about which they know little.

India's Domestic Legal Framework

a) The Indian Constitution and the Rights to Livelihood and Housing

Lacking an international legal and institutional system of protection to depend on, IDPs must rely on their own country's laws and policies with regard to resettlement and rehabilitation.³¹ However, there are no separate Indian laws pertaining specifically to the state's legal responsibility to its internally displaced.³² Thus, IDPs must turn to the provisions of fundamental rights of the Constitution and the writ jurisdiction of the courts for recourse.³³ In fact, the Indian Supreme Court has advanced human rights in India by implementing

³¹ Jeremy Levitt, 'Conflict Prevention, Management, and Resolution: Africa - Regional Strategies for the Prevention of Displacement and Protection of Displaced Persons: The Cases of the OAU ECOWAS, SADC, and IGAD' (2001) 11 *Duke J Comp & Int'l Law* 39, 78. The paper discusses on the responses to internal displacement in African nations, where the international community failed to extend adequate resources to protect the rights and well-being of displaced populations, a failure that has resulted in great suffering in many cases).

³² S. Parasuraman, *The Development Dilemma: Displacement in India* (Hardbound edn, Macmillan 1999) 41.

³³ R.Rangachari et al., 'Large Dams: India's Experience, in World Commission on Dams Case Study' World Commission on Dams Country Review Paper (2000) 36 <<http://www.dams.org/studies/in/>> assessed 26 February 2012.

the principles of international declarations and treaties in support of the Constitution.³⁴

One of the most important provisions pertaining to human rights in the Constitution is article 14, which states that if the displacement is due to some unavoidable reason meant for the larger good, such as developmental programmes, then it should be done in a way compatible with this article of the Constitution that guarantees equality before law and equal protection of laws to all citizen. It means that the classification or selection of the area, people and property to be dislocated should not be discriminatory. Such a classification should be founded on an intelligible differentia that distinguishes persons or things that are grouped together from those that are left out of the group, and the differentia must have a rational relation to the object sought to be achieved by it.³⁵ The new approach taken in article 14 has widened the scope of its application. Now one need not allege any discrimination vis-à-vis others³⁶, an arbitrary or unreasonable action is *per se* discriminatory. This aspect of the equality principle has been used to strike down clearance given by the government to set up developmental or industrial projects without looking into or giving due consideration to the environmental impact assessment (EIA). Article 21 also provides the framework for securing the right to life and personal liberty. In addition, article 39 directs the state to secure its citizens with the right to an adequate means of livelihood.’ In a related provision, article 41 articulates that the state shall ‘make effective provision for securing the right to work.’

In an unprecedented decision, the Indian Supreme Court expanded the socio-economic dimension of article 21 in *Olga Tellis v. Bombay Municipal Corporation* and provided persons who are forcibly evicted with a more meaningful interpretation of the right to life.³⁷ In this case, Bombay sidewalk dwellers argued that the construction of an expressway would destroy both their home and workplace, and would result in the loss of their means of livelihood and deprive them of their right to life. The Court agreed and stated that any person deprived of his or her right to an adequate livelihood or right to work can challenge the deprivation as offending article 21’s right to life.³⁸

³⁴ Vijayashri Stripati, ‘Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)’ (1998) 14 Am U Int’l L Rev, 468.

³⁵ It was expressed by Das J. in *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75.

³⁶ *A.L.Kalra V. Project and Equipment Corpn* 3 SCC 316(India 1984).

³⁷ *Olga Tellis v. Bombay Mun. Corp* 2 SCR 51 (1986), 83.

³⁸ *Ibid.*

In addition to interpreting article 21 as recognizing the right to livelihood, the Indian Supreme Court in *Mullin v. Union Territory of Delhi* elaborated on the right to adequate shelter as part of the alien compassing right to life.³⁹ Eight years later, the court reaffirmed this view in *Ram Prasad v. Chairman, Bombay Port Trust* when it held that the right to life prohibited the eviction of slum dweller families unless the Bombay Port Trust provided them with alternative accommodations.⁴⁰

One way of achieving it is to lay down in the statute the procedures or the guidelines to be followed by the concerned authority so that any step taken inconsistent with it will be void. As laid down by the Supreme Court in *Narmada Bachao Andolan* that proper rehabilitative measures are to be incorporated when there is displacement of people due to construction of dams. While looking into the rehabilitation of the displaced, regard should be had not only to the compensation of the lost land but also to the common property shared by the community and on which they depend to meet their other subsistence needs such as firewood, fodder etc.⁴¹

b) *The Land Acquisition Act 1894*

The Land Acquisition Act 1894 of India is the primary legislation that provides for acquisition of land. Section 3(f) defines public purpose to include carrying out any educational, housing, health or slum clearance scheme, the provision of any premises or building for locating a public office, the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities and so on. It includes provisions for compensation (section 11) and provides for recourse to legal remedies (section 18). The Land Acquisition Act has been criticized for considering land only as a commodity generating income. However, when a family is settled on a piece of land not only does it earn its livelihood from it but it also has a whole social network. Finally, the LAA provides that the Indian Supreme Court is the only appellate forum for individuals whose land is to be acquired, an assertion which significantly curtails the rights of displaced persons.

The power of eminent domain finds its expression in the 1894 Land Acquisition Act. The jurisprudence that has developed around this Act has placed severe constraints on the possibility to challenge the power of the state to compulsorily acquire. It sets out what constitutes public purpose and it hands

³⁹ *Mullin v. Union Territory of Delhi* 2 SCR 516 (1981), 529.

⁴⁰ *Ram Prasad v. Chairman, Bombay Port Trust*, AIR 1989 SC 1306.

⁴¹ K. Ratnabali, 'Internal Displacement of People: Absence of Law and the Urgent Need to Frame One in India' (2004) 25 Delhi Law Review, 167.

over land without encumbrances to the state to do whatever it wants with it, at will. The way the law understands interested persons is who would have a right to raise objections, or to contest compensation, leaves no space for women, except for the exceptional woman who may have eluded the stranglehold of law and practice to become the holder of a legally demonstrable interest in the land.⁴² The computing of compensation is circumscribed by a set of predetermined factors which are to be considered in determining compensation⁴³ and is restricted to the market value of land; the replacement value is not the norm prescribed by law. There are also matters to be neglected in determining compensation⁴⁴ which excludes any disinclination of the person interested to part with the land acquired.

The power of eminent domain draws its sustenance from the notion of sovereignty of the state. In 2004, while adjudicating on a dispute between two village communities in Nagaland over the ownership and use of a water source, the Supreme Court said⁴⁵ ‘So far as natural resources like land and water are concerned, dispute of ownership is not very relevant because undoubtedly the state is the sovereign dominant owner’. This was preceded, at the start of the judgment, with an acknowledgement of the existence of customary law in those parts: ‘At the outset, it may be stated that the civil rights to the water source and the land in the hill district of Nagaland comprising the two villages mentioned above are not governed by any codified law contained in the Code of Civil Procedure and the Evidence Act. The parties are governed by customary law applicable to the tribal and the rural population of the hill district of Nagaland.’

The disregard for customary law, the relationship of local communities to natural resources and the presumption about the sovereign power of the state over such resources all indicate the power that eminent domain has handed over to the state. There is also the non-advertence to the Fifth and Sixth Schedules of the Constitution, which negotiate the state’s right to take over land differently in a tribal area. There is a special status accorded to tribal areas, which are termed as ‘scheduled areas’, which includes provisions for protecting the continued possession and enjoyment of lands belonging to tribes, and circumscribes the power of the state to alienate and transfer land in these areas. In 1997, the Supreme Court reinforced this status in what is known as the *Samatha*

⁴² Usha Ramanathan, ‘Displaced by Development—Confronting Marginalisation and Gender Injustice’ <<http://infochangeindia.org>> assessed 27 February 2012.

⁴³ Land Acquisition Act 1894, s 23.

⁴⁴ Ibid s 24.

⁴⁵ *Tekaba AO v. Sakumeren AO* 5 SCC 672 (2004).

judgment⁴⁶. That provision seems to have escaped the court when it made its comment. This is illustrative of the power that eminent domain has handed over to the state.

There are whole segments of persons who are displaced but who, it would seem, can be pushed to the margins of the state's concerns because of the limited mandate imposed on the state by the eminent domain doctrine. Since only landowners have any direct right to be considered during the exercise of the eminent domain power, those who possess no legal title or interest stand automatically excluded. The landless constitute one such segment. Women, who have at best been subsidiary constitutional subjects in the matter of landholding and ownership, and who, the laws of succession, the notion of family and the presumption of dependency especially have disabled from holding legally defined interest in land, constitute a significant group among the excluded.

c) The Rehabilitation and Resettlement Bill 2007

The Bills such as Rehabilitation and Resettlement Bill 2007 and Land Acquisition (Amendment) Bill 2007 are now being considered by the Parliament and various Committees.

The purpose of this paper is to bring out certain lacunae in the existing legislation and policy and suggest legal, moral and policy alternatives regarding displacement due to large projects in India. Central to the land-acquisition law reforms is the problem of a lack of political will which has prevented the 2007 Bill from being passed in both the houses of the Parliament. The Rehabilitation and Resettlement Bill has incorporated a lot of suggestions which are sensitive to the inadequacy of monetary compensation. It also outlines minimum benefits for displaced families such as land, house, monetary compensation, skill training and preference for jobs. A grievance redressal system was also provided for them.⁴⁷ In *State of M.P. Appellant(s) v. Behru Singh & Others Respondent(s)*⁴⁸, in the writ petition filed claiming appropriate reliefs on the ground of inadequate measures adopted by the Government of Madhya Pradesh for rehabilitation and resettlement of displaced families of the Man Dam Project, the High Court ruled that every son who had become major on or before the date of notification under Section 4 of the Land Acquisition

⁴⁶ *Samatha v. State of Andhra Pradesh* 8 SCC 191(1997).

⁴⁷ 'Land Acquisition Private Realm Private Gain' (8 September 2010) <<http://prsindia.org/theprsblog/2010/09/08/land-acquisition-public-realm-private-gain/>> accessed 26 February 2012.

⁴⁸ *State of M.P v. Behru Singh et al* SCC 91(2012).

Act but who was part of their family from whom land had been acquired will be treated as a separate displaced family and would be allotted agricultural land in accordance with the R & R Policy hence, the appeals, the Supreme Court held that the controversy arises out of Policy decision and has clearly not emerged from any ambiguity in the Land Acquisition Act or any statutory provisions. Further, the court held that in spite of its finding that R & R Policy has been substantially complied, it has gone beyond the ambit of the R & R Policy which clearly lays emphasis on the fact that only those displaced families would be entitled to 2 hectares of land from whom 25% of their separate holding of land had been acquired. Thus, it is hoped that the change in the legislation will bring in more stability in the rehabilitation of the victims of displacement.

The revised National Rehabilitation and Resettlement Policy 2007 has come into force from October 2007. This new policy is applicable to all affected persons and families whose land, property or livelihood are adversely affected by land acquisition or by involuntary displacement of a permanent nature due to construction of projects or any other reason. These could be tenants, landless, the agricultural and nonagricultural labourers, artisans, and others dependent on the land. One of the objectives of the policy is to minimise the displacement of people and to promote non-displacing or least displacing alternatives. It recommends that, only the minimum necessary area of land commensurate with the purpose of the project should be taken, and the use of agricultural land for non-agricultural purposes should be kept to the minimum; multi-crop land should be avoided and irrigated land use should be kept to the minimum for such purposes.

But it is to be noted that, by and large there is unanimity that no development can be accepted at the cost of social equity. Land acquisition needs total reform and rehabilitation package. Land owners should get adequate compensation of their land. Lastly, there is also a need to think proactively to make partnership under SEZs with such land owners to bring the social equity.

Conclusion and Suggestions

One of the major challenges facing the world today is protection and promotion of assistance to persons displaced within their countries. It has become a crisis to increase or develop by successive stages with the high numbers and deteriorating conditions of IDPs. International response to the crisis has been hampered with lack of clarity on this concept. The loophole of specificity and precision in the existing protection regime of IDPs has led to inadequate protection and assistance of IDPs. In India, plans are taken with good intention

but unfortunately end with bad implementation. These need to be checked and corrected for those vulnerable people who are always internally displaced by different reasons. The current land acquisition policy violates the democratic fabric of the constitution of India. The issue of displacement is an example how law has to be consistent with socio-economic and political circumstances, and appears to have failed in doing so. As it appears, there is a strong need to put legal thought into issues concerning the land acquirers as well as to thoroughly investigate issues regarding removing the imbalance from the system.

The suggestions made from the above submission can briefly be presented as follows:

- State needs to give recognition to the hundreds of thousands or more IDPs in accordance with the Guiding Principles on IDPs and to frame a national policy for IDPs.
- Women constitute a large portion of the displaced population, hence, rehabilitation programmes need to be gender sensitive. Ignoring gender equality in emergencies is not a neutral position. It supports discrimination.
- The state needs to utilise post conflict and post displacement situations to break the patriarchal norms and socio-cultural constraints faced by women who are subject to new forms of control and victimisation during emergencies.
- Lastly, the state needs to introduce effective institutional mechanisms to ensure successful implementation of the policy guidelines because poor implementation plagues almost all the third world countries.
