CHAPTER- 5

ROLE OF EXECUTIVES AND JUDICIARY IN PROTECTION OF THE ECONOMIC AND SOCIAL RIGHTS OF INTERNALLY DISPLACED WOMEN AND CHILDREN

CHAPTER 5

Role of Executives and Judiciary in Protection of the Economic and Social Rights of Internally Displaced Women and Children

A. An Overview

In the previous chapter and effort has been made to point out the conceptual and legal position of the human rights of internally displaced women and children in India. The previous chapter those laws and policies were discussed which though not specifically applicable to the IDPs can however be made applicable to the IDPs because of the dynamic response of the judiciary in ameliorating the conditions of the vulnerable section of the society. In this chapter, therefore, I shall try to elaborate the role of the State's legislative and executive organs in developing and implementing economic and social rights of internally displaced women and children in Indian context. The entire discussion on these issues may take place in two phases. In the first phase I shall try to discuss the role of State's legislative and executive organs in developing economic and social rights of internally displaced women and children and will also try to dedicate to the implementation scenario of these economic and social rights. Second phase an attempt would be made to study the role of higher judiciary and National Human Rights Commission (NHRC) in developing and protecting human rights of the internally displaced women and children in India. A special reference may also be made in this chapter to discuss the particular initiative of the Supreme Court, High Courts and the NHRC in protection of the human rights of the internally displaced women and children accused and convicts.

In the present Chapter an attempt would be made to study the role of Executive and the Judiciary in the protection of the rights of Internally Displaced Women and Children. The Internally Displaced Women and Children are directly under the protection of the state government and hence the state government needs to protect their right. If the state government fails to protect their right after they get displaced then they would be forced to live in abject poverty. The State Government has the authority to formulate its policies and whenever it does so it should direct it towards protecting the rights of Internally Displaced Women and Children, that is to say it needs a wholesome approach and not a halfhearted approach because India has a large number of displaced populations but there is no law to look after them. The State Government has also failed to provide them appropriate rehabilitation to have in cases of ethnic conflict, communal strife or for that matter development. The executive needs to give a serious thought to all these consideration as India is marked as Welfare State in which the welfare of individual needs to be looked after.

It is well known to all that the doctrine of separation of powers are applied in Indian legal system where in, the implementation of laws are in the hand of the executives they can make rules, regulations and bye laws as delegated legislation for the effective implementation of the Parent Statutes passed by the state and the central legislative it is therefore need to discuss on the role of executives in implementation of human rights, which are recognized either as fundamental rights or constitutional rights or other legal rights, applicable to the internally displaced women and children present in India.

Judiciary has played a dynamic role in the protection of the rights of vulnerable group. The Judiciary has come in the forefront to protect the right of the displaced family. Justice is an attribute of human conduct. As said in the previous chapter, “law” as a social engineering is to remedy existing imbalances, as a vehicle to establish an egalitarian social order in a socialist, secular Indian Republic.

The term “displacement” has no doubt reached the Courts. The petitioners are those who have been affected by scourge of war, ethnic violence, natural

calamities, development projects, such as; dams, reservoirs, industry, urbanization, wildlife parks and sanctuaries and mining. It is pertinent to mention here that wherever there is an excess of exercise of power by the executive, the judiciary steps in, to balance the power. The judiciary has enabled the filing of Public Interest Litigation (PIL) for the easy access to courts and also to acknowledge the existence of a group interest.

The reasoning of the court is very fortunately influenced by the statutory laws. The displaced women and children, whose rights have been represented but marginally in the law, have had to resort to the assurances of policy; and policy has no more than persuasive effect. And further, courts are reluctant to adjudicate on the exigencies of policy implementation.[1]

As has been pointed out in the earlier chapter, India has a great tradition of human rights values since ancient historical period. In the post independent period also India was ahead in the matter of human rights, as inscribed in the constitution, with a court system as a vigilant sentinel and implementational instrument. Mahatma Gandhi, who led the struggle for independence battled, not merely for political liberation but for the composite freedoms found in the Universal Declaration for Human Rights, with his heart on the oppressive human condition.[2] Rabindranath Tagore, a cosmic visionary, was a leader in the valiant movement and regarded the 'innate worth of the individual' as of the essence, beyond acquiring the 'means of attaining mere material satisfaction'.[3] On the whole, the national struggle was resistance to fascist trends and colonial exploitation as necessary, since liberty has 'a true foundation only in the moral worth of the individuals who compose the state'.[4] Revolutionaries, martyrs, crimson ideologues, countless women ready to 'do or die' and great souls, each the pride of the nation, held aloft the banner of human liberation and marched to win Swaraj, impregnated with wide spectrum values

[1] Usha Ramanathan, *"Displacement and the Law",* Economic and Political Weekly, Vol. 31 No. 24, June 1996, Pg. 1490.
[2] V.R.Krishna Iyer, *"The Dialectics and Dynamics of Human Rights in India- Yesterday and Tomorrow",* 1st edn. (Eastern Law House, Culcutta, 1999) Pg. 201.
[3] *Ibid.*
[4] *Ibid.*

covering political, social and economic content and belonging as a birth right of every one.[5] Thus when India became free, its democracy encompassed human rights in their comprehensive coverage.[6] Jawaharlal Nehru, as the First Prime Minister and national articulated this vision in immortal diction:

> *'A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance. It its fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the still larger cause of humanity.'*
>
> * * *
>
> *'And so we have to labour and to work hard to give reality to our dreams. Those dreams are for India, but they are also for the world, for all the nations and peoples are too closely knit together today for any one, of them to imagine that it can live apart. Peace has been said to be indivisible; so its freedom, so is prosperity now, and so also is disaster in this one world that can no longer be split into isolated fragments.'*[7]

Later was enacted a long constitution enriched by Fundamental Rights and incorporating social, cultural and economic rights (the latter although not judicially enforceable).

B. Existence Of Higher Law In Indian Constitution

In 1979, India adopted the International Covenant on Civil and Political Rights (1966). India must, therefore, strive for the promotion and observance of the rights recognized in this covenant.

[5] *Ibid.*
[6] *Ibid.*
[7] Speech at the Constituent Assembly, on 14-15th August, 1947.

The Indian Constitution was drafted even before the Universal Declaration, but it was adopted at a time when the deliberations for the Universal Declaration were in the air, so that the framers of the Indian Constitution were influenced by the concept of human rights, and already guaranteed most of the human rights which later came to be embodied in the International covenant in 1966.[8]

Even prior to the framing of the constitution for free India, Mahatma Gandhi had announced before the Second Round Table Conference that his aim was to establish a political society in India in which there would be no distinction between high class and low class people, that women should enjoy the same rights as men; and dignity and justice, social, economic and political, would be ensured to the teeming millions of India. This was one of the objects which inspired Jawaharlal Nehru in drafting the historic objectives Resolution in the Constituent Assembly, and which was adopted on January 22, 1947. Clause (5) of this Resolution stated:

> *'this Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution:*
> *(5) WHEREIN shall be guaranteed and secured to all the people of India Justice, Social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality…..'*

This ideal of the objectives Resolution was reflected in the Preamble of the constitution with the specific mention of 'dignity of the individual'. This conceptual and philosophical basis of Preamble may be taken into consideration as the basis and reflection of human rights protection regime for the displaced women and children under the Indian Constitution.

[8] D.D.Basu, *"Human Rights in Constitutional Law",* 1st edn. (Prentice Hall of India, New Delhi, 1994), Pg. 13.

Furthermore, in the substantive provisions of the constitution, the human rights were divided into two parts in much the same way as the International Covenant on Civil and Political Rights, and on Economic, Social and Cultural Rights did later (1966). As pointed out earlier, in the Indian Constitution, the justifiable human rights, broadly speaking, were included in Part III, while the non-justifiable social and economic rights set forth in Part IV on the Directive Principles of State Policy.

In this part of the chapter, I shall try to show how many and how far these human rights are protected in India, particularly for the displaced women and children who are present in India, by the Constitution or by the ordinary law, and, the short comings, if any. We shall see that the Indian Constitutional guarantee in some matters goes beyond than in more advanced countries.

C. Fundamental Rights Available To The Internally Displaced Women And Children Under Indian Constitution

Up to 80 % of the displaced populations in the world are women and children. These women are extremely vulnerable and exposed to abuses and dangers already mentioned. India is one of the few developing countries that have tried to count its homeless, finding more than 2.3 million. The right to freedom of movement and related rights of those who have already been displaced are clearly set forth in the Guiding Principles on Internal Displacement (the Guiding Principles). Principle 14(1) expressly affirms the rights of internally displaced persons to move freely throughout the territory of a state during their displacement. This right is essential to the personal security and well-being of persons seeking to flee the real or potential effects of armed conflict, situations of generalized violence, human rights abuse, and disasters. It also ensures the right of IDPs to voluntarily choose a place of residence, one ostensibly conducive to securing personal safety as well as access to sustainable livelihoods.

Principle 14(2) makes clear that IDPs may exercise this freedom by finding safety and security in camps and other settlements. Not only does it indicate that IDPs have the right to enter and move freely about within camps and settlements, it also affirms their right to leave these sites on their own volition. In other words, IDPs should not be confined or interned in camps against their will. Although this Principle does not oblige national authorities to take any affirmative measures to provide protection to displaced persons, it does imply an obligation not to interfere with persons seeking to exercise their freedom of movement in contexts of displacement.

The movement-related rights identified in Principle 14 and the ability of IDPs to seek safety from the causes of their displacement is given further effect in Principle 15. According to this provision, if the safety of an IDP is threatened in one part of the country, he or she may exercise his or her freedom of movement in order to find safety elsewhere. This includes moving freely to another part of the country (para. [a]) as well as the right to leave the country in accordance with international human rights law (para. [b]). Paragraph (c) also draws upon international law by affirming the right of IDPs to seek asylum in another country on the basis of having a well founded fear of persecution.

Particular attention should be given to Principle 15(c), which reflects the international refugee law principle of non-refoulement (the prohibition against forcible return), and applies it by analogy to situations of internal displacement. By vesting IDPs with the right to protection against forcible return or resettlement to danger zones within their own country, this Principle suggests that states are obliged to ensure that internally displaced persons are not compelled to return or resettle to locations where their safety and security are at risk. Finally, Principle 28 on voluntary return and resettlement recognizes the duty of national authorities to create conditions suitable for durable solutions as well as the means for internally displaced persons to return in safety and with dignity to their former places of residence or to resettle in another part of the country. This Principle's significance is

also noteworthy for affirming the right of IDPs to choose between durable solutions available to them, i.e., return, local integration, or resettlement.

a. A Comparison Of Universal Declaration Of Human Rights (1948) And Fundamental Rights Enunciated In Part III Of The Indian Constitution

Generally speaking, many rights enshrined in the UDHR have been reflected specifically in the Indian Constitution as "Fundamental Rights". They may be referred to 'specified' fundamental rights because they are mentioned in the constitution by name. The following table (Table 1.1) shows the different Articles of the UDHR wherein identical rights are enumerated.

The Table 1.1 shows that the 'right to equality before law', 'right to prohibition of discrimination on grounds only of religion, race, caste, sex, place of birth or any of them', 'right to liberty of movement', 'freedom to choose residence', 'right to peaceful assembly', and 'freedom of association with others' are provided in UDHR and also guaranteed to the people (although only to the internally displaced women and children)

TABLE 5.1

A Comparative Study of UDHR and the Indian Constitution

UDHR	INDIAN CONSTITUTION
Article 7	Article 14
Article 2 Para (1)	Article 15 (1)
Art.19:Everyone has a right to freedom of opinion and expression: Art.20(1) Everyone has the right to freedom of peaceful assembly Art.12 (1) Everyone has the right to freedom of movement and residence within the borders of each state.	Art. 19 (1): All citizens shall have the a. Right to freedom of speech and expression b. Right to assemble peaceably without arms d. Right to move freely throughout the territory of India. e. Right to reside and settle in any part of the territory of India.
Art.3: Everyone has the right to life, liberty and security of person. Art.9: No one shall be subjected to arbitrary arrest, detention or exile.	Art.21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Art.4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all forms.	Art. 23 (1) Traffic in human beings and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
Art. 8: Everyone has the right to an effective remedy by the tribunals for acts violating the fundamental rights granted to him by the constitution or by law.	Art. 32 (1) The right to move the supreme court by appropriate proceedings for the enforcement of rights conferred by this part is guaranteed.

in different clauses of Article 14, 15(1), 19(1) of the Constitution. Further it may be said that, prohibition of forced or compulsory labour provided in the Constitution is laid down under Article 23 of the constitution. Similarly right to equality and right to life and personal liberty are guaranteed to all the individuals under Article 14 and 21 respectively in our Constitution.

In the Indian constitution, the justiciable human rights, broadly speaking, were included in part III, while the non-justiciable social and economic rights were set forth in part IV on the Directive Principle of state policy.[9] The Directive Principles of State Policy are mentioned in part IV of the constitution covering articles from 36 to 51. The Directive Principles of State Policy are not enforceable. Art.37 enjoins the state to apply the Directive principles in making laws. They are enumerated in the constitution in order to certain directive to the central and state Governments so that, by implementing those principles and an egalitarian society can be evolved where political, social and economic equality shall prevail.[10]

The main emphasis of these directive principles is to ensure the goal of a welfare state for Indian polity where the state has a positive duty to ensure to its citizens social and economic justice and dignity of the individual. What is significant here is that the socialist approach has been incorporated in Art.39-A which enjoins on the state to provide free legal aid to the poor and to take other suitable steps to ensure equal justice to all.[11]

[9] George Pathanmackel, *"The Constitution of India-A Philosophical Review",* Media House, Delhi, 2003, Pg.177.
[10] Granville Austin, *'Working a Democratic Constitution, The Indian Experience',* Oxford University Press, New Delhi, 2000, Pg.123.
[11] Mahendra P. Singh, *"Constitution of India",* Lucknow: Eastern Book Company, 2004, Pg.303.

Directions to the legislature and the Executive regarding the manner in which the states should exercise their legislative and executive power: and, certain rights of the citizens, which are not justiciable, like fundamental rights, but which the state shall aim at securing by regulation of its legislative and administrative policy.[12]

It will be seen that the human rights contemplated to be assured to the citizens of this country include the right to free and compulsory primary education; right to adequate means of livelihood; right of both sexes to equal pay for equal work; right against economic exploitation; right of children and the young to be protected against exploitation and to opportunities for healthy development; right to humane conditions of work and maternity relief; consonant with freedom and dignity etc.[13] Universal Declaration of Human Rights speaks similar rights. Directive principles of state policy enumerated in the constitution will help to promote the establishment of a welfare state based on democratic and socialist lines.

b. Indian Constitution and the International Covenants on Human Rights

On 27th day of March 1979, India acceded to the International Covenant on civil and political rights (ICCPR) and the International covenant on Economic, social and cultural rights (ICESCR).

Therefore India is under an obligation "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, religion, language, political or other opinion, national or social origin, property, birth or other status"[14] and "to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the

[12] Jayant Chaudhary, *"Text book of Human Rights",* Dominant Publishers and Distributors, New Delhi,2000, Pg.30.
[13] P.M. Bakshi, *"The Constitution of India",* Universal Law Publishing Co. Pvt. Ltd, Delhi, 1991, Pg.232.
[14] Article 2: ICCPR, 1966.

rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures".[15]

Many of the civil and political rights contained in the International Covenant on civil and political Rights (ICCPR), 1966 are also enumerated in part III of our constitution as Fundamental Rights. These may be called Enumerated or Specified Fundamental Rights. Such rights are enumerated under Table 1.2:

Table 5.2

A Comparative Study of ICCPR and the Indian Constitution

SUBJECT	**ICCPR**	**INDIAN CONSTITUTION**
All human beings have the inherent right to life and this right shall be protected by law.	Article 6	Article 21
No one shall be held in slavery and the slave trade in all forms shall be prohibited.	Article 8	Article 23
Everyone has the right to liberty and security.	Article 9	Article 22
Right to equality before the courts and the right to provide legal assistance.	Article 14(1)	Article 14
Right to freedom of peaceful assembly	Article 21	Article 19(1)(b)
Right to equal protection of law.	Article 26	Article 14&15

Thus even before ICCPR was adopted in 1966, these human rights, were available to individuals in India as fundamental rights enshrined in part III of the Constitution.

While civil and political rights are contained in the International covenant on civil and political Rights (ICCPR), the economic, social and cultural rights are

[15] Article 2: ICESCR, 1966.

contained in a separate covenant called the International Covenant on Economic, Social and Cultural Rights (ICESCR).Most of the economic, social and cultural rights have been included in part IV of the Indian Constitution entitled "Directive Principles of State Policy".[16] The economic, social and cultural rights already found mentioned in part IV of our constitution is incorporated in ICESCR. They are enumerated under Table 1.3.

Table 5.3

A Comparative Study of ICESCR and the Indian Constitution

SUBJECT	**ICESCR**	**INDIAN CONSTITUTION**
Right to adequate standard of living for himself and his family. Food, clothing, housing and other living conditions are recognized as the fundamental rights of everyone.	Article: 11	Article: 47
Right to education. All kinds of education should aim at strengthening the respect for human rights and fundamental freedoms. As such primary education is freely available to all.	Article: 13	Article: 45

Though it is recognized both categories of rights are inter related to each other yet there is a vast difference between them, while civil and political rights by their very nature can be directly enforced, economic, social and cultural rights can be achieved only progressively.

Having considered the basic structure of executive organization, an attempt is made to study the role of the executive in protecting the civil rights of the IDPs.

[16] J. C. Johari, *"Indian Polity: A Concise Study Of The Indian Constitution, Government And Politics",* (New Delhi: Lotus Press, 2004), Pg.17.

D. Role Of Executive In The Protection Of Internally Displaced Women And Children

The basic framework of our Constitution is to eliminate inequality in income and status and standards of life. The preamble directs the Centre's of power. Legislature, executive, and Judiciary- to strive to a vibrant, throbbing socialist welfare society under Rule of Law though it is along march but during the journey to the fulfillment of goal every State action including interpretation whenever taken, must be directed and must be so interpreted to take the society towards establishing egalitarian socialist State, the goal.

Further to be mentioned that in this chapter attempt would be made to study the role of higher judiciary and National Human Rights Commission (NHRC) in developing and protecting human rights of the internally displaced women and children in India. An international human rights instrument has widely recognized the importance of access to justice and independent justice for the protection and development of the human rights jurisprudence. Justice Krishna Iyer had observed and recommended some wordings in this regard. He said---

> *"Rights however solemnly proclaimed and entrenched in great instruments, are but printed futility unless a puissant judiciary armed with legal authority and remedial jurisprudence of human rights into the public law of enforceable justice."*[17]

Under Part IV of the Indian Constitution titled 'the States', Article 152[18] defines 'States'. For the interpretation of the constitution, by operation of Article 367, unless the context otherwise requires or modifies, the General Clauses Act shall apply. Section 3(23)[19] of the General Clauses Act thereof defines 'Government' to

[17] V.R.Krishna Iyer, "*Human Rights and Inhuman Wrongs",* B.R.Publishing Corporation (1990), Pg. 57.
[18] Article 152 of the Constitution reads as under, "In this Part, unless the context otherwise requires, the expression, "State" means a State specifies in Part A of the First Schedule".
[19] Section 3(23) of the General Clauses Act 1897 reads as under, "Government" or "the Government" shall include both the Central Government and any State Government.

include both Central Government and State Government. Section 3(8) (b)[20] of the General Clauses Act 1897 defines 'Central Government' and Section 3 (60)[21] of the General Clauses Act, 1897 defines "State Government', which reads, "State Government, as regard anything done or to be done, shall mean the Governor." The Governor of each State is its executive head and the Executive power of the State shall be exercised by the Governor either directly or through officers subordinate to him in accordance with the Constitution as envisaged under Article 154.

The executive power of the State is co-extensive with that of the legislative power of the state. The Chief Minister of the state is appointed by the Governor and on the advice of the Chief Minister he appoint Council of Ministers, who is responsible to aid and advice the Governor in the exercise of his function except, in so far as he is, by or under the Constitution, required to exercise his functions or any of them, in his discretion. Both the Council of Ministers and the Chief Ministers shall be collectively and individually responsible to the legislature and people in the matter of the governance of the state. All executive actions of the Government of the State be expressed to be taken in the name of the Governor.

---

[20] Section 3(8)(b) of the General Clauses Act 1897 reads as, in relation to anything done or to be done after the commencement of the Constitution, mean the
President, and shall include-
In relation to functions entrusted under clause (1) of article 258 of the Constitution, to the Government of a State, the State Government acting within the scope of the authority given to it under that clause,
in relation to the administration of a Part C State (before the commencement of the Constitution (Seventh Amendment) Act, 1956, the Chief Commissioner or the Lieutenant - Governor or the Government of a neighboring State or other authority acting within the scope of the authority given to him r it under article 239 or article 243 of the Constitution, as the case may be, and
in relation to the administration of a Union territory, the administrator thereof acting within the scope of the authority given to him under article 239 of the Constitution.

[21] Section 3(60) of the General Clauses Act 1897 reads as-
As respects anything done before the commencement of the Constitution, shall mean, in Part A State, the Provincial Government of the corresponding Province, in Part B State, the authority or person authorised at the relevant date to exercise executive government in the corresponding Acceding State, and in a Part C State, the Central Government.
As respects anything done (after the commencement of the Constitution and before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a Part A state, the Governor, in a Part B State, the Rajpramukh, and in a Part C State, the Central Government.
As respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 195, shall mean, in a State, the Governor, and in a Union territory, the Central Government.
And shall, in relation to functions entrusted under article 258A of the Constitution to the Government of India, include the Central Government acting within the scope of the authority given to it under that article.

In ***Shamsher Singh v. State of Punjab*,**[22] a bench of Seven Judges of the Supreme Court, keeping in mind the structure of our country, has held;

> *"The Governors are only constitutional or formal heads and they exercise their powers and function with the aid and advice of the Council of Ministers and not personally save in cases where the Governor is required by the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the 'satisfaction' of the Governor, the satisfaction is not the personal satisfaction of the Governor but it is the satisfaction of the Council of Ministers. The executive is required to act subject to the control of the legislature. The real executive power is vested in the Ministers of the cabinet. The Council of ministers with the Chief Minister as its head, aid and advice the Governor, in the exercise of his executive functions."*

The court had further said in the following case of ***Sanjeevi Naidu v. State of Madras***,[23] it was held that—

> *"The Governor is essentially a constitutional head and the Government is run by the Council of ministers. All the matters in which the Governor is specifically required to act in his discretion have to be decided by Council of ministers."*

The area in which the Governor has to act in his discretion is "ear-marked". In various Articles and if the question arises whether the Governor should exercise this discretionary power in that area, then his decision in that respect attains finality under Article 163(2). It is not that he can arrogate to himself any executive function of the State and then claim his decision to be final. That approach would be contrary to the legal position as settled by Supreme Court in Shamsher Singh. Therefore Article 163(1) does not enable the Governor to grant sanction for the prosecution in

[22] *AIR 1974 SC 2192.*
[23] *AIR 1970 SC 1102.*

his discretion. Further, Article 163(2) does not attach finality to the decision of the Governor in such matter. It is outside the preview of Article 163(1) as it is not "expressly spelt out" in any provision of the Constitution. It is not also covered by any exception situation as indicated in paragraph 153 in the Shamsher Singh Judgment. It can therefore be concluded that in absence of any source of power emanating from specific provision in the Constitution, or any Constitution conventions, it is not possible for the Courts to concede to the Governor the power to sanction the prosecution of a Minister.

Under Article 163(1) of the Constitution the Governor has been given discretion only in relation to his function under the Constitution, he is required to exercise in his discretion. The grant of sanction under 197 of Cr. P.C is statutory function of the State Government and cannot be said to be discretionary function of the Governor under the constitution. This is not a matter in respect to which the Governor is required under the Constitution to act in his discretion and he has to act on the advice of the Council of Ministers.

The interpretation of a provision of the Constitution would not differ or deflect simply because of the possibility of abuse of power by the Council of Ministers in a given case. The Constitution has reposed greater faith in the Council of Ministers answerable to the people and it is expected that it would consider even the question of grant of sanction for prosecution of its Minister in a detached and dispassionate manner upholding the Rule of Law and Cause of Justice. There is a presumption that the decisions of the Council of Ministers have been arrived at rightly and regularly and not to shield the guilty. Hence, the Governor if at all has discretion would be under the Constitution, and not under any statute.

If we analyse we will find in a democratic set up Rule of Law is in the center of governance. The administration is run by a constitutional mechanism. Bureaucracy forms another essential arm of governance-an arm of the political executive. Bureaucracy assumes an integral part of the administrative mechanism. The bureaucrats are considered to shape social, economic and administrative

policies, which are to further the goal set down in the Constitution to establish the egalitarian social order in which socio- economic justice can be rendered to the poor and weaker sections of the society. It is also no doubt true that the Minister is responsible not only for his actions, but also for the job of the bureaucrats who work or have worked under him.

a. Role of Executive in Protection of IDPs Displaced due to Ethnic Conflict, Communal Violence etc.

India has large number of IDPs who are unassisted and in need of protection. Several states in our country are directly under the target of militant groups. No matter what may be the cause of their displacement, its consequence is one and same. It causes a large number of families and persons to be displaced. And having discussed the definition of IDPs they are totally at the mercy of the state authorities and controlling agencies.

India is an open heart to give the every one the security of home. A large number of IDPs who are forced to move from their own land due to communal violence, ethnic cleansing, secessionist movement, etc are being the one of the person who can be secured by the resident of this country.

From the late 1980s, ethnic conflict and counter-insurgency operations to oppose movements for greater autonomy or secession generated hundreds of thousands of IDPs in India. The affected areas have primarily been in the country's northeastern areas of Assam, Tripura, Manipur, Chhattisgarh, Andhra Pradesh, Orissa, Gujarat and Uttar Pradesh.

The most common figure for the total number of IDPs in India is 28.8 million out of which 526,000 people displaced by communal violence and armed conflict. This figure comprises of 2013:[24]

[24] India: Internal displacement in brief, December 2013, website- http://www.internal-displacement.org/south-and-south-east-asia/india/summary/, visited on 31.11.14.

At least 2,50,000 IDPs displaced from Jammu and Kashmir and they have been living protracted displacement since 1990. After the survey by the Indian Ministry of Home Affairs it was found that there are 59,442 Kashmiri Pandit families who are spread over Jammu (38,119), Delhi (19,338) and other States (1,985).

An estimated 77,000 people are also currently displaced in the north-eastern state of Assam. This figure includes 3,000 displaced by the arbi-Reng communal violence in 2013, in addition to 32,000 IDPs living in protected displacement in Western Assam since 2008. In 2012, communal violence in Assam displaced 500,000 people.

148,000 people are displaced in central India. In May 2013, 10,000 mostly tribal but also middle class traders fled Chhattisgarh in the direction of Andhra Pradesh. This combined to those displaced from the Naxalite conflict that includes: 40,000 people in camps in Chhattisgarh and dispersed in Andhra Pradesh; 8,000 people in West Bengal displaced as of 2007 and more than 100,000 people displaced from Chhattisgarh since 2005.

In 2013, the Centre for Social Justice reported that 4,000 people were displaced in Gujarat and 10,000 remain in displacement in Orissa.

In Uttar Pradesh, 51,000 people had been displaced in relation to the violence that broke out on 7 September 2013.[25]

Kashmir has been at heart of controversy between India and Pakistan. This controversy has caused conflict and displacement of population since independence in1947 due to shelling and military buildup along the Line of Control (LOC) and in the border areas, the displaced populations belong to different communities Muslims, Hindus and Sikhs. Beginning as a territorial dispute, small groups mobilised in conflict as their interests began to conflict with others' perceptions of

[25] *Ibid.*

power in the region. A region with a multitude of cultural, racial and religious groups, the diversity of identities is notable across the Indian-administered provinces of Jammu and the Kashmir Valley. Armed rebel forces have arisen among Muslim groups who seek one of three outcomes: independence, accession to Pakistan, or bilaterally recognised autonomy for Kashmir. Consequently, a vast majority of the conflict in the region has arisen between Muslim militants and Indian security forces.[26]

Since 1989 the increase in intensity of conflict combined with civil disorder in the State of Jammu and Kashmir (J & K) which is part of Indian Territory the numbers of displaced have increased. Some displaced have crossed borders to fall into the category of refugees, but most have stayed within. In this movement of people the largest stream has been of Hindu Kashmiris who have been forced to move out of the Kashmir Valley in India to other parts of the country. This paper concentrates on their plight. In this paper I draw from ethnographic field research conducted intermittently during the last two years. It has not been confined to any one camp or border area, but is a preliminary task of trying to understand the people who left Kashmir in the backdrop of increasing civil disorder.

If we verify the conflict disturbances we will find that, the Kargil War caused displacement especially in Akhnoor District due to which, the displaced population was huddled in school building or government complexes in Akhnoor town with no relief in terms of food or health care. Six months later, the camps came up at several places on the outskirts of Akhnoor- few people went back to their villages in phase, some in 2004 and others in the summer of 2005. But the return was not totally voluntary. An element of coercion and the unfulfillment promise of demining their agriculture lands and providing compensation for the damaged houses by the civil administration has been a major reason for the return. The people were finally forced to return after the government forcefully shifted the schools and primary health centre and dispensaries from the camps to the villages.[27]

[26] Brian Cloughley*,'Violence in Kashmir'*, Security Dialogue, Vol. 30 no.2, June 1999, Pg. 225-238.
[27] Mahanirban Culcutta Research Group (MCRG), "*Voices of the Internally Displaced in South Asia",* December 2006, Pg. 10-11

The Centre has announced a package of Rs 78 crores for the border people from just these 78 villages, out of which Rs 22 crores is already released. Much of the money is likely to be spent on constructing permanent safe shelters for these villagers, on the reconstruction of their houses, (an amount which has already been disbursed but found inadequate), schools and medical health-care infrastructure. Some relief in terms of rations and meager cash doles was received by these people till last year. Some months back, the government announced extension of free rations for a period of another year, ending September 2005. Most villagers, both those living on the camps and in the villages, said that they were not receiving this ration or they had received it only for two months.

There has always been an apprehension with regard to the relation between India and Pakistan. The attack on Indian Parliament on December 2001 gave indication of war between the two nations. Numerous events ultimately led to a ceasefire between India and Pakistan in November 2004, which made the displaced population feel that their problems would come to an end and they could return safely. The displaced population having been displaced for so many years found that their life has changed so much that the question of return did not come as an immediate decision. The camp life was a compulsion for them but the return too was not easy. Amidst this confusion many returned but many continued to live in the camps.[28]

Taking in view of the vulnerable people women and children are the most effected by the armed forces. The women who are from camps and settle in the areas of Jammu, which are a constituent part of Kashmir and some from further a field in Delhi. It includes women from the Nagrota, Muthi and Mishriwala camps in Jammu and noncamp women in Delhi. The article is not only about the Kashmiri Pandit groups who are Hindus but also other Kashmiri Hindus and Muslim Kashmiris forced to leave their homes. The article includes those women from border areas

[28] Shekwat Mahapatra, *"Kargil Displaced of Aknoor in Jammu and Kashmir: Enduring Ordeal and Bleak Future",* A report on the Border Displacement and Return in Akhnoor, website-www.internal displacement.org/8025708F004BE3B/ , visited on 03.12.14.

who have been displaced a number of times over. It is also about those women who have tried to return back to their homes but were forced to go back to a life in camps. They fled for two reasons, fear or economic uncertainty. As to specific reasons for women leaving Kashmir especially Muslim women, fear of sexual assault by militants and in some cases security personnel has been a major element.

Displacement due to conflict is universally often preceded and accompanied by physical violence. In this dispute over Kashmir, though conflict affects men as they join the forces or who are targets of state violence because they are militants or are supposed to support these groups, it affects women differently. Recent years of global conflict has shown us that the targets of ethnic violence are particularly women and they, suffer the worst forms of cruelty and indignity in the form of rape. Sexual violence is the result of the civil disorder in the State and has also been used as a strategic method aimed at a people who are considered as the 'enemy'. Sexual violence is not only a personal trauma but has a social stigma attached to it.[29]

During conflict situations such as in Kashmir, displaced women face not only a continual threat of rape, but also other forms of gender based violence including prostitution, sexual humiliation, trafficking and domestic violence. The psychological effects of traumatic experiences such as these in the context of gender-relations are still to be explored.[30]

Health, especially reproductive health care is a major problem among those displaced in Jammu, especially for those who cannot access facilities due to their limited financial resources. Though Medicare is free in government hospitals medicines are rarely available and have to be paid for. The facilities, location and environmental conditions at the camps are not favourable to healthy living. Sanitation remains a major problem in camps. It has its gendered dimension as it makes women vulnerable to physical and sexual harassment both by camp and non-

[29] Asha Hans, *"Internally Displaced Women from Kashmir: The Role of UNHCR",* Sarwatch, Vol. 2 No. 1, July 2000, Pg. 22.
[30] *Ibid Pg. 22-23.*

camp males. There is little freedom for women in contrast to their sisters in Delhi, as Jammu is still an extended militancy area.[31]

The shelling of villages had dire consequences for women. Many of them were injured and needed medical attention that was already scarce. In a report discussing the fate of one such woman who suffered leg injuries it was stated "because of the pressure on beds she was moved from a bed with a fan (vital in the searing heat) to one that had no ventilation. Her son complained to the hospital authorities but with no success."[32] Thus even in hospitals women are the last to be tended to. According to observers, "in the ultimate analysis the women of Kashmir have had to bear the end of the violence that has wracked the valley. It is they who as widows, half widows, rape victims, victims of religious dictates, and victims of displacement have to ensure that the pattern of life continues as normally as possible even when the times are abnormal."[33]

Not only are they the first to be displaced but even in displacement they are pushed into sub human lives. According to one eyewitness report the people relocated from the Indian side of the border were put in relief camps which were formerly storage sheds or condemned factories. In one such camp for the internally displaced due to war it was reported that 200 people including women and children were packed in a 1800 sq ft. area. These camps had no heating facilities in the bitter cold winter. Due to unhygienic conditions and poor relief many of the inmates fell sick. On their arrival these people were given five kilos of rice per head and four litres of cooking oil. They had no money to buy even wood fuel. "Several women, old persons and children were suffering from cold dysentery and influenza," and they had almost no health care facilities. These displaced including women and children were dumped and forgotten.[34]

---

[31] *Ibid Pg. 24.*

[32] Paula Banerjee, *"Women and Population Flows in India",* Refugee Watch, Vol 38, December 2011, Pg. 6.

[33] Sumona Das Gupta and Ashima Kaul Bhatia, *"Women in Conflict Resolution: The Road Ahead in Kashmir,"* J&K Article, 31 December 2001, website- http://www.ipcs.org/issues/newarticles/671-kas-sumona.html, visited on 02.12.14.

[34] Tapan K. Bose, *"A Kargil War Refugee Camp: Reporting from Gagangir," Refugee Watch*, No. 7, September 1999, Pg. 7-9.

The camps had no privacy for women and their lives in these camps were extremely harsh. Even an ICRC report discussed the gravity of the situation faced by the internally displaced from villages near the LOC. It stated that these people were "experiencing great difficulty in providing for themselves and their children, especially in the wintry conditions now prevailing in these mountainous areas."[35]

The UN guiding principles on internally displaced notwithstanding, the displaced women from the LOC face grave risks to their lives. Many of these women were maimed when they tried to return to their homes that were heavily mined. They are neither consulted nor conferred with before they are displaced. They are not allowed to carry personal items such as enough warm clothes with them because the trucks that transport them do not have enough room. Even now many of these displaced women and children remain uprooted because they can not return to their villages.

In displaced camps, the protection of children's rights is a major issue as these camps are vulnerable to internal trafficking. Combating the exploitation and abuse of non-Kashmiri (the non-Kashmiri speaking population from the hills of districts of Rajouri, Poonch, Udhampur, Reasi, Doda and Kistwar) children is an important and crucial priority and action is being taken to address the root causes, to provide protection through strengthened policy and law enforcement and to support the recovery and reintegration of victims of trafficking. The paper intends to present a profile of the phenomena of child trafficking in conflict induced displaced situations, provide insight into the underlying factors and causes of child trafficking, identify trafficking routes and methods, and those actively involved and whose complicity fuels the crime of child trafficking. It also documents the experiences of child victims and families whose lives have been irrevocably changed because of trafficking. Through a shared understanding of trafficking and its impact on non-Kashmiri children, and their families in displaced settings, attempts have been made to mobilize and address the underlying causes and to prevent further exploitation

[35] *Supra Note 33, Pg.8.*

and abuse of targeted children.

Kashmir has not only taken a toll on human lives and property but caused various forms of psychological disorder and trauma amongst the survivors and also the displaced. Several NGOs have opened up special trauma care centres in different parts of Kashmir. Kashmiri Displaced Persons form an election forum to contest elections in order to save the future of their generations to come and to put their voice before the legislative assembly .In April 1995, the organizations like the All State Kashmiri Pandits Conference (ASKPC), Kashmiri Pandits Sabah (KPS), All India Kashmiri Pandits Sabah (AIKPS), All India Kashmiri Samaj Migrant Action Committee (AIKSMAC) jointly formed the Displaced Kashmir's' Election Forum (DKEF) for contesting the proposed assembly elections and demanded the transfer "three to five Assembly constituencies from the Valley to Jammu so that they could also contest election and send their representatives to the Assembly". However, their demand was rejected out of hand by the authorities. Consequently, their hope that they would be able to place their point of view on the floor of the Assembly dashed to the ground.[36]

As a matter of fact, while organizations like the All State Kashmiri Pandits Conference (ASKPC) have been vouching for a dispensation that not only "reorganizes the scattered Hindu minority in a manner that will create a security zone with concentrated Hindu population in the Valley" but also recognizes its right to determine its own political future itself,[37] the outfits like Panun Kashmir, PKM, IAKF and daughters of Vitasta have been advocating that "four percent (8,4000) sq.kms." of the land area in Jammu and Kashmir north-east of Vitasta be set apart forthwith for the setting up of "homeland" for the Kashmiri Hindus: that the area so earmarked be granted the "status of Union Territory"; And that the "proposed Union

[36] Hari Om, "*Beyond the Kashmir Valley"*, Har-Anand, Publications Pvt. Ltd. Printed at Print Line, New Delhi, p.119.

[37] *Future of Kashmiri Hindus,* All State Kashmiri Pundit Conference, Jammu, July 15, 1990.

Territory must grantee undiluted flow of the Indian Constitution, which stands for democracy, pluralism and freedom."[38]

The Parliamentary Standing Committee on Home Affairs constituted a sub-Committee on Civil Defence and Rehabilitation of J&K Displaced People on 13th April 2007 for in-depth examination of the subject. The Committee gave its 137th Report on 'Rehabilitation of J&K Migrnats' in February, 2009 on which Action Taken Notes were furnished by the Ministry of Home Affairs on the recommendations made in the Report.

The Committee is moved by the pitiable condition off the Migrants, over the years the conditions have only worsened as families have grown and there has been no addition to their resources. The unhygienic environment in which Migrants live is extremely deplorable. The Committee is, therefore, of the strong view that the Government should give a serious thought to the problems of Kashmir displaced person and improves their living condition.

The thrust of the policy of the Government has been to ensure that difficulties and hardships of the Migrants are minimized and the needy families are provided an amount, enough for sustenance and support. Accordingly, monthly relief is being provided to the needy families in Jammu and Delhi which has been enhanced from time to time. The Number of families drawing relief is 20,633.

In view of the fact that the most of the Migrants do not have confidence in the conditions prevailing in J&K, which are not conducive enough, for them to return to the Valley, the Government, therefore, continues to create better facilities for Migrants in camps. To improve their accommodation, construction of 5242 two room tenements announced in Hon'ble PM's Packeged-2004, at Jammu have been completed. Out of these, 4624 flats have already been allotted to the Kashmiri Migrants. Allotment of remaining flats is in progress. The internally displaced

[38] Ashwani Kumar, *"Return of Kashmiri Pundits with security and dignity"*, *Koshur Samachar, Jan. 1997.*

families are also eligible to avail most of the assistance under PM's Packege for Migrants as announced in 2008.

The Committee notes with concern that in the absence of adequate and comprehensive policy for rehabilitation, the Kashmiri displaced person are reportedly being compelled to live in shanty-like camps set up in placed like Udhampur, Nagrota, JMMU ns Delhi. The displaced person had left behind their properties, household goods, business establishments, agricultural land and other means of livelihood and continuing to lead their lives in scarcity and insecurity. Neither the Central Government nor the State Government has adopted a holistic approach to tackle tbe problems being faced by the displaced person. The Committee, therefore, recommends that there should be clear directions by Central Government to all the State Governments and Union Territories to provide relief and rehabilitation on a uniform and holistic basis to Kashmiri Displaced Persons living in those States and UTs. It is subjected to mention that, the State Government should provide land to them for construction of houses under group housing schemes and for construction of cultural centers. To the extent possible, registration charges and stamp duty should be waived as per a uniform policy throughout India.

The Kashmiri Displaced Person is given with monthly allowance and also to ensure that difficulties and hardships faced by them are minimized and the needy families are provided with a reasonable quantum of sustenance and support. Keeping in view the requirement for the decent living and the expenditure needed to be incurred; the Government should consider increasing the monthly sustenance allowance from Rs. 1000 per month per head to a reasonable amount commensurate to the current cost of living.

It is pertinent to mention that, there was a demand for Replacement of the Word 'Migrants' with 'Displaced' for Kashmiri Migrants, the Ministry has expressed the view that nomenclature is not an important element for protecting the interest of the Kashmiri Migrants. The use of t term "Migrants' by no means is coming in the way of mitigating their hardships. The replacement of the term

'Migrant' with 'Displaced Persons' at this stage may give rise to avoidable misgivings. Some of the migrants may even raise the demand for permanent rehabilitation outside the Valley, which is against the Government Policy. However, presently the issue is pending before the Supreme Court. Whatever may be the primary responsibility for providing assistance to IDPs is said to lie with the Ministry of Home Affairs. However, the overall responsibility rests with the state concerned which is considered to be ad-hoc and inconsistent. In fact, India has no national IDP policy which can guide the state for the displaced population.

Furthermore, the state has invoked its Special Status under Article 370 of the Constitution of India, granting it a certain degree of autonomy, to evade review by the National Human Rights Commission.[39] The UN asserts that both the SHRC and NHRC are unsupported by sufficient financial and other resources to effectively carry out human rights mechanisms, leaving both organisations unaccountable to IDPs.[40] There is a distinct lack of independent investigation agencies or measures able to scrutinise IDP circumstances in Jammu and Kashmir, furthering the problems that arise with the absence of a federal government institution that can effectively monitor, implement and acknowledge the need for provision of rights to IDPs.

The north-eastern region of India has seen many episodes of armed conflict and generalised violence since India's independence in 1947. Some of these situations caused massive internal displacement, of hundreds of thousands of people. In 2011, more than 76,000 people remain in internal displacement in the region due to such violence, according to conservative estimates. India's northeast has witnessed seven major cases of conflict-induced internal displacement in recent years:

[39] Asian Centre for Human Rights (ACHR). India Human Rights Report Quarterly, September-December 2010, ed. S. Chakma, Pg 2, Accessed 04.12.14, website- http://www.achrweb.org/ihrrq/issue2/ihrrq-oct-dec-2010.pdf.

[40] United Nations Committee on Economic, Social and Cultural Rights (CESCR). 2008.Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: India, Pg 3, , website- http://www2.ohchr.org/english/bodies/cescr/docs/co/E.C.12.IND.CO.5.doc (cat.no. E/C.12/IND/CO/5), Accessed on 04.12.14.

- Displacement of Bengali Hindus and Muslims from within Assam;
- Displacement of Adivasis (also called Tea Tribes on account of their representation in the workforce of the plantation industry) and Bodos within and from western Assam;
- Displacement of the Bengalis from Meghalaya, particularky from Shillong;
- Displacement of the Bengalis from and within Tripura;
- Displacement of the Nagas, Kukis and Paites in Manipur;
- Displacement of the Reangs from Mizoram;
- Displacement of the Chakmas from Arunachal Pradesh and Mizoram.

Conflict and violence in north-east India have had different causes. Rebel groups have fought for outright independence for their ethnic group or for some level of autonomy. Related, the increasing scarcity of collective land available to indigenous people has led some to instigate violence against people they regard as "outsiders" in order to change ethnic demographics in their favour. Inter-ethnic violence between indigenous groups has also led to internal displacement.

The Sixth Schedule of the Constitution of India has been a means for some groups to establish a de facto ethnic "homeland", as it provides special protection to some "tribes" in north-eastern states, by recognising "Tribal Areas" administered through Autonomous Councils. A demographic majority in an area is necessary for groups to seek this status. This has created grievances among minorities living in territories falling under Autonomous Councils.[41]

The hundreds of ethnic groups in north-east India do not live in distinct areas, and so their demands for ethnic homelands have often led to generalised violence and, in turn, internal displacement. The number of episodes of displacement shows that the Sixth Schedule does not lead to effective and stable

[41] *"This is our land: the ethnic violence and internal displacement in north-east India",* Internal Displacement Monitoring Centre, Norwegian Refugee Council, January 2011, Pg.4.

protection of the north-east's many groups, but rather perpetuates potentially violent competition for land and political power.

There is no central government agency responsible for monitoring the situations and numbers of people internally displaced by armed conflict or generalised violence in India. Some data on IDPs in camps has been published by the authorities of districts hosting camps, but this information is usually not updated regularly. When an IDP camp is closed, its residents may no longer appear in official statistics. However, this does not necessarily mean that they have been able to return home and rebuild their lives there, or have reached a durable solution by integrating in the place they were displaced to or settling elsewhere in the country. There is no monitoring of the number of people in displacement outside camps, including in urban areas. Official figures are therefore likely to underestimate the scale of the actual situation.[42]

In December 2010 and January 2011, violence between Garo and Rabha people in Assam's Goalpara District and Meghalaya's East Garo Hills District displaced about 50,000 people. The IDPs were housed in public buildings, mostly schools, in both districts. The authorities initially provided food rations and health services, but sanitation was a problem. Rs. 10,000 ($200) and some building materials were given as compensation to those whose houses had been destroyed. The Indian Red Cross Society and NGOs provided additional assistance. The camps were closed in February and March, in spite of the fact that many people were reluctant to return for fear of further clashes. IDPs and returnees had difficulty accessing livelihoods, and the education of displaced children as well as local children in whose schools the camps were set up was interrupted.[43]

In Western Assam, more than 46,000 Adivasis, Bodos and Muslims remained in protracted displacement after several hundred thousand of them were forced to flee ethnic violence during the 1990s. The authorities stopped providing food rations in 2010 and distributed a rehabilitation grant of Rs. 50,000 ($1,000) to

[42] *Ibid.*
[43] *Ibid.*

many families. The IDPs had difficulty finding livelihoods, and children lacked access to education. Durable solutions seemed out of reach for these IDPs.

Some Adivasis who had returned to their homes were displaced yet again in late 2010, as they were evicted by the forest authorities without compensation for their losses and without being given alternative land. These evictions clearly failed to meet the conditions laid down in international treaties to which India is a State party, and therefore constituted forced evictions.

In March 2011, a fire affecting one-third of the more than 30,000 displaced Bru people from Mizoram staying incamps in Tripura brought new attention to their situation.They had been displaced by generalised violence involving Bru and Mizo people in 1997 or in 2009. They were lacking basic necessities such as access to drinking water, and had difficulty accessing livelihoods. Following the fire, the Tripura authorities and NGOs provided emergency assistance.[44]

The return of the displaced Bru people had started in May 2010. The process has since stalled several times, with some IDP representatives concerned about the returnees' security and with Mizo groups remaining opposed to their return.

The responses by government authorities, including state and central government agencies, to the different displacement situations caused by generalised violence in north-east India have been ad hoc, inconsistent and often inadequate. Generally, state-level responses have not been based on comprehensive assessments of the needs of either recent or longer-term IDPs, but on political factors including local demographics, the variable interests of the central government, and different levels of media attention. In all cases their decisions were dominated by short-term considerations rather than an emphasis on long-term solutions.[45]

[44] *Ibid, Pg 4-5.*

[45] *"This is our land: the ethnic violence and internal displacement in north-east India",* Internal Displacement Monitoring Centre, Norwegian Refugee Council, January 2011, Pg.5.

National non-governmental organisations (NGOs) have been able to fill some of the gaps, but have generally lacked the capacity for sustained long-term support to the IDPs. International NGOs have played a limited role in the response to violence-induced internal displacement, mostly by funding the work of national NGOs, as the government restricts their access.

The lack of a systematic response by various government authorities on internal displacement caused by generalized violence, and their failure to monitor the various situations of internal displacement, reflects the absence of a national policy or legislation covering such situations. An IDP policy or law would provide a framework against which the respective authorities could be held accountable. If it was based on the Guiding Principles on Internal Displacement and the Framework on Durable Solutions, it would not only focus on emergency responses immediately after displacement, but would also include measures to facilitate durable solutions for the displaced, whether through sustainable return, local integration, or settlement elsewhere in India.[46]

Women have found particularly themselves in a vulnerable position in such situations. During the initial few months of Assam violence, the administration provided some nutritious supplies to pregnant women. But this reduced as days passed. Private organizations took up relief work in full swing and concentrated on providing basic amenities for women and young girls. Sanitation issues were addressed by Oxfam. Special attention was given to maintaining hygiene so as to fight epidemics. In the past, during the riots between the Santhals and the Bodos, in 1998, cholera epidemic had killed several children.

The UN Guiding Principles on IDPs insists that "special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counseling for victims of sexual and other abuses." There is a clear recognition at the UN level that in a situation of violence all are victims, men, women, children and the old, but the

[46] *Ibid.*

impact of violence differs from person to person, and women suffer the most. They become victims of shock for losing their belongings and beloved ones. It is the duty of the state to provide counselors and take proper care of women and adolescent girls.[47]

In most of the camps, many women were pregnant. Yet, they were provided with rice and dal most of the times and no other nutritional supplement. A mother in Gumurgaon in Chirang gave birth to a premature baby. In the absence of any medical care, she was malnourished and the child who born was just bones and flesh.[48]

Women's security in such situations also becomes very important. There is a constant threat of being attacked from someone within the community or outside. Security personnel should be appointed outside the camps. But in most camps there was no such security. This often created immense fear among the parents of young girls. The experience of Gujarat during the 2002 riots led to a situation where many under-aged girls were married off so that the family could get rid of their burden would be shared by someone else. A similar situation was found among the victims of Assam violence.

The UN Guiding Principles for IDPs requires that equal rights be given to women and men to obtain such necessary documents. Further, they want women's names should be entered in all legal documents. But no such provisions were made in Assam. The National Legal Service Authorities in its scheme on disaster management has clearly mentioned that documents should be provided to all those who have lost their important documents, but this too never happened.

The Centre for Social Justice made special representations for the enhancement of financial assistance to the IDPs. Special mention was made in these

[47] Johanna Lokhande, *"Assam Violence Suggests That Women Suffer The Most Due To Conflict-Induced Internal Displacement",* May 23, 2013. Website-www.counterview.org/assam.jpg.html. visited on 02.12.14.
[48] *Ibid.*

representations that women should not discriminate against in awarding compensation. These representations were made to the chief minister and the chief secretary of Assam and the National Human Rights Commission. But all this was of no avail. There is so far no response. Assam violence has been forgotten like another episode. It is more than seven months now, and the displaced persons, especially women, have fought odds like the rains, biting winters and now even the summers. The authorities have still to decide as to how many people will return. They have made public statement that everyone could return. However, nobody knows how people could return to their homes and lands.

Copies of representation were sent to the director, Prime Minister's Office, apart from the principal secretary, revenue, Government of Assam, and local officials at Kokrajhar, Chirang, Dhubri and Bongaigaon districts and at the sub-divisional level in Gossaigaon, Bijni, Parbatjhora and Bilasipara. The demands included financial assistance to enhance the compensation to the grievously injured from Rs. 50,000 to Rs 1 lakh, apart from compensation of up to Rs. 1.25 lakh towards relief and rehabilitation, as mentioned in the directions given to the Gujarat government for the victims of the 2002 Gujarat communal riots. As for the financial assistance for families whose houses have been burnt or damaged, as against the cumulative provision of Rs 52,700, the demand ten times of what was sanctioned, as provided to the victims of the 1984 Sikh riots.[49]

An analysis of the Central government's responsibility, as a party to relevant international treaties, shows that it must take steps to prevent forced evictions, and to provide adequate compensation in cases where forced evictions have occurred. Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which India is a party, underlines that everyone has the right to the protection of the law against arbitrary or unlawful interference with his or her privacy, family and home.

[49] *Ibid.*

India is also party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and so is bound to recognize (and take steps to ensure the realization of) the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 7 Article 11 defines "forced eviction" as " the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights."

In addition, "States parties shall ensure, prior to carrying out any evictions, (…) that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force Legal remedies or procedures should be provided to those who are affected by eviction orders."[50]

General Comment 7 highlights: "All the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected " Furthermore, "Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available "

In 2008, the CESCR recommended that India " take immediate measures to effectively enforce laws and regulations prohibiting displacement and forced evictions, and ensure that persons evicted from their homes and lands be provided

[50] Johanna Lokhande, *"Assam Violence Suggests That Women Suffer The Most Due To Conflict-Induced Internal Displacement",* May 23, 2013. Website-www.counterview.org/assam.jpg.html. visited on 02.12.14.

with adequate compensation and/or offered alternative accommodation", in accordance with General Comment.

All these provisions apply regardless of sex or whether the evictees held legal title to their housing or land, or were "encroachers". The Basic Principles and Guidelines on Development-Based Evictions and Displacement, drawn up by the UN's Special Rapporteur on adequate housing, state: "All those evicted, irrespective of whether they hold title to their property, should be entitled the compensation for the loss, salvage and transport of their properties affected, including the original dwelling and land lost or damaged in the process "

In all these situations, the Researcher can underline, women should be the first to be taken care of. In fact, they are doubly affected. They affected not just by violence like men, but are pushed back into homes, for fear of loss of dignity and honour, or are often left to fend for themselves. Women's psychological condition also gets neglected, if is not taken care of. Women who suffer sexual violence need special assistance in order to help them to recoup. But the question that looms large is: Is the state responding to these special needs of women, or has it just stuck to providing basic amenities, and blanketed the needs of the victims as the same needs of the whole lot?

Based on the UN Principles on IDPs, CSJ carried out a fresh survey between January and March 2013. The survey is based on an interacted with 364 IDPs in rehabilitation camps and 100 IDPs (total 464) who live in alternative housing in different towns in eight districts of Gujarat. In all, 464 IDPs were selected, as they were the worst affected by the Gujarat violence of 2002, and have been living a displaced life ever since. The basic objective was to solicit information regarding the IDPs and analyze their socioeconomic conditions. Issues that were looked into included assistance given by the Gujarat government, basic amenities, issues of

security, relief, rehabilitation and resettlement as well as the status of litigation processes, where applicable.[51]

Housing and basic amenities remained a key concern in most IDPs. In many colonies the ownership of houses is yet to be transferred to the IDPs' names. Besides, these colonies have not been provided with drinking water, approach roads, drainage, street lights etc. IDPs said, the compensation given to them is inadequate. The initial damage survey done by local government officials was done in a discriminatory and inappropriate manner, which resulted in minimal compensation. Indeed, normalcy eludes most the IDPs, as the state government has denied any recognition of their existence. Even after 12 years, these colonies have not been mainstreamed in the towns or villages where they are located. Most IDPs did not want to return to their original place of living, as they said, they did not have faith in the present administration for their safety. Their houses were burnt, property damaged, and many their own kin were killed. They did not want to risk their life again.

The UN Refugee Agency, UNHRC, calls internally displaced persons, or IDPs, as among the world's *"most vulnerable people"*. It says, unlike refugees, IDPs have *"not crossed an international border to find sanctuary but have remained inside their home countries"*. It adds, "Even if they have fled for similar reasons as refugees (armed conflict, generalized violence, human rights violations), IDPs legally remain under the protection of their own government – even though that government might be the cause of their flight." It underlines, "As citizens, they retain all of their rights and protection under both human rights and international humanitarian law."

The issues of Gujarat IDP's who were displaced due to the communal violence in 2002 can be traced to the aftermath of a ghastly incident on February 27,

[51] Report by Iynne Henry, *"Prime Minister of India, Chief Justice of India: Please Make right IDP situation in Gujarat; ensure safe homes, all municipal facilities",* website- https://www.change.org/p/prime-minister-of-india-chief-justice-of-india-please-make-right-idp-situation-in-gujarat-ensure-safe-homes-all-municipal-facilities, visited on 06.12.14.

2002, when a bogie of the Sabarmati Express train heading towards Ahmedabad from Firozabad was set ablaze by a raging mob at Godhra railway station. More than 58 persons, including 26 women and 12 children, were burnt alive. Many of those who died were kar sevaks (religious volunteers) who were returning from Ayodhya in Uttar Pradesh. The incident threw up a reaction that changed the face of Gujarat.[52]

Due to the massive attack property of the people were burned down, people were killed and injured persons of the minority community. Women were raped, children were rendered homeless, and the horror continued unabated in urban and rural areas for more than two months in seven districts of the state, out of which Vadodara, Ahmedabad and the Panchmahals were the worst affected. Various estimates exist of how many people were killed. While official statistics say, 1,169 persons were killed, human rights organisations estimated the numbers at around 2,000, apart from 2,500 who were reported missing. What happened in Gujarat was interpreted widely as one of the biggest ethnic cleansing attempts in independent India.[53]

Thousands of people fled from their residence in search of security and safety. The state government set up 102 relief camps to cater to the immediate need of security and shelter of those who were forced to flee their residence. By 2002, an estimated 1,13,697 people from the minority community were living in these camps.

All these persons fitted well into the United Nations Guiding Principles on Internally Displaced Persons (IDPs), which say that IDPs are "persons 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."

[52] *Ibid.*
[53] *Ibid.*

The relief camps remained operational for six months after which they were forced to officially close down by a directive of the Gujarat government. All aid to the camps was blocked on June 30, 2002. Many of the IDPs were forced to return back with a mere Rs 1,250 as cash dole for all they had lost. Others were condemned to a life of permanent compromise and second-class citizenship. Numerous cases were reported when IDPs were "allowed" to return only if they withdrew legal cases, stopped using loudspeakers for the azaan, and quietly moved out of certain businesses. Many of these compromises were brokered by government officials, carrying out the state's mandate of enforcing "normalcy" and creating an illusion of public order.

Though officially neither the Government of India nor the Gujarat government recognizes IDPs as a category which needs special care and attention, many of them are still unwilling to live the deeply compromised lives they fear would form the condition on their return. Many IDPs want justice and have refused to withdraw legal cases against the perpetrators of violence. Then there are those who refuse to return because they face direct threat of violence. In fact, they have nothing left to return.

These IDPs survive on a no-man's land, caught between existence and denial. They live in makeshift colonies hastily constructed by NGOs and community organizations on the outskirts of towns and villages. They have been literally reduced to the margins of society. Their future is uncertain, as the government denies their existence. In an affidavit to the Supreme Court of India, the Gujarat government has gone so far to say that there is "no internal displacement" in Gujarat, and that if a few people choose not to return to their homes, they are doing it to better their economic prospects.

Women and girls were particularly targeted in the reprisal attacks; hundreds were raped, maimed and killed during the riots. The state government had organised relief camps, where the internally displaced reportedly lacked the most basic necessities such as food, medical supplies and sanitation. More importantly there

were no facilities for women and girls to who have been widowed or orphaned to get any special training to earn their livelihood. No efforts were made to make women aware of the compensations that were promised to them. Although inadequate these compensations could at least give some confidence to women who are traumatised by their own destitution. The National Commission for Women reported that many of the camps "were not up to the mark" and they asked the government to carefully supervise relief with adequate compensation.[54]

The preliminary status report was prepared in April 2004. It was submitted to the Planning Commission, after which Planning Commission member visited several colonies. A status report on the condition of the IDPs in Gujarat was also submitted to the National Integration Council (NIC). It was annexed and quoted in affidavits filed before the Supreme Court in various matters related to the Gujarat carnage.[55]

The status report was based on a field survey, which recorded the existence of 83 plus colonies across northern and central Gujarat. Over 4,000 families were surveyed in the first round. The study was updated thrice. The update done in October 2005 listed 47 colonies housing and 5,170 families. Another update done in January 2007 recorded the existence of 66 colonies. The most recent update was done in 2012, which recorded existence of 83 IDP colonies.[56]

Despite overwhelming documentary evidence, the state government denies the existence of IDPs and maintains that all affected persons have been "adequately rehabilitated". Yet, by the government's own admission, the total damage to property during the violence came to Rs 687 crore, yet the total financial assistance for rehabilitation to the victims only came to Rs 121.85 crore. In fact, the state

[54]Paula Banerjee, *"Women and Population Flows in India",* website- http://www.mcrg.ac.in/rw%20files/RW38/1.Paula.pdf, visited on 06.12.14.
[55]Report by Iynne Henry, *"Prime Minister of India, Chief Justice of India: Please Make right IDP situation in Gujarat; ensure safe homes, all municipal facilities",* website- https://www.change.org/p/prime-minister-of-india-chief-justice-of-india-please-make-right-idp-situation-in-gujarat-ensure-safe-homes-all-municipal-facilities, visited on 06.12.14.
[56] *Ibid.*

government actually returned Rs 19 crore to the Government of India, claiming that it could not make any use of it.[57]

The Government of India gave an assurance that a rehabilitation package along the lines of the package given to the survivors of the anti-Sikh massacre of 1984 would be given to the survivors of the Gujarat 2002 violence. While the NCM initiative has accorded recognition and visibility to the IDPs, regretfully, it has so far been unable to secure reparation or rehabilitation. The matter is still officially pending with the NCM, a statutory body, which has the mandate to "monitor the working of safeguards provided in the constitution and in laws enacted by the Parliament and the State legislatures", as well as "look into specific complaints regarding deprivation of rights and safeguards of the minorities."

The dismal situation of the survivors led the IDPs to come together to demand justice. They formed Aantarik Visthapit Hak Rakshak Samiti (AVHRS – the Committee for the Rights of the Internally Displaced). Its first public hearing was held in Ahmedabad on February 2007, where more than 3,500 people gathered at the Gujarat Vidyapith. It was a testimony that the IDPs were in truly miserable situation and needed special care and support.

b. ***Role of Executive in Protecting the Rights of IDPs due to Development Projects***

According to UN guiding principles on Internal Displacement "Internally displaced persons are persons 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."

[57] *Ibid.*

India has invested in industrial projects, dams, roads, mines, power plants and new cities to achieve rapid economic growth. This has been made possible through massive acquisition of land and subsequent displacement of people. Development Displacement Population is the single largest category among all Internally Displaced Populations (IDPs). In India around 50 million people have been displaced due to development projects in over 50 years. Around 21.3 million development-induced IDPs include those displaced by dams (16.4 million),mines (2.55 million), industrial development (1.25 million) and wild life sanctuaries and national parks (0.6 million).[58]

In the earlier Chapter VI the role of executive had already discussed regarding the protection of rights of IDPs due to Development Projects and Natural Disasters. In India, the problem of land acquisition and payment of compensation is handled by the colonial Land Acquisition Act 1894. The land acquisition procedure has become a complex one, prohibiting the payment of fair compensation to project ousters. The operation of the said Act has given the state the authority to abuse power and fix the rate of compensation in a most arbitrary manner.[59]

To address various issues related to land acquisition and rehabilitation and resettlement comprehensively the Department of Land Resources has formulated a National Rehabilitation and Resettlement Policy, 2007. The new policy has been notified in the Official Gazette and has become operative with effect from the 31 October 2007, based on which many State Governments have their own Rehabilitation and Resettlement Policies.

- The National Resettlement and Rehabilitation Policy (NRRP) 2007 is applicable to all development projects leading to involuntary resettlement of people.

[58] Nalin Singh Negi and Sujata Ganguly, *"Development Projects vs. Internally Displaced Populations in India: A Literature Based Appraisal",* Centre on Migration, Citizenship and Development, February 2011, p. 6

[59] Parkash Chandra Deogharia, *"Development, Displacement and Deprivation",* Shree Publishers & Distributors, New Delhi 2012, Pg.40.

- The policy aims to minimize displacement and promote, as far as possible, non-displacing or least displacing alternatives.
- The policy also aims to ensure adequate rehabilitation package and expeditious implementation of the rehabilitation process with the active participation of those affected.
- The policy also recognizes the need for protecting the weaker sections of the society especially members of the Scheduled Castes and Scheduled Tribes.[60]

To give legal backing to the policy, the Cabinet also decided to bring legislation on the lines of Resettlement and Rehabilitation Policy and to suitably amend the Land Acquisition Act 1894. In this direction, Government has introduced two bills on similar lines in Lok Sabha in 2009 named as the Land Acquisition (Amendment) Bill 2007 and the Rehabilitation and Resettlement Bill, 2007. Both of the Bills lapsed with the dissolution of the 14th Lok Sabha.[61]

i. The Right To Fair Compensation And Transparency In Land Acquisition, Rehabilitation And Resettlement Act, 2013- An Overview

The Government of India believed there was a heightened public concern on land acquisition issues in India. Of particular concern was that despite many amendments, over the years, to India's Land Acquisition Act of 1894, there was an absence of a cohesive national law that addressed fair compensation when private land is acquired for public use, and fair rehabilitation of land owners and those directly affected from loss of livelihoods. The Government of India believed s that a combined law was necessary, one that legally requires rehabilitation and resettlement necessarily and simultaneously follow government acquisition of land for public purposes.[62]

[60] *Ibid Pg. 30.*
[61] Lok Sabha Unstarred Question No. 3305 dated 13.12.2012. website- mha1.nic.in/par2013/par2013-pdfs/ls-110214/3305.pdf, visited on 06.12.14.
[62] http://taxguru.in/corporate-law/fair-compensation-transparency-land-acquisition-rehabilitation-resettlement-act-2013-effective-01012014.html

Forty-Fourth Amendment Act of 1978 omitted Art 19(1) (f) with the net result being:-

1. The right not to be deprived of one's property save by authority of law has since been no longer a fundamental right. Thus, if government issues a fiat to take away the property of a person, that person has no right to move the Supreme Court under Art 32.

2. Moreover, no one can challenge the reasonableness of the restriction imposed by any law the legislature made to deprive the person of his property.

The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 was introduced in Lok Sabha. Two Bills on similar lines were introduced in Lok Sabha in 2007. These Bills lapsed with the dissolution of the 14th Lok Sabha.

- ***Aims and objectives***

  The aims and objectives of the Act include:
- To ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution of India, a humane, participative, informed and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation with the least disturbance to the owners of the land and other affected families

- Provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition.

- Make adequate provisions for such affected persons for their rehabilitation and resettlement

- Ensure that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement

in their post acquisition social and economic status and for matters connected therewith or incidental thereto.

- ***Purpose and scope***

The Act aims to establish the law on land acquisition, as well as the rehabilitation and resettlement of those directly affected by the land acquisition in India. The scope of the Act includes all land acquisition whether it is done by the Central Government of India, or any State Government of India, except the state of Jammu & Kashmir.

The Act is applicable when:

- Government acquires land for its own use, hold and control, including land for Public sector undertakings.

- Government acquires land with the ultimate purpose to transfer it for the use of private companies for stated public purpose. The purpose of LARR 2011 includes public-private-partnership projects, but excludes land acquired for state or national highway projects.

- Government acquires land for immediate and declared use by private companies for public purpose.

The provisions of the Act does not apply to acquisitions under 16 existing legislations including the Special Economic Zones Act, 2005, the Atomic Energy Act, 1962, the Railways Act, 1989, etc.

c. ***Role of Executive in Protection of IDPs Displaced due to Disaster***

India has its fair share of natural and man-made disasters. It is just six years since the National Disaster Management Authority was created and going by the machinery and equipment it has acquired, it is capable of pre-empting some

categories of disasters. Another sub-continental size of India, the NDMA will need to expand the coverage of the National Disaster Response Force well beyond the ten that have been sanctioned because spreading it thin could be counter-productive.[63]

Since time immemorial the Indian sub-continent has been unpropitious to be plagued by natural disasters. **Earthquakes, tsunamis, landslides, avalanches, floods, droughts, cyclones, forest fires, river erosions,** you name it and we have experienced them all. And, as if the wrath of nature was not bad enough, we have experienced a fair share of man-made disasters as well like chemical, biological, radiological and nuclear disasters, cyber-terrorism, mine disasters and environmental disasters. One of the worst man-made disasters experienced in our country was the Bhopal gas tragedy which occurred on the night of 2/3 December 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh. It is categorised as one of the world's worst industrial catastrophes.[64]

The threat of a disaster happening has always been around us, hanging like the proverbial sword of Damocles, yet our reactions have mostly been knee-jerk, reactive and focused on providing relief after being struck by a disaster rather than by being proactive. It was therefore high time for us as a nation to wake up to the crying need of the hour. With the creation of the National Disaster Management Authority (NDMA) in 2005, a paradigm shift took place in the handling of disasters. A proactive, holistic and integrated action plan was drawn up which emphasised the importance of prevention of disasters where possible, mitigation where unavoidable and preparedness for handling the same. The aim being to conserve developmental gains, minimise the loss of life, livelihood and property.[65]

i. Disaster Management Act

By the enactment of the Disaster Management Act 2005 (DMA), government of India ordered the creation of the National Disaster Management

[63] NDMA Role And Function By Lt Gen. V.K.Jetley, website- http://www.dsalert.org/disaster-management/255-ndma-role-and-function, visited on 09.12.14.
[64] *Ibid.*
[65] *Ibid.*

Authority (NDMA) as opposed to creating a separate ministry recommended by the Pant committee. The importance that the government gave to this newly created body can be adjudged by the fact that the NDMA is chaired by the Prime Minister himself, with a Vice Chairman of the status of Cabinet Minister and 8 members of the status of Ministers of State. The Vice Chairman and the members are charged with the responsibility of running the day to day functions of the NDMA.

The salient features of the DMA were that it was a proactive, holistic and integrated approach as opposed to a reactive one. It had the legal authority to respond and take action as demanded by the situation and was backed by an institutional framework. And, last but not the least, it had what its predecessor organisations did not have viz. financial support by the creation of a Response Fund and a Mitigation Fund.

ii. Disaster management structure

The disaster management set up was structured at three levels viz. national, state and district. The NDMA was set up as the apex bodies at the national level, while at the state level State Disaster Management Authorities (SDMA) were set up. These were headed by the Chief Ministers. At the district level District Disaster Management Authorities (DDMA) were set up. These were headed by the District Collectors and co-chaired by elected representatives of the local authorities. All these authorities were charged with the responsibility of formulating holistic and integrated plans for disaster management and ensuring the implementation of these plans when required. The executive committee of the NDMA is called National Executive Committee (NEC). It coordinates the response on behalf of the NDMA. It consists of 14 Secretaries of the government of India as well as the Chief of the Integrated Defence Staff. To assist the NDMA two other bodies have been created called the National Institute of Disaster Management (NIDM) and the National Disaster Response Force (NDRF).

The NDMA is mandated to deal with all types of disasters, natural or man-made. Whereas, such other emergencies including those requiring close involvement of the security forces and/or intelligence agencies such as terrorism (counter-insurgency), law and order situation, serial bomb blasts, hijacking, air accidents, Chemical, Biological, Radiological and Nuclear (CBRN) weapon systems, mine disasters, ports and harbour emergencies, forest fires, oil field fires, and oil spills will continue to be handled by the extant mechanism i.e., National Crisis Management Committee.[66]

NDMA may, however, formulate guidelines and facilitate training and preparedness activities in respect of Chemical, Biological, Radiological and Nuclear (CBRN) emergencies. Cross cutting themes like medical preparedness, psycho-social care and trauma, community based disaster preparedness, information & communication technology, training, preparedness, awareness generation etc. for natural and manmade disasters will also engage the attention of NDMA in partnership with the stakeholders concerned. Resources available with the disaster management authorities at all level, which are capable of discharging emergency support functions, will be made available to the nodal Ministries/Agencies dealing with the emergencies at times of impending disasters/disasters.[67]

The National Executive Committee (NEC) comprises the Union Home Secretary as the Chairperson, and the Secretaries to the GOI in the Ministries/Departments of Agriculture, Atomic Energy, Defence, Drinking Water Supply, Environment and Forests, Finance (Expenditure), Health, Power, Rural Development, Science and Technology, Space, Telecommunications, Urban Development, Water Resources and the Chief of the Integrated Defence Staff of the Chiefs of Staff Committee as members. Secretaries in the Ministry of External Affairs, Earth Sciences, Human Resource Development, Mines, Shipping, Road

[66] National Policy on Disaster Management, website- http://ndmindia.nic.in/NPDM-101209.pdf, visited on 09.12.14, Pg. 11.
[67] *Ibid, Pg. 11.*

Transport & Highways and Secretary, NDMA will be special invitees to the meetings of the NEC.[68]

The NEC is the executive committee of the NDMA, and is mandated to assist the NDMA in the discharge of its functions and also ensure compliance of the directions issued by the Central Government. NEC is to coordinate the response in the event of any threatening disaster situation or disaster. NEC will prepare the National Plan for Disaster Management based on the National Policy on Disaster Management. NEC will monitor the implementation of guidelines issued by NDMA. It will also perform such other functions as may be prescribed by the Central Government in consultation with the NDMA.[69]

The enunciation of this policy represents merely the first step in the new journey. It is an instrument that hopes to build the overarching edifice within which specific actions need to be taken by various institutions and individuals at all levels. A destination has been described and, hopefully, a direction shown. The stage has been set, and the roadmaps now need to be rolled out. This document has endeavoured to capture, in its essence, the vigorously enabling environment, which the body politic has put in place through an Act of Parliament that heralds the onset of a different approach in dealing with disasters that have, in the past taken a heavy toll of lives and properties and crippled the economic base of communities. It also illustrates realisation of the fact that disasters not only cause a setback to economic and developmental growth, but also seriously affect the national security environment.

According to the researcher this is also an expression of the firm conviction of the national leadership to make necessary financial allocations for Prevention, Preparedness and Mitigation rather than fruitlessly incur post-disaster expenditure year after year. This policy will have served its purpose, if those that are charged with the responsibility of carrying the task forward, find that their hands have received from it, the strength and direction that they need.

[68] *Ibid.*
[69] *Ibid, Pg. 12.*

E. Role Of Judiciary For The Protection Of Internally Displaced Women And Children

Justice is not synonymous with equality: equality is one facet of it. Justice is not something which can be captured in a formula once and for all. It is a process, a complex and shifting balance between many factors including equality, Justice is never given; it is always task to be achieved. Justice is just allocation of advantages and disadvantages, preventing the abuse of power preventing the abuse of liberty by providing facilities and opportunities to the poor and disadvantaged and deprived social segments for a just decision of disputes adapting to change.[70]

Role of judiciary in different causes of displacement is not exhaustive. Very few cases have come up before the courts. The reason may be that they are satisfied with the approach of the government in providing them relief and rehabilitation or because they are not known of the fact that they have rights after their displacement has taken place.

a. Role of judiciary in protection of displaced women and children caused due to Ethnic Cleansing

Instantly, we are concerned only with the proactive role of the Judiciary in protecting the rights of displaced person due to ethnic cleansing. Ethnic cleansing has taken place in Indi's northeast which is as ethnically diverse as compared to the rest of the country. India's northeast has witnessed major cases of ethnic cleansing in recent years;

- Displacement of Bengali Hindus and Muslims from and within Assam;
- Displacement of Adivasis and Bodos within and from western Assam
- Displacement of Bengalis from Meghalaya, particularly from Shillong, the capital city
  of Meghalaya;
- Displacement of the Bengalis from and within Tripura;

[70] Dias, 'Jurisprudence', 5th Edition, Butterworths, London, 1985, Pg 66.

- Displacement of Nagas, Kukis and Paites in Manipur;
- Displacement of Reangs from Mizoram;
- Displacement of Chakmas from Arunachal Pradesh and Mizoram.

The Judiciary has, however, not been directly involved in the protection of the rights of those injured in violence as well as those displaced. Though the matter which is going to be discussed hereinafter does not exclusively deal with the IDPs but still it is important since it seems to indirectly deal in the protection of the right of the IDPs. An important case is to be mentioned here that of ***National Human Rights Commission vs. State of Arunachal Pradesh & Another.***[71] public interest petition, being a writ petition under Article 32 of the Constitution, has been filed by the National Human Rights Commission (hereinafter called "NHRC") and seeks to enforce the rights, under Article 21 of the Constitution, of about 65,000 Chakma/Hajong tribals It is alleged that these Chakmas, settled mainly in the State of Arunachal Pradesh, are being persecuted by sections of the citizens of Arunachal Pradesh. The factual matrix of the case may now be referred to. A large number of Chakmas from erstwhile East Pakistan now Bangladesh, were displaced by the Kaptai Hydel Power Project in 1964. They had taken shelter in Assam and Tripura. Most of them were settled in these States and became Indian citizens in due course of time. Since a large number of refugees had taken shelter in Assam, the State Government had expressed its inability to rehabilitate all of them and requested assistance in this regard from certain other States. Thereafter, in consultation with the erstwhile NEFA administration (North East Frontier Agency - now Arunachal Pradesh), about 4,012 Chakmas were settled in parts of NEFA. They were also allotted some land in consultation with local tribals. The Government of India had also sanctioned rehabilitation assistance @ Rs.4,200/- per family. The present population of Chakmas in Arunachal Pradesh is estimated to be around 65,000.

The issue of conferring citizenship on the Chakmas was considered from time to time. Groups of Chakmas have represented to the petitioner that they have made representations for the grant of citizenship under Section 5(1)(a) of the

[71] *1996 SCC (1) 742.*

Citizenship Act, 1955 (hereinafter called "The Act") before their local Deputy Commissioners but no decision has been communicated to them. In the recent years, relations between citizens of Arunachal Pradesh and the Chakmas have deteriorated, and the latter have complained that they are being subjected to repressive measures with a view to forcibly expel them from the State of Arunachal Pradesh.

The Committee for Citizenship Rights of the Chakmas (hereinafter called "The CCRC") filed a representation with the NHRC complaining of the persecution of the Chakmas, alleging immediate threats to the lives of the Chakmas. Approaching that, it finds impossible to extent protection to them to move the Supreme Court for solving the issue. Ahmed C.J. held;

"We are a country governed by the Rule of Law. Our Constitution confers contains rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics."

The Court further issued various directions, directing the state that, the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organised groups, such as the AAPSU, shall be repelled, if necessary by requisitioning the service of para-military or police force. Further, the Court spelt out that "except in accordance with law, the Chakmas shall not be evicted from their homes and shall not be denied domestic life and comfort therein."

Certain interim orders and judgements from High Courts across the country have also upheld the human right to adequate housing, and condemned the practice

of forced evictions without due process and adherence to human rights standards.[72] ***In P.K.Koul vs Estate Officer & Another,[73] Gita Mittal J. held that,*** the instant case is a testimony to events which lead to an unprecedented ethnic cleansing of a minority community from the Kashmir valley on account of the inability of the State to protect them and their property from violence, who, as a result, were rendered homeless. Such turmoil was faced by the minority community in the state of Jammu & Kashmir after December, 1989, compelling its members to flee home, hearth and State for bare survival.

The right to residence and to settle in any part of the country is assured to every citizen as a fundamental right under Article 19 (1) (e) of the Constitution of India… The right to shelter springs from this right and has been considered to be an integral part for a meaningful enjoyment of right to life under Article 21 of the Constitution of India.

It is essential to note that in fact no new right is being created, recognized or reiterated by the international instruments or the said guidelines. The right to shelter of every person has been recognized as an essential concomitant of right to life under Article 21 of the Constitution of India. It would clearly be covered under the definition of a "human right" under Section 2(1)(d) of the Protection of Human Rights Act, 1993, which includes rights relating to life, liberty, equality and dignity. The right to shelter, an essential part of right to life, would therefore also be a statutorily recognized right under Section 2(1)(d) of the Act of 1993 and enforceable as such also.

In ***P. G. Gupta vs. State of Gujarat[74]*** the Supreme Court had further declared that it was the duty of the state to construct houses at reasonable costs and make them easily accessible to the poor, and that such principles have been expressly

[72] Reaffirming Justiciability: Judgements on the Human Right to Adequate Housing from the High Court of Delhi, Housing and Land Rights Network, New Delhi, 2013. Available at: http://www.hic-sarp.org/documents/Reaffirming_Justiciability_judgement_on_HRAH_from_High_Court_ofDelhi.pdf, visited on 13.12.14.

[73] *P.K. Koul and Others. vs. Estate Officer and Another, W.P. (C) No. 15239/2004 and CM No. 11011/2004, High Court of Delhi, 30 November 2010.*

[74] *1995 (2) SLR 72.*

embodied in our Constitution to ensure socioeconomic democracy so that everyone has a right to life, liberty and security of the person.

The Supreme Court has repeatedly reiterated the well settled position that the state has the constitutional duty to provide adequate facilities and opportunities to all including the disadvantaged and the displaced, by distributing its wealth and resources for the settlement of life and erection of shelter over their heads. The court has emphasized the constitutional right of every citizen to migrate and settle in any part of India for better employment opportunity and it would be the duty of the state to provide right to shelter to the disadvantaged in society (***Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan & Ors***[75]).

It is the constitutional duty of the state to protect human rights and the fundamental rights of all persons. The distinction between such rights and legal rights which may require adjudication in appropriate proceedings has also been emphasised on several occasions.

The expansion and interpretation by the courts has affirmatively established a positive right to housing and shelter for every person as part of the fundamental right. Human rights and fundamental rights are inalienable; their violations are indefensible. The state is under a constitutional obligation and duty to protect these rights. When violated, a citizen is entitled to their enforcement. The constitutional mandate upon it is coupled with the statutory duty and public law obligations to ensure the protection of the fundamental and basic human rights to all, in addition to its obligation under the several international instruments noticed above. This essentially remains in the exclusive domain of state functions. Failure to protect the citizens from eminent loss of life and property as well as maintenance of public order, implicates the state for culpable inaction.

[75] *Ref: 1997 (11) SCC 121.*

In the case of ***Sudama Singh and Others vs. Government of Delhi and Anr. (2010)***,[76] the High Court of Delhi also established that housing is a human right. It stated:

"Adequate housing serves as the crucible for human wellbeing and development, bringing together elements related to ecology, sustained and sustainable development. It also serves as the basic unit of human settlements and as an indicator of the quality of life of a city or a country's inhabitants."

The recognized importance of the right to housing over time has led to its ratification and reinforcement through other international declarations, conventions and conferences, in which more precise and complex objectives have been developed.

The Protection of life guaranteed by Article 21 encompasses within its ambit the right to shelter to enjoy the meaningful right to life. The right to residence and settlement was seen as a fundamental right under Article 19 (1) (e) and as a facet of inseparable meaningful right to life as available under Article 21.

One another important case came before the Judiciary regarding the tragedy of Kandhamal[77] is that the attack on the Christian community. Violence against religious minority communities across Orissa has been reported for the past two decades. The extreme right-wing nationalism propagated by Hindutva forces in India is aimed at creating a Hindu state. It operates with a mandate of perpetuating violence and discrimination against minority groups in order to maintain domination over them, and make them secondary citizens, living on sufferance, and subservient to the Hindu community. Christians, Muslims, adivasis and dalits are the minority groups who have been at the receiving end of such attacks by the Sangh Parivar. The state's duty to provide relief, rehabilitation and reparations stems from the

[76] *Sudama Singh and Others vs. Government of Delhi and Anr., W.P. (C) Nos. 8904/2009, 7735/2007, 7317/2009 and 9246/2009, High Court of Delhi, 11 February 2010.*

[77] Saumya Uma, *"Kandhamal The Last Must Change its Course",* edited by Vrinda Grover, Published by Multiple Action Research Group, 1st Edition, 2010, website- http://www.ngo-marg.org/wpcontent/uploads/2011/01/kandhamal-Book-Final.pdf, visited on 13.12.14.

Constitutional mandate to protect the life and liberty of the people, which envisions a life with dignity and not a mere animal existence.[78]

In 2008 led to large-scale internal displacement of Christian people from Kandhamal. Approximately 27,000 – 40,000 people were displaced and while some shifted to the 25 relief camps, many left for other towns in Orissa and some even for other states. The movement of people away from their homes was coercive and involuntary, as it was caused by the communally-motivated attacks over persons and property by violent mobs. The movement of such people was within the nation's borders. The victim-survivors of Kandhamal violence, therefore, fall within the definition of IDPs according to standards of international law.[79]

Communal violence, conversely, involves crimes committed against collectivities. Victim-survivors are targeted because of their religious identity, and in situations where there is an extraordinary deviation or collapse of state institutions, functionaries and agencies with the statutory duty to govern in accordance with Constitutional principles and provisions fail to do so. Even in those few provisions in the IPC that may be used for crimes committed in contexts of communal violence that deal with crimes against collectivities, the approach of the law is to construe these crimes as 'unlawful assembly' and 'riot', terms that do not accurately reflect the realities of communal violence.[80]

In our understanding, a communal riot is spontaneous and involves clashes between two groups possessing more or less equal power. Communal violence, on the other hand, is planned and involves the more powerful launching attacks upon the less powerful, with state complicity and its overt or covert sanction. The description of communal violence situations (such as anti-Sikh violence in 1984, post-Babri Masjid violence in 1992-93 and Gujarat carnage in 2002) as 'pogrom', 'carnage' and 'genocide' indicates that these were planned attacks upon religious

[78] *Francis Coralie Mullin vs. Administrator, Union Territory of Delhi AIR 1981 SC 746.*
[79] *Supra Note 77, Pg. 70.*
[80] *Ibid.*

minorities, with state complicity and sanction to varied extents.[81] The IPC framework seeks to protect the state from its people, but in situations of communal violence, it is the people who need protection from the state. This presumption in the IPC completely contradicts the principles of constitutional democracy, which warrant that people be protected against the arbitrary exercise of power wielded by the state and its functionaries.

The State's obligation to protect the lives and property of its citizens in times of communal violence is mandated by the law and reiterated by the judiciary. In the words of the Delhi High Court, *"it is the duty and responsibility of the State to secure and safeguard life and liberty of an individual from mob violence. It is not open to the State to say that the violations are being committed by private persons for which it cannot be held accountable."*[82] Under the Constitutional scheme, the maintenance of public order is a responsibility of the State government[83] whereas the Union has a duty to ensure that the state is run in accordance with the provisions of the Constitution and to protect the State against any internal disturbance.[84] Furthermore, under the Code of Criminal Procedure the local Magistrate has the

[81] Saumya Uma, *"Kandhamal The Last Must Change its Course",* edited by Vrinda Grover, Published by Multiple Action Research Group, 1st Edition, 2010, website- http://www.ngo-marg.org/wpcontent/uploads/2011/01/kandhamal-Book-Final.pdf, visited on 13.12.14, Pg 122.

[82] *Bhajan Kaur vs. Delhi Administration through the Lt. Governor ILR 1996 Delhi 754: 3 (1996) CLT 337.*

[83] Item 1, List 2, Seventh Schedule of the Constitution of India.

[84] Article 355 of the Indian Constitution obligates the Central government "to protect every state against external aggression, internal disturbance and to ensure that the government of every state is carried out in accordance with the provisions of this Constitution." Article 356 (1) states as follows:
"(1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation –
(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;
(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:
Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts."

power to call upon the armed forces of the Union to aid in the civilian administration to ensure that public order is maintained.[85]

It would appear therefore that both the state and the central governments have a responsibility to ensure that citizens' fundamental rights guaranteed by the Constitution are not violated through incidents such as communal violence. The courts have clarified that since secularism is a basic feature of the Indian Constitution, *"any State Government which pursues unsecular policies or unsecular course of action acts contrary to the constitutional mandate and renders itself amenable to action under Art. 356."*[86] Further, the courts state that *"the acts of a State Government which are calculated to subvert or sabotage secularism as enshrined in our Constitution, can lawfully be deemed to give rise to a situation in which the government of the State cannot be carried on in accordance with the provisions of the Constitution."*[87]

After a long process the researcher had surveyed the context of communal violence of whole India she found that, India does not have any normative standards related to rights of internally displaced persons (IDP) as well as corresponding duties of the government. The state was failure to discharge its obligations towards providing relief, rehabilitation and reparation in the Kandhamal violence. The absence of normative standards in India on state obligation with regard to victim-survivors of communal violence who become IDPs, coupled with a lack of institutional arrangements for discharging such obligations towards IDPs, result in blatant violations of the fundamental and human rights of victim-survivors in contexts of communal violence.

Hence, there is a need for incorporating the Guiding Principles on Internal Displacement into the national policy framework of India, in order to address internal displacement through factors including communal violence. Such a policy ought to aim at ensuring full protection of rights of IDPs in consonance with

[85] Section 130, Code of Criminal Procedure, 1973.
[86] *B.P.Jeevan Reddy J in S.R.Bommai vs. Union of India, 1994 AIR 1918, 1994 SCC (3) 1.*
[87] *Ibid.*

standards prescribed by the Guiding Principles. It ought to address all elements of the problem of displacement – prevention, protection and assistance, as well as emphasize the state's obligation to find durable and sustainable solutions.

The State's obligation towards peace-building of the IDPs' right is to establish justice and the rule of law, reconstruction, economic and psychological rehabilitation, and reconciliation. The state has the duty to create an environment that can sustain return or local integration through access, without discrimination, to basic public services, legal and personal documentation, and to livelihoods or income-generating opportunities

Indian efforts at formulating policies of a similar nature in other contexts (such as natural disasters) should also be taken into consideration because they provide useful pointers to appropriate government obligations in contexts of communal violence. The Orissa Relief Code 1996, enacted to deal with instances of flood, famine, drought, earthquakes and other natural disasters, lays down the types of relief that are to be given for different sets of people, and provides clear duties for specified government departments. The National Policy on Resettlement and Rehabilitation for Project Affected Families, 2004, which extends to instances wherein agricultural families are displaced from their lands due to developmental activities, recognizes the right of the families to be given cattle, land, houses and other property commensurate to what they owned prior to their displacement.

In ***Union Of India & Ors. vs Vijay Mam,***[88] held, a writ petitions which were filed by the respondents herein. All these respondents are Kashmiri Pandits with their permanent residence in the State of Jammu and Kashmir. They were employees of the Central Government and most of them were posted in Kashmir. However, due to the turbulence in that State resulting in putting their lives in danger, they were transferred to Delhi. In fact, most of these respondents were representing the intelligence agencies, paramilitary and defence forces as well as the Government media and had become the prime target of militants.

[88] *LPA No.332 of 2011, Pronounced on: 1st June, 2012.*

The present petitioners along with several other families, have been compelled to relocate within India and would therefore fall under the category of such internally displaced persons ('IDPs') who have received either insufficient or no protection by the State, from or during their persecution.

It is very unfortunate that, there is no specific law, rule, regulation or instrument providing for treatment of IDPs or setting out any minimum standards for their protection, rehabilitation and relocation. The Guiding Principles on Internal Displacement reiterate the very right to shelter constitutionally guaranteed and recognized as a basic human right in the international instruments. These Guidelines thus consolidate and fill gaps in national and international law relating to such displaced persons. They also provide a valuable benchmark for what must be ensured as part of the basic human rights security of such persons and would guide consideration of the rights of the present petitioners.

In ***Shri J.L. Koul & Anr. v. State of Jammu & Kashmir & Ors.***[89] In that case, Shri J.L. Koul & the other petitioners were Kashmiri pandits who were employees of the State Government and being State Government servants, had been allotted residential accommodations in Jammu between 1989.

Their houses in the valley were either destroyed or burnt down by militants. Even though they had retired from service, these petitioners were permitted to retain the Government accommodations in Jammu for safety reasons. Such a step was considered necessary and inevitable by the State Government as the atmosphere was not congenial for the appellants to return to the valley, more so when they had lost their respective houses. It appears that other state Government employees awaiting allotment of official accommodation, could not get the same for the reason that these retired persons continued to occupy the official accommodation.

The learned Single Judge had also directed that the persons who were not in Government service but required Government accommodation because of security

[89] *CIVIL APPEAL NO. 3809 OF 2005.*

reasons, should be tried to be accommodated within one complex so that their security is ensured, reducing the burden on the State which would have to incur lesser amount for their security.

In the words of Justice Vithyathil, *"There is much truth in saying that if you want peace you must work for justice."*[90] The researcher had tried to show that there are glaring inadequacies in the framework of Indian law and policy when used to address contexts of communal violence, and these inadequacies cause severe obstacles to justice. The present laws are not designed to adjudicate mass crimes wherein an entire community is targeted with the willful and culpable acts of commission and omission by state agencies. The yardstick of "normal times" cannot be indiscriminately applied to trials marked by an extraordinary collapse of state agencies and institutions.[91] To prosecute and convict extraordinary crimes committed in contexts of communal violence and to provide justice, security and restore a life with dignity to victim-survivors, India needs a different legal regime, for which some pointers may be taken from international law.

b. Role of judiciary in protection of displaced women and children caused due to Natural Calamities

Calamity is a leveler of rich and poor, strong and weak, all are suffering alike. The fallout of natural calamity is considered to be the flow of generosity for help to the victims from the country and all over the world. At times, so much of relief material and money is received that its management and distribution pose an uphill task to the government. No doubt, a natural calamity causes devastation and destruction of life and property of the people. It renders numerous homeless and displaced.

[90] Report of the Justice Joseph Vithyathil Commission on the Tellicherry riots, 1971.
[91] Vrinda Grover, 'The Arrears of Justice', Indian Express, 11 February 2010.

One of the case that can be mentioned here about the Gujarat High Court direction in ***Bipin Chandra J. Diwan v. State of Gujarat.***[92] Regarding to this case it was found in newspapers and media reports that the Government has failed to meet the situation arising from the calamity and has no adequate infrastructure to satisfactorily perform the stupendous task of providing relief to the displaced family.

In the petition, apprehensions have been raised and doubts expressed that the tremendous quantity of relief material and money received as contribution from different bodies, organisations and persons for the quake victims and which is likely to be received in future may not be properly utilised leaving the victims high and dry.

The main reliefs claimed are issuance of directions to Government to set up independent committee or commission manned by experts in different fields who may be found competent in quake relief management operations. It is prayed that such independent committee or commission of experts should be entrusted the relief materials and the relief fund to ensure their proper utilisation for the victims and to avoid their diversion, misappropriation and loss.

The Respondent of the present case had contended that, the allegations of slackness and inefficiency leveled against the Government in the petition are baseless. The contributions received in cash and kind constitute the Government fund and the Government, though duly formed Committees for management of quake relief, is committed to utilize them for quake victims. In the instant case, the Court acknowledged the need of legislation to address to such kind of disaster and held;

"The duties of the Government or the Court on occurrence of a disaster or natural calamity of this magnitude are not statutorily regulated. In fact, there is complete lack of any legislation in this field. Article 21 of the Constitution of India which guarantees to every citizen protection of his life and personal liberty, is repository of all important human rights which are essential for a person or a

[92] *AIR 2002 Guj 99.*

citizen. When there is a natural calamity like earthquakes, floods, fire, cyclones and similar natural hazards the State as guardian of the people is obliged to provide help, assistance and support to the victims of such natural calamities to help them to save their lives."[93]

Art. 21 of the Constitution the Supreme Court have deduced an affirmative obligation to preserve human life. There is no parallel to the present colossal natural calamity as in India. In order to protect the human rights as a part of right that flows from Art. 21, the Supreme Court has enforced obligations to the Government and the State to protect life of every citizen of the country.

The Supreme Court is prompted by the philosophy of social justice or social rights. In doing so, the Supreme Court has been even enforcing directive principles of State policy. This was so done because with the amendment of the preamble of the Constitution "social justice" is an objective for the Government to achieve. Whatever may be the precise content of "social justice", it is held to include recognition of the needs of weaker section of the community as "human being". This need is more urgent where a large section of people have been seriously affected by natural calamity like earthquake and their homes and life is totally shattered.

In the present case the Supreme Court had taken a view that to humans affected by calamity the State is obliged to provide help, assistance and support, so that they may be able to save their lives. This right of assistance in calamity has to be treated as an enforceable right. Such affected persons, as a result of the calamity, are rendered helpless and handicapped. Help and corrective action sought for them through service-spirited organisations or section of people cannot be thwarted, but the same deserves to be encouraged.

This case leads us to one conclusion that an immediate legislation to look after this affair is essential instead of filing writ petition or for that matter a PIL. A law in this respect can solve this problem.

[93] *Ibid, Pg. 103.*

The doctrine of parens patriae was applied by the Supreme Court in the case of ***Charanlal Sahu v. Union of India***[94]. This doctrine was appropriate to apply to the case of victims of earthquake like the present one which occurred in Gujarat. The court held;

"The concept in jurisprudence of doctrine of parens patriae is that the State has the inherent power and authority to provide protection to the person and property of persons non-sui juris such as minor, insane and incompetent persons like those rendered helpless due to earthquake disaster. "Parens patriae" has been literally explained to mean "the father of the country" and is used to designate the State referring to its sovereign power of guardianship for persons under disability. Parens patriae jurisdiction, it has been explained is the right of sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. Conceptually, the parens patriae is theory of obligation of the State to protect and take into custody the rights and privileges of its citizens for discharging its obligations. The Constitution makes it imperative for the State to secure to its citizens rights guaranteed by Constitution and where the citizens are not in a position to assert and claim their rights, the State can be activated and approached to effectively come upon the scene and protect the human rights of victims of a disaster. The Supreme Court has held that the Preamble of the Constitution read with Directive Principles in Arts. 38, 39 and 39A enjoins the State to take up this responsibility. It is the protective measure to which the Social Welfare State is committed."

The Court commented on the role of Government functionaries held;

"The allegations of failure and incapacity of the Government machinery show a prejudice and distrust in the elected Government. The paradox in a democratic society is that the people expect too much from the elected Government and its executive and at the same time show utmost distrust in it and its functionaries. It is too early to attribute any failure to the Government machinery and show distrust in its capability to meet the situation which has arisen out of the disaster. The petitioners could have been careful enough not to take any stand as

[94] *AIR 1990 SC 1480.*

would have a demoralising effect on host of officers, members of the staff and workers in the government machinery who are actively involved in the relief and rehabilitation operations. Obviously, the country was totally unprepared for a calamity of this dimension, but there is no cause to distrust capabilities of Government machinery to handle the situation."

The functions of a State governed by Constitution and Rule of Law are to take necessary remedial measures as parent and guardian of the citizens of the country to help and support helpless victims of a massive disaster. This is the obligation of the State which is enforceable by the victims or public-spirited organisations on their behalf by way of collective action.

c. Role of judiciary in protection of displaced women and children caused by Development Projects

India has invested in industrial projects, dams, roads, mines, power plants and new cities to achieve rapid economic growth. This has been made possible through massive acquisition of land and subsequent displacement of people. Development Displacement Population is the single largest category among all Internally Displaced Populations (IDPs). The judiciary has contributed in protecting the rights of the displaced person due to development project. The role of the judiciary in addressing to the issue of development Induced Displacement may be studied under the following heads.

i. Impact fall upon the internally displaced women and children caused by Mining Activity

The tribal / adivasi regions of India are prominently located in forest areas which are rich in biodiversity. These areas have vast reserves of flora, fauna and minerals. Since, these areas are rich in biodiversity they are prone to exploitation for just and unjust causes. Due to this reasons, the Constitution of India has provided safeguards and legislations which protect these people as well as the country's natural resources.

The Swadeshi Forest is home to the indigenous Tribal Communities who are being displaced on account of large-scale mining operations. It is submitted that this displacement of the Tribal Communities violates their right to shelter guaranteed under Art. 21 of the Constitution.

The right to shelter has been read into Art. 21[95] as an essential concomitant of the fundamental right to life[96] have been read into Art. 21. This Hon'ble Court has interpreted the right to shelter to mean the right against forceful eviction.[97] Crucially, with regard to forest dwelling tribal communities, this right has been codified under the Forest Rights Act.[98] Therefore, it is submitted that the Tribal Communities are entitled to their natural habitat under Art. 21 and this is contravened by the Project.

The state when mining projects have displaced and affected these communities have now spiralled into a region of war and violence, given the scale and number of mining projects being proposed in the *adivasi* lands. The impacts that these projects have had on the *adivasi* women have completely been by-passed with the women being excluded from any consultation, compensation or rehabilitation. Yet the impacts have caused serious problems and human rights abuses on *adivasi* women who are the principal campaigners for the protection of their lands and natural resources.

Mining projects have led to displacement of *adivasi* communities where women are direct losers, yet are not accounted for in the project costs. Displacement to *adivasi* women means more than just losing a house or land. Existing mining projects show how women lose their economic activities, food security, social, cultural and health support systems, and often end up as landless and migrant labour.

---

[95] *Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180; Shantistar Builders v. Narayan Khimalal Totame, AIR 1986 SC 180.*

[96] *Francis Corallie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746; Shantistar Builders v. Narayan Khimalal Totame, AIR 1990 SC 630; Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan, (1997) 11 SCC 123.*

[97] *Ram Prasad Yadav v. Chairman, Bombay Port Trust, 1989 SCALE (1) 716.*

[98] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 3 (2006).

Displacement from Scheduled Areas (areas marked out with predominantly *adivasi* populations under the Constitution of India) also has direct impact on *adivasi* women's constitutional and customary rights over their land.

The Fifth Schedule of the Indian Constitution guarantees to the *adivasis* in the country and is the backbone to the legal framework in the *adivasi* areas. The most important right provided under this Schedule is the prevention of land alienation through land transfer regulation where no land or immovable property in Scheduled Areas can be transferred by way of sale or lease to persons other than an *adivasi*.

For the *adivasi* women, the Fifth Schedule of the Constitution provides protection of their lands and natural resources from being alienated to outsiders. Even if it does not directly provide for legal entitlements to the women, they enjoy a fair degree of control and access to these resources within their traditional social norms as long as the lands are within their community fold. As women have a primary role in agriculture and forestry activities, the cultural practices allow for decision-making and usufructory rights of women as well as their control over incomes, to a large extent.

In ***Rural Litigation and Entitlement Kendra v. State of U.P.***[99]is the first case where the Supreme Court made and attempts to explore the adverse effects of mining. In this case, the petitioners, a voluntary organization, feared that mining activities of the lessees caused ecological disturbance. According to a committee of experts appointed by the Court, mining of limestone in certain areas was found dangerous and damaging ecological balances. The Supreme Court ordered to close the mining operations in these areas, though it permitted mining operations in certain other cases. The court further laid down;

"Indisputably displacement has been suffered by these lessees and the sudden displacement must have up-set their activities and brought about substantial inconvenience to them. The court has no other option but to close down the activity

[99] *AIR 1988 SC 2187.*

in the broad interests of the community. This however, does not means that the displaced mine owner should not be provided with alternative occupation. What is necessary is a time frame functioning if rehabilitation is to be made effective. It may be that all the displaced mine owners may not find suitable mining sites within the States of U.P. it is therefore necessary to associate some other states in the programme while effecting rehabilitation by giving alternative mining sites, ecology and environment will have to be considered."[100]

In this case the court directed that a Committee should be set up to oversee the rehabilitation of the displaced of the displaced mine owners. This rehabilitation task was to be carried out in consultation with other State of U.P. may not be able to meet the requirements of the situation. Hence the court was zealous in protecting the rights of the mine owners as well as protection of the environment.

In yet another judgment of ***Samantha v. State of Andhra Pradesh***[101]the Supreme Court upheld and protected the lives and livelihood of the adivasis. This judgment is important in the context of increasing mining activities and the growing involvement of the private section in the displacement process of tribal/ adivasis who are residing in nature-rich Tribal/ Scheduled Areas.

The Samatha Judgement was delivered on 11 July 1997, after a four- year legal battle by a three- judge bench of the Supreme Court. The Court upheld that private mining industries must be seen as a 'non-tribal person and hence, all mining leases to private industries in the tribal lands of Scheduled Areas are null and void. The judgement also highlighted that every Gram Sabha should prevent alienation of land in the Scheduled areas and that the mineral wealth of these areas should be exploited by tribals themselves.[102]

[100] *Ibid, Pg. 2209, 2210.*
[101] *AIR 1997 SC 3297.*
[102] Lyla Mehta, *"Displaced By Development Confronting Marginalisation and Gender Injustice"*, Sage Publication Indi Pvt. Ltd., Published in 2009, Pg. 253.

The Samatha took up the legal battle against mining in the Scheduled area on a constitutional point, there were many larger issues at stake. These included the far-reaching socio- economic and cultural impacts of the mining industries on adivasi women and men, and the overarching 'development' agenda being forced upon the adivasis, often experienced by them as an enterprise that treats them as its debris rather than its beneficiaries.[103]

Adivasi displacement due to mining activities in Andhra Pradesh and the neighboring state, it has been demonstrate how mining activities have put negative impacts upon the women's livelihood, security employment opportunities and rights. Analysis made an outline that, a special focus on these women to give with legal protection. The judgement of the present case is powerful piece of legislation that upholds the rights of the adivasi women and men, and is aimed at preventing misrepresentation of the Constitution for future unlawful land appropriations.

"The Samatha case was solely fought on constitutional and legal grounds and not on wider issues concerning environmental and development policies. The key issue on which the case was fought was that the transfer of lands in a Scheduled area to a private mining industry was a violation of the Fifth Schedule and the Land Transfer Regulation Act, 1959, and that an industry is also considered a juristic 'person' and not a tribal."[104]

The majority judgment ruled that-

"When two competing public purposes claim preferential policy decision, option to the State should normally be to elongate and achieve constitutional goal. Secondly the constitutional priority yields place to private purpose, though it is hedged by executive policy. As facet of interpretation, the Court too adopts purposive interpretation tool to effectuate the goals set down in the Constitution. Equally, the executive Government in its policy options requires keeping them in the backdrop and regulating disposal of their land- property in accordance with the

[103] *Ibid.*
[104] *Ibid Pg. 260.*

constitutional policy, executive decision backed by public policy and, at the same time preserve paramount Tribal interest in the Scheduled Areas".[105]

This can be further explained with the view that the founding fathers were conscious of the exploitation of the Tribals. They were anxious to preserve the tribal culture and their holdings. At the same time, they intended to provide ad create opportunities and facilities, by affirmative action, in the light of the Directive Principles in Part IV, in particular, Article 38, 39, and 46 and cognate provisions to prevent exploitation of the tribals by ensuring positively that the land is a valuable endowment and a source of economic empowerment, social status and dignity of persons.[106]

It was further contented that the rich mineral wealth being a national asset cannot be kept unexploited which is detrimental to the national development, is devoid of force. Instead of getting the minerals exploited through non-tribals, by exploitation of tribals, the minerals could be exploited through an appropriate scheme, without disturbing ecology and forest, by the tribals themselves, either individually or through Co-operative Societies composed solely of the tribes with the financial assistance of the State or its instrumentalities.[107]

Jusitce S.Saghir Ahmad who concurred with the majority opinion ruled that-

"If the government was allowed to transfer or dispose of its own land in favor of non-tribals, it would completely destroy the legal and constitutional fabric made to protect the Scheduled Tribes. The prohibition, so to say, disqualifies non-tribals as a class from acquiring or getting property on transfer".[108]

This means that the State Government cannot transfer, assign or sell to a 'person' of its choice but has to transfer, assign or sell to a member of the Scheduled tribe or a Co-operative Society of the Scheduled Tribes.

---

[105] *Samatha v. State of Andhra Pradesh, Pg. 3333, as per K. Ramaswamy J.*
[106] *Ibid. Pg 3336.*
[107] *Ibid, Pg 3342.*
[108] *Ibid, Pg 3363.*

The majority view as per Justice Pattanaik was that-

"The Constitution in our considered opinion does not in any manner suggest that alienation of Government land within the Scheduled area was intended to be prohibited in favour of a non-tribal person."[109]

Though the case is totally concerned to the State of Andhra Pradesh, it was proactively applicable to the Schedule areas in Haryana, Gujarat, Madhya Pradesh, Bihar, Orissa, Rajasthan and Maharashtra, as well, since the problem faced by tribals in scheduled areas is common to all these states. The mining entrepreneur should set aside 20% of his profits to improve the living conditions of tribals by establishing school, hospitals, and sanitation and transport facilities by laying roads etc.

"Since the mining activities are being carried out mostly within the Scheduled area, it is the duty of the State to see that a part of the profits earned by the lessees should be spent for amelioration the living conditions of the tribals by the lessees themselves. The state may also consider the question of incorporating some provision in the leases itself for achieving the aforesaid objectives."[110]

In considering the petition of a people displaced by the Rourkela Steel Plant, their claim for jobs of the adult population and for a preferential right to employment was rejected by the Supreme Court.[111] Apart from a not being able to discover the infringement of a fundamental right, the court found the process of acquisition validated by conformity to the process prescribed in the (LAA).

'Their land', the court said, 'was taken under the LAA. They were paid compensation for it. Therefore, the challenge raised on violation of Article 21 is devoid of any merit.'

[109] *Ibid, Pg. 3371.*
[110] *Ibid, Pg. 3380.*
[111] *Buta Prasad Kumbhar V. SAIL, 1995 Supp 2 SCC 225 at 229, para 6.*

The constitutional mandate that a deprivation of life (and livelihood and dignity) will have to be only by procedure established by law was believed to be fulfilled by applying the LAA.

It is possible that the court found the claims for total absorption in, and preferential right to employment, through the generations of the displaced, impossible of performance and therefore unreasonable, apart from striking it as excessive. The indignation of the court testifies to definite judicial attitudes.

'The government has paid market value for the land acquired', it said, *'even if the government or the steel plant would not have offered any employment to any person it would not have resulted in violation of any fundamental right.'*

The irate court went so far as to say that 'Acceptance of such a demand would be against Article 14', implying that displacement does not constitute a rational basis for positive discrimination. The distance between the perception of injustice of the displaced population, and the statutorily circumscribed understanding of the court are testimony to the importance of initiating amendments to the law. The existence of policy is no substitute.

The anomaly of an interpretation of the law of compensation which converts a protection into a disability was witnesses in the case of the tribals in Andhra Pradesh. The transfer of land in an agency area may only be from one tribal to another- a measure to ensure protection. As is often the case, the rightness of the displacement was not in challenge it was the enhancement of compensation that was sought. The high court found that the market value of the land, being the norm in determining compensation, would be affected by the incapacity of the tribal to enter into open market transactions. A tribal in an agency area may only part with his land to another tribal. The buying capacity of the tribals being, generally, limited, the compensation would have to be computed accordingly.[112] The Supreme Court

[112] *Special Tahsildar V. Kabbidi Posayya CA Nos 1341, etc, of 1992 decided on March 2, 1994 (AP High Court).*

thought it fit to dismiss it merely with a remark that this "is not a correct approach". The difference between the market value and the reinstatement value was disposed of on the understanding of solatium as making up the difference.[113]

The court has always taken into consideration the fact that India is a welfare state and all the state policy should be taken on and for the welfare of the people. The state cannot escape its liability and hence answerable to the people whenever it does or commits any wrong towards its people.

ii. Impact fall upon the internally displaced women and children caused by National Parks and Wildlife Sanctuaries

India has a large body of legislative measures relating to environmental issues. The Constitution of India, 1950, did not include any specific provision relating to environment protection or nature conservation. Presumably, the acute environmental problems being faced now in the country were not visualized by the framers of the Constitution.

Specific provisions relating to certain aspects of the environment, more specially for the protection of the forests and wildlife in the country, were incorporated in Part IV- Directive Principles of the State Policy (Article 48A) Protection and improvement and safeguarding of forests and wild life, under (Article 51-A) (g) duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life. In furtherance of these objectives, The Wild Life (Protection) Amendment Act, 2002: An Act has to provide for the protection of wild animals birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country.

Further it has made the Scheduled Tribes (Recognition of Forest Rights) Bill 2005, to recognize and vest the forest rights and occupation in forest land in forest

[113] *K Posayya V. Special Tahsildar (1995) 2 SCALE 683.*

dwelling Scheduled Tribes who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

The position of forest dwellers rights on land prior to the enactment of Recognition of Forest Rights Act, 2006 can be summed up based on decision of the court in ***Banwasi Seva Ashram v. State of U.P***.[114]

The Supreme Court of India accepted a letter written to the Court as writ petition in ***Banwasi Seva Ashram v. State of U.P.***[115] The Supreme Court had to consider issues relating to the claim to land and related rights of the Adivasis living within Dudhi and Robertsganj Tehsils in the District of Mirzapur in Uttar Pradesh. The State Government declared a part of these lands in the two Tehsils as reserved forest as provided under Section 20 of Indian Forest Act, 1927,[116] and in regard to the other areas notification under Section 4 of the Act was made and proceedings for final declaration of those areas also as reserved forests were undertaken. Adivasis and other backward people living within the forest used the forest area as their habitat. They had raised several villages within these two Tehsils and for generations had been using the forests around for collecting the requirements for their livelihood. The Tribals had converted certain lands around their villages into cultivable fields and had also been raising crops for their food. These lands too were included in the notified areas and, therefore, attempt of the Adivasis to cultivate these lands too was resisted.

---

[114] *AIR 1987 SC 374.*
[115] *Ibid.*
[116] Section 20: Notification declaring forest reserved: (1)When the following events have occurred, namely –(a) the period fixed under section 6 for preferring claims have elapsed and all claims (if any) made under that section or section 9 have been disposed of by the Forest Settlement officer; (b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and (c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894 (1 of 1894), have become vested in the Government under section 16 of that Act, the State Government shall publish a notification in the Official Gazette, specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification. (2) From the date so fixed such forest shall be deemed to be a reserved forest.

Criminal cases for encroachments as also other forest offences were registered and systematic attempt was made to obstruct them from free movement. The Government took steps for throwing them out under the U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972.

In 1983, the Court ordered to work out a formula under which claims of Adivasis or Tribals in Dudhi and Robertsganj Tehsils, to the possession of land and to regularisation of such possession may be investigated by a high powered committee with a view to reaching a final decision with regard to such claims. Finally the Supreme Court in this case laid down;

"Indisputably, forest is a much wanted national asset. On account of the depletion thereof ecology has been disturbed; climate has undergone a major change and rains have become scanty. These have long term adverse effects on national economy as also on the living process. At the same time, we cannot lose sight of the fact that for industrial growth as also for the provision of improved living facilities there is great demand in this country for energy such as electricity. In fact, for quite some time the country in general and specific parts thereof in particular, have suffered a tremendous set back in industrial activity for want of energy".[117]

In this case the court ruled in favour of development project and at the same time directed that the NTPC is to provide facilities to the land oustees who are dispossessed of their land.

In another case of ***Animal and Environment Legal Defence Fund Vs Union of India***[118] Supreme Court dealt with the Tribal Rights and privileges in the forest area. In this case Supreme Court had to resolve a dispute between two neighboring states on the rights of tribals. The Government of Madhya Pradesh allowed fishing permits to the displaced tribal people in Toltadoh reservoir within Pench National Park. The government of Maharashtra objected on environmental grounds such as

[117] *Patiala v. Ravinder KumarAIR 1987 SC 376.*
[118] *AIR 1997 SC 1071.*

potential danger of felling trees harm to crocodiles and turtles in the reservoir disturbance to water birds and migratory birds and the possibility of lighting fires and throwing garbage and polythene bags around and into the reservoir. The fact that displaced persons were not systematically rehabilitated weighed more in the balance. The Court observed while every attempt must be made to preserve the fragile ecology of the forest area and protect the Tiger Reserve the right of the tribals formally living in the area to keep body and soul together must receive proper consideration. Undoubtedly every effort should be made to ensure that the tribals when resettled are in a position to earn their livelihood.

Emphasizing stricter vigilance on the exercise of fishing rights and allied matters the Court insisted on photo identity for access of permit holders, check posts to bar transgress into other parts daily record of fish catch prohibition of tribal fishermen from lighting fires on the banks of reservoir and sanction of more monitoring facilities.

In ***Pradeep Kishan,***[119] the Supreme Court has stated that the State Government does not have any power to bar the entry of the villagers living in and around the Sanctuaries and the National Parks till their rights are not acquired and notifications under Section 26-A and 35 were issued[120]. The Court also stated that the procedure in regard to acquisition of rights in and over the land to be included in

[119] *AIR 1996 SC 2040.*

[120] 26A. (1) When-

(a) a notification has been issued under Section 18 and the period for preferring claims has elapsed, and all claims, if any, made in relation to any land in an area intended to be declared as a sanctuary, have been disposed of by the State Government; or

(b) any area comprised within any reserve forest or any part of the territorial waters, which is considered by the State Government to be of adequate ecological, faunal, floral, geomorphologies, natural or zoological significance for the purpose of protecting, propagating or developing wild life or its environment, is to be included in a sanctuary, the State Government shall issue a notification specifying the limits of the area which shall be comprised within the sanctuary and declare that the said area shall be a sanctuary on and from such date as may be specified in the notification:

(3) No alteration of the boundaries of a sanctuary shall be made except on a resolution passed by the Legislature of the State."

We may next notice the relevant part of Section 35(1) which reads thus:

"35(1) Whenever it appears to the State Government that an area, whether within a sanctuary or not, is by reason of its ecological, faunal, floral, geomorphologies, or zoological association or importance, needed to be constituted as a National Park for the purpose of protecting, propagating, or developing wildlife therein or its environment, it may, by notification, declare its intention to constitute such area as a National Park.

a Sanctuary or National Park has to be followed before a final notification under Section 26-A or Section 35. It held, "On a plain reading of these provisions, it is, therefore, obvious that the procedure in regard to acquisition of rights in and over the land to be included in a Sanctuary or National Park has to be followed before a final notification under Section 26-A or Section 35(1) is issued by the State Government. In the instant case, it is not the contention of the petitioner that the procedure for the acquisition of rights in or over the land of those living in the vicinity of the areas proposed to be declared as Sanctuaries and National Parks under Section 26-A and 35 of the Act has been undertaken. It was for this reason that the order of 28.3.1995 in terms stated that since no final notification was issued under the said provisions, the State Government was not in a position to bar the entry of villagers living in and around the Sanctuaries and the National Parks so long as their rights were not acquired and final notifications under the aforesaid provisions were issued.[121]

The court called for urgent steps and keeping in mind the decision of ***Pradeep Krishen,***[122] stressed on more continuous and vigilant measures and observed;

"While every attempt must be made to preserve the fragile ecology of the forest area, and protect the Tiger Reserve, the rights of the tribals formally living in the area to keep body and soul together must also receive proper consideration. Undoubtedly, every effort should be made to ensure that the tribals when resettled are in a position to earn their livelihood. In the present case it would have been far more desirable, had the tribals been provided with other suitable fishing areas outside the National Park or had been provided land for cultivation".[123]

[121] Website- http://www.wti.org.in/Wildlife_Law_Book/page-74.html, visited on 27.12.14.
[122] *AIR 1996 SC 2040.*
[123] *Supra note 118, at Pg. 1073.*

iii. Impact upon the internally displaced women and children caused by Urbanization

Urban growth across the world is phenomenal, and India is no exception. About one fourth of its population is already in urban areas and thousands of people are pouring in from rural areas every day. Unable to cope with this influx, almost every Indian town and city is well on its way to becoming an urban nightmare. In town and country planning involving land development of the cities which are sought to be achieved through the process of land use, zoning plan and regulating building activities must receive due attention to all concerned. There are two competing interests viz., the interest of the state vis-à-vis the general public and to have better living conditions and the right of property of individual which, although is not a fundamental right, but is a constitutional and human right.

At times the question arises as to whether acquisition of land which was made for one purpose was utilized for construction of residential houses. Whether such kind of acquisition was proper or not? The Apex Court, noticing such issue in ***Gulam Mustafa v. State of Maharashtra***,[124] held that the excess land out of the land, which was acquired for a country fair was utilized for carving out plots for the housing colony, did not invalidate the acquisition the Court observed;

"Apart from the fact that a housing colony is a public necessity, once the original acquisition is valid and title has been vested in the municipality, how it uses the excess land is no concern of the original owner and cannot be the bais for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose, other than the one stated".[125]

The question which survives for consideration is whether in view of public purpose declared in the notification under Section 4 of the Land Acquisition Act, the land can be utilized for any other public purpose. In ***Union of India v. Jaswant Rai***

[124] *(1976) 1 SCC 800.*
[125] *Ibid, at Pg. 802.*

Kochar,[126] land which had been acquired for public purpose of housing scheme were sought to be utilized for a commercial purpose, namely, for locating a district center. It was contended before the Court that since the acquisition was for a housing scheme, the land cannot be used for commercial purposes. The submission was rejected on the following words;

"We find no force in the contention. It is conceded that the construction of the District Centre for commercial purpose itself is a public purpose. No doubt it was sought to be contended in the High Court that in a housing scheme, providing facilities for commercial purpose is also one of the composite purposes and that, therefore, acquisition was valid in law… When the notification has mentioned that the land is sought to be acquired for housing scheme but it is sought to be used for District Centre, the public purpose does not cease to be public purpose and the nomenclature mentioned in the notification under Section 4(1) as housing scheme cannot be construed to be a colorable one. It is obvious that the land acquired for a public purpose should serve only the public purpose of providing facilities of commercial purpose, namely, District Centre as conceded by the learned counsel in fairness to be a public purpose".[127]

In this regard the judiciary also feels that the court cannot be oblivious to the fact that the owners who are subject to the embargos placed under the Statute are deprived of their valuable rightful use of the property for a long time. Although ordinarily when a public authority is asked to perform statutory duties within the time stipulated it is directory in nature but when it involves valuable right of the citizens and provides for the consequences therefore it would be construed to be mandatory in nature.

In another case of ***Mangal Oram & Ors v. State Of Orissa & Anr***[128] appeal to the Court, the appellants contended that the State Government was not competent to acquire the land in question under the Act for the establishment of a steel plant as it cannot be said to be for the purpose of the development of industry; (b) the

[126] *(1996) 3 SCC 491.*
[127] *Ibid, at Pg. 492.*
[128] *1977 SCR (2) 666, 1977 AIR 1456.*

acquired land could only be used for the steel plant and ancillary industries and not for a civil township. A large number of people were displaced due to this construction.

The Court held that, Development .of Industry, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons (Land Acquisition) Act 1948, the establishment of steel plant and ancillary industries at Rourkela answers to the definition of development of industries as given in the (Land Acquisition) Act, 1948 (Act XVIII of 1948. There is no principle of law by which a valid, compulsory acquisition stands void because long later the requiring authority diverts it to a public purpose.

Considering the above criteria, in ***T. Vijaylakshmi v. Town Planning Member***[129], the Court has held;

"Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provisions, the same cannot be taken away. Town planning legislation is regulatory in nature. The right to property of a person would include a right to construct a building. Such a right, however, can be restricted by reason of legislation. The rights of the parties cannot be intermeddled with, so long as an appropriate amendment in the legislation is not brought into force".[130]

In considering the two competing interests viz. one, the interest of the State vis a vis the general public and, two, to have better living conditions and the right of property of an individual which though not a fundamental right but is a constitutional and human right the court in ***Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke And Chemical Ltd,***[131] analysed this concept. In this case, the respondents obtained permission for development from the competent authority for diversion of land use as far back as on 12.01.1989. They had applied for and were

[129] (2006) 8 SCC 502.
[130] *Ibid, Pg 506.*
[131] *(2007) 8 SCC 705.*

granted sanction of building plan by the Gram Panchayats in the year 1991. No step was taken by the statutory authorities or the appellant Authority to notify a draft development plan. It was not notified till 2003. No further step was taken pursuant thereto or in furtherance thereof. The respondents filed an application before the Director for grant of permission on 02.12.2004 which was erroneously rejected by reason of an order dated 14.12.2004 purported to be for reason that the land in question had been included in the proposed development scheme in question of Indore Development Authority. The Court observed;

"Where, a scheme, comes into force, although it may cause hardship to the individual owners as they may be prevented from making the most profitable use of their rights over property, having regard to the drastic consequences envisaged thereunder, the statute should be considered in such a manner, as a result whereof, greater hardship is not caused to the citizens than actually contemplated thereby, whereas an attempt should be made to prevent unplanned and haphazard development but the same would not mean that the Court would close its eyes to the blatant illegalities committed by the state and/ or the statutory authorities in implementation thereof".[132]

The Court further held;

"Human rights were restricted to the claim of individual's right to health, right to livelihood, right to shelter and employment, etc, but now human rights have started gaining a multifaceted approach. Now property rights are also incorporated within the definition of human rights. Right to property, while ceasing to be a fundamental right would, however, be given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with law".[133]

In one another case of ***Collector Of 24 Parganas And Ors vs Lalit Mohan Mullick & Ors***[134]**,** held that, the original object of acquisition proceedings is generally termed as 'resettlement of refugees' which would mean their rehabilitation.

[132] *Ibid, Pg. 729, 730.*
[133] *Ibid, Pg. 731.*
[134] *1986 AIR 622, 1986 SCR (1) 271.*

It would be for the authorities concerned to think of providing various amenities for the displaced persons in the process of rehabilitation. In this case, after the declaration notification, the authorities concerned thought of a hospital. They may think of providing educational institutions, shopping centres and the like. All these amenities can be conveniently included in the public purpose generally called 'settlement of refugees'.

Putting up of a hospital and in particular one for crippled children is one of the important facets of the concept of 'rehabilitation of displaced persons'. Displaced persons are an unenviable section of society. They bring with them not only misery and poverty but ailments also. Their children will be afflicted by manifold ailments. To provide a hospital for the disabled and for the crippled children of such displaced persons, in our Judgment, squarely comes within the concept of the idea of 'rehabilitation' and consequently of settlement of the refugees.

The Court does not deny the fact there is need for urbanization with the increasing population. However this does not give the state the authority to act on its own whims and caprice. It is to be guided by certain defined set of rules and procedure else it would be hampering the process of development.

iv. Impact fall upon the internally displaced women and children caused by Dams

Dams play a vital role in providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back. The Narmada Bachao Andolan (NBA), a Non-Governmental Organisation which has been in the forefront of agitation against the construction of the ***Sardar Sarovar Dam***[135] filed a writ petition before this Court raising several issues including relief and rehabilitation, the court held;

[135] *Narmada Bachao Andolan v. Union of India, AIR 2000 SC 3751.*

"The Allegation that the Sardar Sarovar Project was not in national or public interest is not correct seeing to the need of the water for burgeoning population which is most critical and important. The population of India, which is now one billion, is expected to reach a figure between 1.5 billion and 1.8 billion in the year 2050, would necessitate the need of 2788 billion cubic meter of water annually in India to be above water stress zone and 1650 billion cubic meter to avoid being water scarce country. The main source of water in India is rainfall which occurs in about 4 months in a year and the temporal contribution of rainfall is so uneven that the annual averages have very little significance for all practical purposes. One-third of the country is always under threat of drought not necessarily due to deficient rainfall but many times due to its uneven occurrence. To feed the increasing population more food grain is required and effort has to be made to provide safe drinking water, which, at present is a distant reality for most of the population especially in the rural areas. Keeping in view the need to augment water it is necessary that water storage capacities have to be increased adequately in order to ward off difficulties in the event of monsoon failure as well as to meet the demand during dry season. On full development, the Narmada has potential of irrigating over million hectares of land and generating 3000mw of power."[136]

The multipurpose project by way of construction of a dam over the river Narmada began its journey in 1961. Starting in late 1960's the Sardar Sarovar Project (SSP) was the central problem between the states of Gujarat, Madhya Pradesh, and Maharashtra over the, 'use, distribution, and control of the waters." The Supreme Court of India created the Narmada Water Disputes Tribunal (NWDT) to settle conflicting claims of the states over sharing the river water, cost of rehabilitating displaced people, and the height of the dam. The SSP is now operated as a, 'multipurpose, interstate,' project being implemented by the governments of Gujarat, Maharashtra, and Rajasthan.

The court in majority ruled; *"when such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in the garb*

[136] *Ibid, Pg. 3786.*

of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project."[137]

The court further laid down;

"In matters of policy the Court will not interfere. Where there is a valid law requiring the Government to act in a particular manner the court ought not to without striking down the law, give any direction which is not in accordance with law. In other words, the court itself is not above the law. In respect of public projects and policies which are initiated by the government the courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large and not merely of a small section of the society has to be the concern of a responsible Government. If a considered policy decision had been taken, which is not in conflict with any law or is not mala-fide, it will not be in Public interest to require the Court to go into and investigate those areas which areas are the function of the executive."[138]

The Court while considering the pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues laid down;

"The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress."

[137] *Ibid, Pg. 7282, (Justice B.N.Kirpal for himself and on behalf of Dr. A.S.Anand, CJI).*
[138] *Ibid. Pg. 3827.*

In State of Kerala & Anr. v. Peoples Union for Civil Liberties,[139] the Court held as under:

"Article 21 deals with right to life and liberty. Would it bring within its umbrage a right of tribals to be rehabilitated in their own habitat is the question? Furthermore, a distinction must be borne between a right of rehabilitation required to be provided when the land of the members of the Scheduled Tribes are acquired vis-vis a prohibition imposed upon the State from doing so at all."

Thus, from the above referred judgments, it is evident that acquisition of land does not violate any constitutional/fundamental right of the displaced persons. However, they are entitled to resettlement and rehabilitation as per the policy framed for the oustees of the concerned project.

In one another case in ***Gramin Sewa Sanstha v. State of M.P. & Ors.,***[140] this Court held that, *"though land has been earmarked by the State Government for resettlement of the displaced tribals, such land is not available because it is already occupied by other persons who themselves will be uprooted if such land is acquired and made available for the tribals displaced on account of the Hasdeo Bango Dam Project. If this is true, the remedy might be worse than the disease because in order to re-settle one set of displaced persons the State Government would be displacing another set of persons. We would, therefore direct the State Government to consider in the meanwhile as to whether the cultivable land at any other place or places can be made available for the tribals who are displaced on account of the present project."*

The Court said so far a number of such river valley projects have been undertaken in all parts of India. The petitioners have not been able to point out a single instance where the construction of a Dam, on the whole, has an adverse environmental impact.

[139] *(2009) 8 SCC 46.*
[140] 1986 Supp SCC 578.

In ***N.D.Jayal v. Union of India***,[141] the petitioner brought about a second round of legal action connected to the safety and environmental aspects of the Tehri Dam before the Supreme Court. The observation of Dharmadhikari, J, though dissenting is more favorable for the present purpose:

"When natural resources are exploited in a big way for big projects by State with all sincerity and good intentions for general common benefit, social conflicts arise as a natural adverse consequence. Generally the conflicts arise between marginal farmers, peasants and other landless persons who survive on natural resources and those who are better off, rich or affluent and who desire to undertake agriculture and industry. When river projects for dams are undertaken to generate electricity and improve irrigation facilities, conflicts arise between people living up-stream who has to necessarily lose their source of living and habitat and those living down- stream that need water and electricity for their homes, industries and agricultural fields. When such social conflicts between different social groups i.e. up-stream population and down-stream population, between rural population and urban population, between poor surviving on natural resources and others needing natural resources for further development arise what should be the duty and priorities of the State and its authorities who have undertaken the projects? When such social conflicts arise between poor and more needy on one side and rich or affluent or less needy on the other, prior attention has to be paid to the former group which is both financially and politically weak. Such less advantaged group is expected to be given prior attention by Welfare State like ours which is committed and obliged by the Constitution, particularly by its provisions contained in the Preamble, Fundamental rights, Fundamental duties and Directive Principles, to take care of such deprived sections of people who are likely to lose their home and source of livelihood."[142]

The Honorable Judge went on to observe that the large dam projects are, therefore, required to be taken care by the Government with utmost concern of the poor and the deprived sections of the society who are necessarily to be displaced

[141] *(2004) 9 SCC 362.*
[142] *Ibid, Pg. 418.*

from their habitat and shifted to a totally new environment and way of life. The poor and the marginalized group in carrying out of a dam project suffer most because the natural resources-base of their survival are eroded and cash compensation of land at a different location many times does not fully rehabilitate them. The dams are built by public funds with the aim to satisfy the energy and water needs but what benefit ultimately it would give to the displaced people should also be taken care of. The conflicts over natural resources which frequently come to Courts are therefore conflicts over rights between haves and haves not.[143]

Another set of controversy arose with respect to the Sardar Sarovar Project in the year 2005.[144] In this second round of writ petition the petitioner alleged that the directions of the Court were not implemented *in-toto*. The case made an attempt to discuss the relief and rehabilitation aspect of the oustees. The Court expressly provided thus;

"Rehabilitation of the oustees is a logical corollary of Article 21. The oustees should be in a better position to lead a decent life and earn livelihood in the rehabilitated locations."[145]

In third series of Narmada case[146] the petitioner, an organization, working for the legal rights of the oustees family affected by the large dam in the Narmada Valley, filed this public interest litigation for direction for rehabilitation and resettlement of the oustees' families of the Omkareshwar Project in the State of Madhya Pradesh. The Court in this case held;

"The Omkareshwar Multi- purpose was to be constructed out of the resources of the State Government as well as the resources of the Central Government and the Narmada Hydro-Electric Development Corporation is an agency of the Central Government and the State Government. Hence, both the State Government and the Central Government were under a constitutional obligation under Article 21 of the Constitution to work out a Resettlement and Rehabilitation

[143] *Ibid, Pg. 410.*
[144] *Narmada Bachao Andolan v. Union of India, AIR 2005 SC 2994.*
[145] *Ibid, Pg. 3010.*
[146] *Narmada Bachao Andolan v. Union of India & Ors., (2005) 4 SCC 32.*

Policy for rehabilitation and resettlement of the displaced persons of the Omkareshwar Multipurpose Project which would ensure that the persons displaced by the Project were better off after their displacement and were not deprived of their very livelihood by the project."[147]

It is very evident to explain the position of the women and children during the dam displacement. In the Sardar Sarovar area, terrible atrocities have been committed against women. They have been the victims of state-sponsored rape and abuse, and a few have also committed suicide due to the social pressure involved. The National Commission for Women has openly questioned the role of the State and the police in suppressing women's participation in the movement of Narmada Bacho Andolan. Answer to the question of the National Commission the state asserted that since the women have just begun to step out for the first time from their homes into the public domain, the need to be treated with dignity and their concerns must be addressed. But after a long process of this treatment by the state there was still commission of all kinds of atrocities were going on to move back these women to their own houses.[148]

A key question in every resettlement policy is that of land. In every struggle, I have analysed that the women at the forefront are always demanding 'land for land', a clear stipulation of the Narmada Award and other resettlement policies. But in the Sardar Sarovar Project, which boasts of having the most progressive R and R policies, only about 4000-5000 people have been awarded land, largely in Gujarat and Maharashtra. But as many as 50,000 people in Madhya Pradesh have not yet got land and in Maharashtra, more than half have not got land. But after a thorough discussion, men can easily be lured into accepting cash compensation, especially in times of drought and need. But cash can easily be spent and cannot sustain a family like a land can.[149]

[147] *Ibid, Pg. 157.*
[148] Lyla Mehta, *"Displaced By Development Confronting Marginalisation and Gender Injustice"*, Sage Publication Indi Pvt. Ltd., Published in 2009, Pg. 287-288.
[149] *Ibid, Pg. 289-290.*

After a long process of river valley projects which have been in all parts of India, the petitioners have not been able to prove where the construction of Dam has, on the whole, had an adverse impact. On the contrary the environment has improved. Being so, there is no reason to suspect, with all the experience gained so far, that position here will be different. Dams have also been at the center of controversy there. The only reason for this hue and cry is the fact that they tend to bring out displacement and the incompetency on the part of the government to carry out in organized manner the required relief and rehabilitation of the displaced family. The judiciary too seems to be divided in establishing the actual role being played on construction of such dams.

F. Judicial Interpretation Of Land Acquisition Act, 1894

No statute in colonial India or independent India has been used against the interests of the poor in such a systematic and widespread manner, causing misery, as the Land Acquisition Act, 1894. From independence up to 1995, millions of persons were displaced from land due to a variety of reasons including forcible displacement for public projects. Acquisition of lsnd, which is compulsory in nature, the owner may be deprived of land, the means of his livelihood, but the state's exercise of the power is for the public purpose, the individual's right as the owner of the land must yield place to a larger public purpose and a plea of deprivation of right to livelihood under article 21 of the Constitution in such cases is unsustainable. Whenever, issues relating to Land Acquisition arise it evolves around two concepts, one of 'eminent domain' and the other is 'public purpose'. The two concepts have dealt with in the previous chapter and it is found that they can be judged in the light and circumstances of different cases.

In ***State of Bombay v. R.S.Nanji***,[150] the Supreme Court held that, it is impossible precisely to define the expression 'public purpose'. In each case, all the facts and circumstances will need to be closely examined in order to determine

[150] *AIR 1956 SC 294.*

whether a public purpose has been established. The Court in the instant case held that,

"Prima facie, the government is the best judge as to whether public purpose is served by issuing a requisition order, but it is not the sole judge. The courts have the jurisdiction, and it is their duty to determine the matter whenever a question is raised as to whether a requisition order is or is not for a public purpose."

In the said case, the Supreme Court further observed that the phrase 'public purpose' includes a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. It is impossible to define precisely the expression 'public purpose'. In each case, all the facts and circumstances will need to be closely examined to determine whether a public purpose has been established.

The Supreme Court, in ***Somawanti v. State of Punjab***,[151] held, whether or not, in a particular case, the purpose for which land was needed was a public purpose was for the government to be satisfied about, and the declaration of the government would be final, subject to one exception-namely that, where there was a colourable exercise of power, the declarations would be open to challenge at the instance of the aggrieved party.

The Constitution Bench of the Supreme Court, in ***Satya Narain Singh v. District Engineer, PWD***,[152] observed;

"it is undoubtedly not easy to define what is 'public service' and each activity has to be considered by itself for deciding whether it is to be regarded as public services, as for instance, those undertaken in the exercise of the sovereign power of the state or of governmental functions. About these there can be no doubt. Similarly, a pure business undertaking though run by the government cannot be classified as public service. But where a particular activity concerns a public utility, a question may arise whether it falls in the first or second category. The mere fact

[151] *AIR 1963 SC 774.*
[152] *AIR 1962 SC 1161.*

that the activity may be useful to the public would not necessarily render it a public service. An activity, however beneficial to the people and however useful cannot, in our opinion, be reasonable regarded as public service if it is of a type which may be carried out by government with a distinct profit motive. It may be that plying stage carriage buses even though for hire is an activity undertaken by the government for ensuring the people a cheap, regular and reliable mode of transport and is in that sense beneficial to the public."

In ***Somavanti v. State of Punjab,***[153] the Supreme Court observed that public purpose must include an object in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. Public purpose is bound to change with times and the prevailing conditions in a given area and therefore, it would not be a practical proposition even to attempt an extensive definition of it. It is because of this that the legislature has left it to the government to say what a public purpose is and also to declare the need of a given land for a public purpose. The constitution bench of the Court observed thus;

"whether in a particular case the purpose for which land was needed was a public purpose or not was for the government to be satisfied about and the declaration of the government would be final subject to one exception, namely, that where there was a colourable exercise of the power, the declaration would be open to challenge at the instance of the aggrieved party."

It is because of this the legislature has left it to the government to say what public purpose is and also to declare the need of a given land for a public purpose.

In ***Arnold Rodricks v. State of Maharashtra***[154] while justice Wanchoo amd Justice Shah dissenting from judgement, observed that there can be no doubt that the phrase 'public purpose' has not a static connotation, which is fixed for all times. There can be no doubt that it is not possible to lay down a definition of what public purpose is, particularly as the concept of public purpose may change from time to

[153] *AIR 1963 SC 151.*
[154] *AIR 1966 SC 1788.*

time. There is no doubt, however the public purpose involves in it an element of general interst of the community and whatever furthers the general interest, must be regarded as a public purpose.

Broadly speaking, the expression 'public purpose' would, however, include a purpose in which the general interest of the community as opposed to the particular interest of the individuals is directly and virtually concerned.

A seven Judge Bench of the Supreme Court, in ***State of Karnataka v. Raganatha Reddy***,[155] explained the expression 'public purpose' in the following words;

'it is indisputable and beyond the pole of any controversy now as held by this Court in several decisions including the decision in the case of ***Keshavananda Bharti v. State of Kerala****,[156] popularly known as fundamental right case, that any law providing for acquisition of property must be for a public purpose. Whether the law of acquisition is for public purpose or not is a justifiable issue. But the decision in regard is not to be given by any detailed inquiry or investigation of facts. The intention of the legislature has to be gathered mainly from the statement of objects and reasons of the Act and its Preamble. The matter has to be examined with reference to the various provisions of the Act, it context and setup, the purpose of acquisition has to be culled out there from and then it has to be judged whether the acquisition is for a public purpose within the meaning of Article 31(2) and the law providing for such acquisition.…*"[157]

Though not directly in point, the observations of the Supreme Court in ***State of Maharashtra v. Mahadeo Deoman Rai,***[158] are significant to determine the approach of courts in such matters. In this case a notification under Section 4 of the Land Acquisition Act was issued for the purpose of establishing a 'Tonga' stand. The respondent applied for permission to raise a construction which was denied on

[155] *(1977) 4 SCC 471.*
[156] *(1973) 4 SCC 225.*
[157] *State of Karnataka v. Raganatha Reddy, Pg. 503-504.*
[158] *(1990) 3 SCC 579.*

the ground that the land was reserved for road widening under a town planning scheme which was being implement. Since, the respondent was prevented from continuing with construction work undertaken by him, he initially filed a writ petition before the High Court which was withdrawn and subsequently filed a suit claiming damages, etc. the Municipal Council took a decision to accord permission to the respondent as asked for, and the suit was withdrawn. When the State Government came to know about it, it asked the Municipal Council to explain the circumstances under which such permission had been granted. A resolution of the Municipal Council granting permission to the respondent was rescinded. Another application filed by the respondent was kept in abeyance which compelled the respondent to file another writ petition which was allowed by the High Court. The plea of the Municipal Council was that it had passed a fresh resolution inter-alia, deciding to re-plan the scheme with respect to the area in question in the light of the recommendations made by the Committee. Consequently, the matter was reopened and the objections from the affected persons were invited. Even the respondent filed his objections. The Court set aside the judgment and order of the High Court and observed;

"Besides the question as to whether a particular scheme framed in exercise of statutory provisions in the public interest or not has to determined according to the need of the time and a final decision for all purpose has to be taken at a given point of time but due to change of circumstances it may become essential to modify or substitute it by another scheme. The requirements of the community do not remain static; they indeed go on varying with the evolving process of social life. Accordingly, there must be creative response from the public authority, and the public scheme must be varied to meet the changing needs of the public."[159]

Similarly in ***Chameli Singh and Others v. State of U.P***.[160] and Others, land to the extent of 5 bighas, 6 bighas ad 14 bighas in village Bauan Nagar, Pargana Nahtuar, Tahsil Dhampur, District Bijnore, were notified for acquisition for providing houses to Scheduled Castes and the acquisition was challenged inter-alia,

[159] *Ibid, Pg. 583.*
[160] *AIR 1996 SC 1051.*

on the ground that it is violative of the right to livelihood under Article 421 of the Constitution of the owner of the land, but the Supreme Court repelled the challenge holding;

"the state exercises its power of eminent domain and for public purpose and acquires the land and so long as the exercise of power is for public purpose, the individual's right as an owner must yield place to the larger public purpose."[161]

Public purpose will include a purpose in which the general interest of community as opposed to the interest of an individual is directly or indirectly involved. Individual interest must give way to public interest as far as public purpose in respect of acquisition of land in concerned.

In ***Scindia Employees Union v. State of Maharashtra,***[162] the Supreme Court observed as under;

"The very object of compulsory acquisition is in excess of the power of eminent domain by the State against the wishes or willingness of the owner or person interested in the land. Therefore, so long as the public purpose subsists, the exercise of the power of eminent domain cannot be questioned. Publication of declaration under section 6 is inclusive evidence of public purpose. In view of the finding that it is a question of expansion of dockyard for defense purpose it is a public purpose."[163]

The right of eminent domain is the right of the State to reassert either temporary or permanently its domain over any piece of land on account of public exigency and for public good. Similarly, in ***Laxmanrao Bapurao Jadhav v. State of Maharashtra,***[164] the Apex court observed;

"It is for the State Government to decide whether the land is needed or likely to be needed for a public purpose and whether it is suitable or adaptable for the purpose for which the acquisition was sought to be made. The mere fact that the

[161] *Ibid.*
[162] *(1996) 3 SCC 493.*
[163] *Ibid, Pg. 152.*
[164] *(1997) 3 SCC 493.*

authorized officer was empowered to inspect and find out whether the land would be adaptable for the public purpose, it is needed or is likely to be needed, does not take away the power of the Government to take a decision ultimately."[165]

In ***Balco Employees union (Regd.) v. Union of India & Others,***[166] the Supreme Court has held;

"it is neither within the domain of the courts nor within the scope of judicial review to embark upon an enquiry whether a particular public policy is wise, or whether a better public policy can be evoked and the courts would not be inclined to strike down a policy at the behest of the petitioner, merely because it has been urged that another policy would have been fairer or wiser or ore scientific or more logical."

In yet another case of ***Daulat Singh Surana and others v. First Land Acquisition Collector and Others***[167]**,** the Supreme Court observed;

"In the Constitution of India, some guidelines can be traced as far as public purpose is concerned, in Article 37. According to Article 39 of the Constitution, the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. The laws made for the purpose of securing the constitutional intention and spirits have to be for public purpose. The provisions contained in this Part (Directive Principles of State Policy) shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country, it shall be the duty of the state to apply these Principles in making law."[168]

In the instant case, the Court further observed that Public purpose is not static. It also changes with the passage of time, needs and requirements of the community. Public purpose is bound to vary with times and prevailing conditions in

[165] *Ibid, Pg 495.*
[166] *AIR 2002 SC 350.*
[167] *(2007) 1 SCC 641.*
[168] *Ibid, Pg. 656.*

the community or locality and, therefore the legislature has left it to the state government to decide what public purpose is and also to declare the need of a given land for the purpose. The legislature has left the discretion on the government regarding public purpose. The government has the sole and absolute discretion in the matter.[169]

Again in ***Bhagat Singh v. State of U.P.,***[170] the Supreme Court upheld an acquisition even when the public purpose to which the land was put was contrary to the permitted user under the master plan. The court held that the acquisition was valid but it was for the beneficiary of acquisition to move the competent authority and obtain the sanction of the said authority for change of user. That it could do only after it got possession of the land on question.

The conclusion made by the researcher by observing that Land Acquisition is a bag of mixed feeling. Nothing is certain as to what constitute public purpose. The power of compulsory acquisition as described by the term 'eminent domain' can be exercised only in the interest and for the people. The concept of public purpose should include matter as such as, safety, security, health, welfare and prosperity of the community or public at large.

G. A Sum-Up

The foregoing study may be summerised in the following manner.

1. The provisions of the major international human rights instruments are reflected in our constitution which establishes the desire of the members of the Constituent Assembly towards the respect for the philosophy of human rights. The provisions of UDHR and ICCPR are reflected in Part III of our Constitution as fundamental rights whereas provisions of ICESCR are reflected in Part IV of the Indian Constitution as Directive Principles of State Policy (not enforceable).

[169] *Ibid, at Pg. 662.*
[170] *(1999) 2 SCC 384.*

2. Part IV of the Indian Constitution titled 'the States', Article 152 defines 'States'. For the interpretation of the constitution, by operation of Article 367, unless the context otherwise requires or modifies, the General Clauses Act shall apply. Section 3(23) of the General Clauses Act thereof defines 'Government' to include both Central Government and State Government. Section 3(8) (b) of the General Clauses Act 1897 defines 'Central Government' and Section 3 (60) of the General Clauses Act, 1897 defines "State Government', which reads, "State Government, as regard anything done or to be done, shall mean the Governor." The Governor of each State is its executive head and the Executive power of the State shall be exercised by the Governor either directly or through officers subordinate to him in accordance with the Constitution as envisaged under Article 154.
3. Under Article 163(1) of the Constitution the Governor has been given discretion only in relation to his function under the Constitution, he is required to exercise in his discretion. The grant of sanction under 197 of Cr. P.C is statutory function of the State Government and cannot be said to be discretionary function of the Governor under the constitution. This is not a matter in respect to which the Governor is required under the Constitution to act in his discretion and he has to act on the advice of the Council of Ministers.
4. No law actually exists for the protection of the rights of IDPs in fact no executive decision has been taken to protect the rights of IDPs. The government has failed to provide them relief and rehabilitation. This response of the government is evident from the situation prevailing in the north region of India or in the northeastern region of India. Millions of people have and are still being displaced. The reasons for displacement may be diverse but the consequences of it are one, i.e. displacement and loss of livelihood. The States have failed in their front of looking after the affected person's and the displaced populations are made to spend their live in camps which are lacking in basic facilities.
5. The internally displaced women and children are basically under the care and protection of the State authorities are totally dependent upon the authorities

in providing relief and resettlement which is one of the basic obligation of the State after the displacement has taken place. The State needs to have a humanitarian approach towards them simultaneously providing them with access to food and potable water, basic shelter and housing, appropriate clothing and essential medical facilities.

6. The State authorities have to involve itself with Non-Governmental Organisations to initiate the task of collecting information of internally displaced women and children. The reason for this is that the Indian Government does not have any figure for the population which makes the job providing them with rehabilitation and resettlement more cumbersome. The involvement with NGOs is more necessary to the study the situation of internal displacement in the area concerned as making the return of the affected persons possible.
7. The role of higher judiciary and National Human Rights Commission (NHRC) plays a vital role in implementing and protecting the human rights of the internally displaced women and children in India. The essence of judicial review is within a constitutional basic structure doctrine. The role of higher judiciary under the constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and rights of Indians. The courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by the Supreme Court that in matter of policy the court will not interfere.
8. It can be said that any challenge to government policy must be before the execution of the project is undertaken. Any delay in the execution of the project means overrun in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of latches if the petitioner had the knowledge of such a decision and could have approached the court at that time. Just because a petition is termed as PIL does not mean that ordinary principles applicable to litigation will not apply.

9. There are three stages with regard to the undertaking of infrastructural projects. One is conception or planning, second is decision to undertake the project and the third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision while there is always a need for such projects not being unduly delayed, it is at the same time expected that a thorough study as is possible will be undertaken before a decision is taken to start a project. Once such a considered decision is undertaken, the proper execution of the same should be taken expeditiously. It is for the government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary.
10. In respect of public projects and policies which are initiated by the government the courts should not become an approval authority. Normally, such decisions are taken by the government after due care and consideration. If a considered policy decision has been taken, which is not in conflict with any law or is not mala-fide, it will not be in public interest to require the court to go into and investigate those areas which are the functions of the executive. For any project which is approved after due deliberation, the court should refrain from being asked to review the decision just because an opposite view against the undertaking of the project, which view may have been considered by the government is possible.
11. The courts also feel that putting mere allegations of failures and lapses on the part of the government in providing relief measures to the displaced victims is not a ground for substitution of the government machinery. At times, the government is unprepared for disasters but this does not mean that we attribute failure to the government machinery. In work of such nature of providing relief and rehabilitation, administrative lapses are likely to happen, such lapses are likely to happen but such lapses require immediate attention and are worthy of rectification.
12. Public purpose cannot and should not be precisely defined and its scope and ambit be limited as far as acquisition of land for the public purpose is concerned. Broadly speaking public purpose will include a purpose in which

the general interest of community as opposed to the interest of an individual is directly or indirectly involved. Individual interest must give way to public interest as far as possible in respect of acquisition of land is concerned.

…….**********……