

REHABILITATION OF THE DISPLACED PERSONS IN INDIA

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Developmental projects in India have displaced millions of people and yet there is not a single national legislation on rehabilitation. Though the judiciary has recognised the right to be rehabilitated as a fundamental right under Article 21 of the Constitution of India, the right was not granted in reality, as has been seen in the cases of Narmada and Tehri dams. This paper aims to propose a solution to the present situation by suggesting an expansion of the international definition of the term 'refugee' by including in its scope internally displaced persons such that international pressure can be created on nation states to grant rights to refugees.

I. INTRODUCTION

Since independence, the Indian state has adopted a model of development which involves construction of large multi purpose dams.¹ Such is the faith in the merits of dams that they were said to be the temples of modern India.² To support this assertion, several benefits of multi-purpose projects are often cited, while the costs behind them are shrouded from the public eye. India now boasts of being the world's third largest dam builder.³ According to the Central Water Commission, we have 3600 dams that qualify as Big Dams, 3300 of them being built after independence. Six hundred and ninety-five more are under construction.⁴ According to a detailed study of fifty-four Large Dams done by the Indian Institute of Public Administration, the average number of people displaced by a large dam in India is 44,182.⁵ Importantly, this data relates to the big dams alone and does not reflect the displacement caused by several other development projects. When estimating the number of persons displaced by big projects since

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¹ Arundhati Roy, *Lies, Dam Lies and Statistics*, THE GUARDIAN, June 5, 1999.

² *Id.*

³ *Id.*

⁴ INDIAN WATER RESOURCES SOCIETY, FIVE DECADES OF WATER RESOURCES DEVELOPMENT IN INDIA 7 (1998).

⁵ SATYAJIT SINGH, TAMING THE WATERS: THE POLITICAL ECONOMY OF LARGE DAMS 188-90 (1991).

1947, scholar-administrator and then, Secretary of India's Planning Commission, Dr. N. C. Saxena, puts this number at 50 million.⁶

Given the above statistics, it is fair to conclude that the costs behind the construction of dams have not been sufficiently debated or else what can explain the absence of a dedicated legislation on rehabilitation? It was largely in the 1980s owing to the struggles of the displaced persons due to the Narmada and the Tehri projects that the realities of human devastation in the name of large development projects came to light. The aim of this paper is not to denounce or question the merits of such projects, but to look into the manner in which they have been executed. More importantly, the object is to analyse whether the government has followed a transparent and fair procedure to rehabilitate the displaced persons ensuring their dignity and right to life as granted under Article 21 of the Constitution. To make such an enquiry it is imperative that the law, judicial pronouncements and the ground realities are explored and the first two sections of this paper shall be devoted to the same. The third section of the paper shall suggest an alternative solution to the problem of displacement and look for a remedy in international refugee law to address the issue.

II. EXISTING LEGAL MECHANISM TO ADDRESS THE ISSUE OF DISPLACEMENT AND REHABILITATION

The Indian state has the power to compulsorily acquire private land for development projects without the consent of the owner of such land. The only prevailing law relating to involuntary displacement with an all-India coverage is the colonial Land Acquisition Act of 1894 (*hereinafter* LAA). Other such laws (without direct relevance to big dams) include the Coal Bearing Areas (Acquisition and Development) Act 1957, the Forest Act 1927 and the Army Manoeuvres and Practice Act, 1938. The most important principle underlying the LAA and related Acts is the doctrine of 'eminent domain'⁷, according to which the state enjoys ultimate power over all land within its territory. It follows that the state has the

⁶ At a meeting in New Delhi on 21st January 1999 organised by the Union Ministry of Rural Areas and Employment, for discussion on the Draft National Resettlement and Rehabilitation Policy and the Amendment to the Draft Land Acquisition Act: Arundhati Roy, *The Greater Common Good*, in *THE ALGEBRA OF INFINITE JUSTICE* 60 (2002).

⁷ The concept 'eminent domain', as we know it today, can be traced to the Latin term *Eminenes Dominium*, which referred to a government's power to appropriate private property for the public's use, with or without the property owner's consent. As found in *History of eminent domain and its abuse*, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=512 (Last visited on January 7, 2009). It is an old concept that is seen to have been practised even in biblical times, when King Ahab of Samaria offered Naboth compensation for Naboth's vineyard. As found in *Eminent Domain-History*, <http://law.jrank.org/pages/6423/Eminent-Domain-History.html> (Last visited on January 7, 2009). In India, the Supreme Court in the case of *State of Bihar v Kameshwar Singh*, AIR 1952 SC 458, defined eminent domain to be "the power of the sovereign to take property for public use without the owner's consent upon making just compensation."

right to invoke this right for the 'public good',⁸ and the consequent compulsory acquisition of land cannot be legally challenged or resisted by any person or community. In India, as we have noted, the only national law regarding displacement is the LAA, which places no legal obligation on either the project authorities or the state, beyond a limited conception of adequate 'compensation'.⁹ Displacement of people for the construction of dams and barrages under the LAA was common in the pre-Independence era in India, but the concept of rehabilitation was not heard of then. The displaced were only granted compensation under the LAA for the land acquired.¹⁰ The notion of rehabilitation gradually emerged when it was realized that compensation for land and property acquired was not enough to make good the loss of the displaced. This notion was transformed into reality through rehabilitation policies and packages in the context of projects like the Narmada Valley and the Tehri Dam.

In the mid 1980s, a draft of a rehabilitation policy which would be applicable to all future dam projects, industrial, mining and other development related projects was mooted. It went through plenty of changes for about two decades.¹¹ The draft rehabilitation policy by N.C Saxena in the 1990s did not pass through, despite its many positive aspects. The subject gradually faded into oblivion until 2003 when the draft National Rehabilitation Policy was notified by the NDA government. This policy came into effect in February 2004 as the National Policy on Rehabilitation and Resettlement for Project Affected Families. The National Advisory Council (NAC), unsatisfied with this, sent its own revised policy draft to the government. The bureaucracy then brought out a revised version of the 2003 Policy in the year 2006 which has become the National Rehabilitation and Resettlement Policy of 2007.¹²

The policy has been criticized to a great extent, and one major positive outcome of these criticisms has been the fact that the government is now considering a National Rehabilitation Act rather than another rehabilitation policy. The Ministry of Rural Development is still in the process of drafting a bill to that

⁸ The LAA under § 3 (f) defines public purpose to include provision of village sites, extension, planned development, or improvement of existing village sites; the provision of land for town or rural planning; the provision of land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned etc.

⁹ See § 6 of the Land Acquisition Act, 1894.

¹⁰ Ramaswamy R Iyer, *Towards a Just Displacement and Rehabilitation Policy*, ECONOMIC AND POLITICAL WEEKLY, July 28th 2007, 3103.

¹¹ *Id.* See also Ramaswamy R Iyer, *For an Equitable Rehabilitation Policy*, THE HINDU, October 19, 2006, available at <http://www.hinduonnet.com/2006/10/19/stories/2006101904511200.htm> (Last visited on November 2, 2008).

¹² *Id.* See also *India's Failed Rehabilitation Policy*, THE SOUTH ASIAN, December 22, 2007, available at http://www.thesouthasian.org/archives/2007/indias_failed_national_rehabilitation_1.html (Last visited on November 2, 2008).

effect.¹³ It has been 61 years since we became independent, and the absence of a national legislation rehabilitation is one of our great failures. The National Rehabilitation and Resettlement Policy which was notified on the 31st of October 2007 has been severely criticized for having the potential to cause further conflicts in land acquisitions and leading to human rights abuses. Firstly, the policy, in spite of clearly stating its main aim of minimising displacement, is silent on the procedure to be followed to enforce the same. The absence of clear instructions provides enough scope for evading responsibility by the project authorities. Since such an objective is achievable only at the project conception stage when it could lead to the change in the choice of technology and project size, the absence of such directions would defeat the objective itself.¹⁴ Secondly, the Policy while providing for land-for-land compensation declares that this is subject to the availability of government land in resettlement areas. Also, preference for employment in the project for at least one member in the nuclear family is subject to the “availability of vacancies and suitability of affected person”.¹⁵ Such qualifying words only favour the project developers so that they can evade responsibility.

Also, deleting the 2006 draft provision which specified that the emergency provisions of Section 17¹⁶ of the Land Acquisition Act, 1894, should be ‘used rarely’ and only after providing ‘full justification’ for the proposed project, is yet another benefit in disguise to the project developers who are waiting to bypass their duty to relocate the affected people. Another clause in the policy (7.18) implies that land can be acquired by the state under Section 17 of the LAA, 1894, by keeping the affected families in “transit and temporary accommodation, pending rehabilitation and resettlement scheme or plan”.¹⁷ This could lead to the project authorities ignoring the rehabilitation of the displaced and the latter not having a way of enforcing their rights. Even though the Preamble of the 2007 Policy states that it will apply to all cases of involuntary displacement, clause 6.1 proclaims that the appropriate government has the authority to declare which regions are affected depending on the number of people being displaced, such that a particular locality will not be declared affected if the number of families being displaced is below four hundred in plain areas and below two hundred in hilly areas. This implies that the Policy will not be applicable even if the number of families is just below the mark specified.¹⁸

¹³ *Supra* note 10.

¹⁴ See Shripad Dharmadhikari, *Resettlement Policy: Promising Start and a Let Down*, INDIA TOGETHER, November 12, 2007 available at <http://www.indiatogether.org/2007/nov/hrt-randropol.htm> (Last visited on November 2, 2008).

¹⁵ *Id.*

¹⁶ § 17(1) of LAA - In cases of urgency whenever the [appropriate Government], so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in § 9 (1). [Take possession of any land needed for a public purpose]. Such land shall thereupon [vest absolutely in the [Government], free from all encumbrances.

¹⁷ See *supra* note 12.

¹⁸ *Id.*

In spite of the assurance that there will be “active participation of the affected persons” in the process of resettlement and rehabilitation, the affected people are denied rights to participate in any informed decision making process as regards the usage of their lands by the project developers.¹⁹ Also the Policy does not make it mandatory to establish the achievability of the resettlement before proceeding with the project. All these loopholes have to be fixed and a fair national rehabilitation legislation has to be brought out soon if the woes of the displaced are to be mitigated, if not completely healed. Thus, it is seen that the law has failed to effectively address the issue of rehabilitation of the displaced persons and needs to be reformed to correct its present deficiencies. In this light, it becomes significant to analyse the position taken by the judiciary to gauge whether the courts could correct the discrepancy in the legal provisions to protect the rights of the people displaced owing to developmental projects.

III. RIGHTS OF THE DISPLACED - THE RESPONSE BY THE INDIAN JUDICIARY: TRACING THE RIGHT BEYOND SPECIFIC LEGISLATION

In the absence of any law on rehabilitation, it was expected that the judiciary will take a dynamic stance while interpreting Article 21 of the Constitution, and grant relief to the oustees. In any case, the judiciary has recognised that Article 21 incorporates certain unenumerated rights in the enumerated Right to Life, and has given it a broad interpretation to include right to life with dignity²⁰, and to mean more than mere survival and mere animal existence.²¹ Right to be rehabilitated is the logical corollary of the right to life with dignity. Thus, in the absence of any enumerated right to be rehabilitated, the judiciary could correct the legislative error by recognising the same as an unenumerated right under Article 21 and it did the same in Narmada. However, it is important to contextualize the decision to ascertain whether the expansion of Article 21 has solved the problem at hand, that is, providing rehabilitation to the displaced.

In *B D Sharma v. Union of India*,²² it was ruled that the overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of oustees. They should be rehabilitated as soon as they are

¹⁹ *Id.*

²⁰ *Francis Coralie v. Delhi*, AIR 1981 SC 746: Justice Bhagwati observed that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with fellow human beings.

²¹ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180: The court observed that Article 21 means something more and “the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. The ambit of “right to life” is wide and far reaching. It does not mean only that life cannot be extinguished as taken away but much more than that.

²² 1992 Supp (3) SCC 93.

uprooted. Further, the court provided a time frame by which the rehabilitation must be complete: before six months of submergence. Such a time limit fixed by the Court was reiterated in the Narmada's case. In *Narmada Bachao Andolan v. Union of India*²³ it was observed that rehabilitation is not only about providing just food, clothes or shelter. It is also about extending support to rebuild livelihood by ensuring necessary amenities of life. Rehabilitation of the oustees is hence a logical corollary of Article 21. Further, in *N.D. Jayal and Another v. Union of India*²⁴ the court held that the right to development encompasses in its definition the guarantee of fundamental human rights. Thus, the courts have recognised the rights of the oustees to be resettled and right to rehabilitation has been read into Article 21. In Narmada's case a feeble attempt has been made to define rehabilitation as providing a quality to life *beyond just food, clothes or shelter*. In the light of this construction it is essential to contextualise the law by analysing its application to the cases of Tehri and Narmada.

The Tehri and Narmada projects are both large in scale and have met with mass protests and public outcry on the issue of safety, environment and rehabilitation. Though the three factors are inter linked and crucial in providing a healthy living condition, this paper shall concentrate on the issue of rehabilitation alone while attempting to analyse the remedies provided by the judiciary to the displaced.

A. THE TEHRI PROJECT

According to the 2002 Status Report of the Public Works Department of Tehri, the dam will displace 12,547 families.²⁵ The project that was undertaken in 1979 has failed to rehabilitate the oustees till date and cases in which rehabilitation has been granted, the oustees have faced a new set of problems. The land granted is of poor quality and with multiple ownership claims. Besides, it is important to remember that the above stated figure of 12,547 is the official number which excludes certain categories of people who will lose their land but have not been identified as project affected. In *N.D. Jayal and Another v. Union of India*²⁶, a petition under Article 32 of the Constitution of India was the second round of legal action connected to the safety, environmental and rehabilitation aspects of Tehri Dam before the Court. The court rejected each of the objections of the petitioners and observed that the rehabilitation was taking place *pari passu* the implementation of the project. The court in general eulogized the benefits of a dam and concluded that since the government had constituted committees to look into the question of rehabilitation and accepted its recommendations subject to certain conditions, and since the project was being implemented in the terms thereof, the government had applied its mind to the question of rehabilitation. It further observed that the

²³ AIR 2000 SC 3751.

²⁴ (2004) 9 SCC 362.

²⁵ *Tehri Dam*, internationalrivers.org/files/TehriFactsheet2002.pdf (Last visited on November 1, 2008).

²⁶ *Supra* note 24.

petitioners have not been able to establish that the respondents are carrying on construction without complying with the conditions of clearance.

In truth however, the rehabilitation of the oustees from the Tehri project has been far from satisfactory and the creation of the new town of Tehri has posed further problems as it led to the alteration of the eco system of the area. The promise of employment for one adult of the project affected family at the time of acquiring the land has not been kept.²⁷ The stance of the court has consistently been to draw a demarcating line between the realm of policy and the permissible areas for judicial interference. The position that the court can only ascertain whether the government applied its mind to the issue of rehabilitation on the basis of the materials placed before it has been consistently reiterated in every case that has been filed challenging developmental projects. Even in Narmada's case where the construction of dam was challenged on various issues including rehabilitation, the abovementioned position was upheld.

B. THE NARMADA PROJECT

The implementation of the Narmada project has by far been the most controversial witnessing a large scale organised movement by *Narmada Bachao Andolan* (Save the Narmada Movement), a non-governmental organisation, against it. The NBA claims that the project shall displace 200,000 people apart from causing serious, irreparable environmental damage.²⁸ The movement which initially opposed the project on environmental grounds began to focus on the rehabilitation issue too when the same was not effectively carried out by the authorities. The mode of protest of the organisation has been non violent and includes campaigning, hunger strikes, mass media publicity and legal petitions.²⁹

In 1992, the World Bank which was financing the project sent an independent Commission to evaluate whether the criteria of the bank with respect to environment and rehabilitation had been met.³⁰ The Morse Committee presented a scathing report laying that the conditions of rehabilitation and environment have been dismal and the approach of the government unsatisfactory.³¹ In 1993, the Bank withdrew its support leading to the pull out of several other international financial institutions citing human and environmental concerns. The construction of Sardar Sarovar dam itself was stopped soon afterwards.³²

²⁷ Harsh Dobhal, *There was once an old Tehri town*, www.countercurrents.org/en-dobhal281206.htm (Last visited on November 2, 2008).

²⁸ *See generally*, *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751.

²⁹ Arundhati Roy, *The Cost of Living*, FRONTLINE, February 5-18, 2000.

³⁰ *See generally*, Report of Independent Review (Morse Committee) *available at* narmada.aidindia.org/content/view/52/ (Last visited on November 2, 2008).

³¹ *Id.*

³² *Id.*

In the final order and the decision of the Tribunal, the full reservoir level height of the Sardar Sarovar Dam was determined at 455 feet. It directed the State of Gujarat to take up and complete the construction of the dam. *Narmada Bachao Andolan v. Union of India*³³ was a writ petition praying that the respondents be restrained from proceeding with the construction of the dam. The court ruled that the construction of dam be continued as per Award of Tribunal and that the construction up to 90 meters height can be undertaken immediately. Any construction above 90 meters has to be taken up after necessary clearance: relief and rehabilitation to oustees to be immediately given in terms of packages offered. The primary imperative of the majority judgement by Chief Justice A.S. Anand and Justice B.N. Kirpal was that the construction of the Sardar Sarovar dam be completed as ‘expeditiously’ as possible.³⁴ The 3 Judge Bench order ruled in favour of an ‘immediate’ construction of the dam upto 90 meter as the Relief and Rehabilitation Sub-Group had cleared the construction up to 90 meters. This order was passed despite the materials presented before the court clearly suggesting the failure on the part of the government to carry out rehabilitation work in *pari passu* the implementation of the project.³⁵ Justice Bharucha gave a dissenting opinion.³⁶

C. JUDICIAL RESPONSE TO THE DISPLACED: AN ANALYSIS

Though the court expanded the language of Article 21 to incorporate the right to rehabilitation as a fundamental right, it did not apply the same to a real fact situation. Instead, it chose to take a narrow approach by demarcating a line between policy decisions and judicial interference. The result was that the oustees could not secure justice and were failed by the courts ailed as citizen’s custodian of rights. More significantly, the following criticisms can be made of the above decisions.

1. In Narmada, the court allowed the construction of the dam to proceed by blatantly disregarding the evidences placed before it. The court’s final decision did not take into account the affidavit filed by the government of Madhya Pradesh which stated that that it has no land to resettle the oustees, that in all these years Madhya Pradesh has not produced a single hectare of agricultural land for its oustees. It ignored the facts that not one village has been resettled according to the directives of the Narmada Water Disputes Tribunal Award, the fact that even thirteen years after the project was given conditional clearance, not a single condition has been fulfilled, that there is not even a rehabilitation Master Plan.³⁷

³³ AIR 2000 SC 3751.

³⁴ *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751.

³⁵ See *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751, ¶¶158 & 181.

³⁶ In his dissenting judgement in the Narmada dam case, Justice Bharucha said construction of the Sardar Sarovar dam should be stopped until the rehabilitation of displaced people was completed.

³⁷ See *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751, ¶¶ 158 & 181.

2. In Narmada, the court went on to say that, “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, then the only role which a Court may have to play is to see that the system works in the manner it was envisaged.” The petitioners had not asked the court to intervene in policy decisions of the government, but to restrain the construction on the ground that the project was not being implemented as it was envisaged, without any rehabilitation. The distinction made by the court between policy decisions and the permissible area of judicial intervention was unnecessary in this context. More importantly, contrary to its own finding, the court itself indulged in commenting on the policy decisions of the government when it presented an unqualified eulogy on the virtues of a dam such as the following in the Tehri’s case. It said, “The benefits which have been reaped by the people all over India with the construction of the dams are too well-known and, therefore, the Government cannot be faulted for deciding to construct the high dam on river Tehri with a view to provide water and electricity in the area as was the decision in the Sardar Sarovar project’s case also.”
3. The court refused to accept the report prepared by the Morse Committee which was an independent committee appointed by the World Bank. The Morse committee, which was set up by the World Bank comprised qualified and reputed members. Assisted by the finest consultants from around the world, it conducted an extensive review of the rehabilitation and environmental aspects through a period of 10 months. The committee being the only one with access to all the documents relating to the project from the World Bank, governments, NGOs, NBA etc, produced a comprehensive report.³⁸ However, the report was not accepted either by the World Bank or the Government of India. This rejection by the World Bank and Government of India was not surprising since the report was critical of both the project and the World Bank. But what is highly unacceptable is the Supreme Court’s rejection of the report on the grounds that it was rejected by both the World Bank and the Government of India.³⁹
4. The majority order of the Supreme Court observes that, “Once the Award is binding on the States, it will not be open to a third party like the Petitioners to challenge the correctness thereof. We therefore, do not propose to deal with any contention which in fact seems to challenge the correctness of an issue decided by the

³⁸ *NBA comments on the Supreme Court judgment*, www.narmada.org/sardarsarovar/sc.ruling/nba.comments.html. (Last visited on November 2, 2008).

³⁹ *Id.*

Tribunal.” This is a very legalistic interpretation of the Inter State Water Disputes Act (ISWDA) and Article 262 of the Constitution. The Narmada issue being a dispute between the state and the people and one where the fundamental rights of the people are involved, the court’s declaration that a third party cannot challenge the Tribunal is an incorrect application of the ISWDA which created the Tribunal to solve disputes between the states inter se. The fact that the people were not given a hearing before the Tribunal clearly indicates the injustice involved.

Even if there is an assumption that the governments represent the people, in this case, the governments represent to the tribunals on behalf of the beneficiaries and the affected. This being a conflict of interest, it is only fair that there be a provision enabling the representation of the affected people. If this cannot be done, there should at least be a provision to challenge the tribunal, especially since it involves the right to life of the citizens. The need is furthered by the existence of situations wherein the facts and assumptions on which the tribunal based its order have been found to be incorrect, as in the case of the Sardar Sarovar Project. It would be a difficult situation if the implementation of one part of the tribunal award becomes impossible and there is no right to challenge the tribunal order. The situation is akin to what is happening in the Sardar Sarovar project where implementation of the rehabilitation plans is incomplete leading to the violation of the tribunal order time and again. In such cases, it should be open to the person to challenge the order on the ground that the part of it dealing with right to life is not being implemented.

The three states, namely Madhya Pradesh, Maharashtra and Gujarat, along with the Narmada Control Authority, the machinery to implement the tribunal have not bound themselves by the tribunal. While clause VII of the Tribunal award says, “The Tribunal hereby determines that the height of the Sardar Sarovar Dam should be fixed at Full Reservoir Level (FRL) 455 feet and Maximum Water Level (MWL) 460 feet”, the above mentioned authorities have changed the height of the Sardar Sarovar Dam to a MWL of 455.⁴⁰ According to the tribunal, the people who are below MWL and above FRL have to be rehabilitated. By changing the MWL, the done away with the need to rehabilitate people. Thus the Sardar Sarovar Dam height has been changed, and this change cannot be challenged by people mainly because according to the majority it is impossible to change the height of the dam.⁴¹ An analysis of the cases reveal that the courts have given decisions that helped in legitimising government’s abuse of power. Thus, even though the court granted formal rights by expanding the scope of Article 21, it desisted from applying the same to real fact situations such that the abstract could be contextualised.

⁴⁰ *Letter to Supreme Court Judges on Narmada Case – Sardar Sarovar Dam Height Changed* available at <http://www.narmada.org/sardar-sarovar/sc.ruling/ravi.letter.html> (Last visited on January 5, 2008).

⁴¹ *Id.*

Thus, both the legislature and the judiciary have failed to provide a solution to the problem of rehabilitation. While it was expected that the judiciary would correct the legislative slackness of not enacting a national legislation on rehabilitation by assuming a more dynamic role; however in its absence, the need arises to look for an alternate solution and the next section shall do the same.

IV. ADDRESSING ISSUE OF PROTECTION OF RIGHTS OF INTERNALLY DISPLACED PERSONS BY CHANGING THE DEFINITIONAL PERSPECTIVE IN INTERNATIONAL REFUGEE LAW

The term 'refugee' in ordinary usage is understood to mean someone in flight who seeks to escape conditions or personal circumstances found to be intolerable,⁴² where destination of such flight is irrelevant: the flight is to freedom, safety.⁴³ In spite of this being the definition of a refugee, the term has received a surprisingly restrictive definition in international law. The exercise of providing a restrictive legal definition of refugee itself has been questioned as being an "unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of the people in distress."⁴⁴ However, the reality remains that historically, the states have always agreed on and favoured a restrictive definition of 'refugee' under international law. The present section seeks to analyse the rationale for such a restrictive definition and ascertain whether a broadening of contours of the definition can provide an efficacious solution for preserving rights of internally displaced persons.

There is no one single definition of the term refugee in international law. Various definitions have been adopted at various points of time and a number of them existed or continues to exist simultaneously. While the scope of such a definition depends on the function of the particular organization adopting it, or the treaty the states agree to adopt and purpose for which they seek to employ such definition,⁴⁵ the broad fundamental purpose of facilitating and justifying aid and protection remains a constant, the subject itself being an aspect of the wider discipline of human rights.⁴⁶ For a closer analysis of the content of the definition of refugee in international law, the traditional sources of international law, being treaties and practice of the states along with practice and procedures of international organizations established for dealing with refugee issues have to be examined.⁴⁷

⁴² See G.S. GOODWIN GILL, THE REFUGEE IN INTERNATIONAL LAW 15 (1998).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*, 16.

⁴⁶ *Id.*

⁴⁷ *Id.*

In the earlier part of the twentieth century, when the problem of refugees appeared as a significant international issue after the experiences of First World War, a group or category approach was adopted in defining refugee.⁴⁸ The elements of the definition of this approach were: *first*, that someone was located outside their country of origin and *second*, without the protection of the government of the state.⁴⁹ This approach of defining refugee was criticised by J.H. Simpson as early as 1938 as having ‘certain inherent deficiencies’.⁵⁰ He stated that the existing approach failed and restricted taking into account the ‘essential quality’ of the refugee as someone “who has sought refuge in a territory other than that in which he was formerly resident as a result of political events which rendered his continued residence in the former territory impossible or intolerable.”⁵¹ The remarkable aspect of the criticism and the proposed essential quality is the fact that Simpson envisaged displacement of former territory of residence by reason of political fluctuations as enough ground for designation of the status of refugee. He did not envisage crossing of international borders as a necessary condition for a person to attain the status of a refugee.

However, such observation was not reflected in the definitions emerging post the Second World War when definitions became even more precise and legalistic in their approach. The often cited justification for such approach was that in view of the extent of displacements that had taken place due to the extraordinary circumstances of the war, broadening of the scope of the status would have rendered the problem unmanageable with irrational liability on the international community.⁵² Although in the period immediately succeeding the Second World War, because of the cessation of international political reasons of refugee flow, there emerged a consensus among nations that refugees were not an international problem requiring international protection. It is essentially in the sovereign domain of a state and the “fundamental dilemma of respect of sovereignty of states versus the right and responsibility of the international community to intervene and stop the violation of human rights and prevent exodus has never been satisfactorily resolved.”⁵³

In fact, James McDonald, the High Commissioner for Refugees for the period 1933-35, in his 3000 word letter of resignation had advocated for compromising sovereignty in the interests of common humanity.⁵⁴ Thus, it is submitted that it will be incorrect to conclude that refugee is an exclusively domestic problem not requiring international protection. This is reflected in the subsequent

⁴⁸ See *supra* note 30, § 2.

⁴⁹ *Id.* E.g. Arrangement relating to the issue of identity certificates to Russian and Armenian refugees, 12 May, 1926: 84 *LNTS* No. 2004 as cited in *id.*

⁵⁰ See J.H. Simpson, *Refugees- A preliminary Report of a Survey 1* (1938) as cited in GOODWIN GILL, *supra* note 1, § 2, 19.

⁵¹ *Id.*

⁵² See *supra* note 30, § 2.

⁵³ See J.C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 11(1991).

⁵⁴ *Id.*

adoption of international conventions on refugee issues immediately after 1949. The principal convention governing international refugee issues is the 1951 Convention Relating to the Status of Refugees and its 1967 protocol.⁵⁵ The convention defined refugee in the following terms, "...the term 'refugee' shall apply to any person who...owing to well founded fear of being persecuted prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality...*"⁵⁶

As is evident, the definition requires a person to be outside his country of nationality in order to be recognized as refugee. This excludes internally displaced persons from being granted the status of refugee and hence the protection. Another limitation of the definition is the fact that it recognizes only individualized persecution and does not recognize other situations such as large scale development projects as legitimate causes of flight for which refugee status should be granted.⁵⁷ The essential element of the definition, that the person claiming such status must be located outside the country of his nationality, has been heavily criticised for the reason that majority of persons fleeing their home in quest of safety remain within the borders of their country, their plight and suffering is every bit as serious as persons crossing international borders.⁵⁸ There is no reason compelling enough to justify the discrimination between persons who are the circumstantial victims of involuntary migration.⁵⁹ Again, such requirement turns a blind eye to socio-economic and legal impediments that make it impossible for persons to cross international borders.⁶⁰

Post 1951, the trend has been towards modifying the definition to contemporary situations taking into account contemporary causes of the refugee problem. An example would be the 1969 Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa which incorporated contemporary causes of flight such as internal armed conflict and abuse of human rights within the definition of refugee.⁶¹ In keeping with the 'Convention Plus'⁶² efforts, in conclusion of multilateral regional agreements for securing firmer

⁵⁵ *Id.*

⁵⁶ *See* Article 1 (2), Convention Relating to the Status of Refugees of July 28, 1951.

⁵⁷ *See supra* note 53, 14.

⁵⁸ *See id.*, 15.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See* Article 1, Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

⁶² Convention Plus is an international effort initiated and coordinated by the Office of the United Nations High Commissioner for Refugees (UNHCR). Its aim is to improve refugee protection worldwide and to facilitate the resolution of refugee problems through multilateral special agreements: As found in Convention Plus at a Glance, <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=403b30684> (Last visited on 10th October, 2008).

commitments for refugee protection where a definition of refugee shall be adopted keeping in view the Simpsonian *essential quality* of the term, not providing crossing of international borders as a necessary condition for ascription of the status of refugee, appears to be an efficacious solution for protection of rights of persons who are internally displaced by reasons such as large scale development projects. The Simpsonian definition takes within its ambit and gives protection to persons displaced due to large scale developmental projects as legitimate causes of flight for which refugee status must be granted. The definition of refugee which makes crossing of national boundary a precondition for being considered a refugee has been identified and criticised as a major flaw or limitation of the broadly accepted definition of the term refugee in international law.

Such efforts by means of conclusion of treaties can be instrumental in incorporating genuine human rights concerns with the international obligation to harbour refugees. Such acknowledgement of rights and obligation of state parties to secure protection of the rights of internally displaced persons shall serve as a pressurizing tool for State parties to implement such obligations by adoption of domestic legislations to that effect and ensuring that the same be implemented by the domestic institutions

V. CONCLUSION

The legislature has shown unwillingness to enact a rehabilitation legislation even after sixty years of independence. Although, the judiciary has granted rights to the displaced *prima facie*, it did little to implement them. In fact the Narmada and the Tehri judgments reflect how courts have supported the acts of the government by taking a stand that would further their interest. The situation now is that both the legislature and the judiciary have failed to address the injustice caused to the internally displaced persons. Thus, this paper made a case for creating international pressure on the nations to grant the right to rehabilitation of the refugees by expanding the current definition of refugees such that internally displaced persons are included in its purview.

The existing definition of refugee in international documents has been consistently criticised beginning with Simpson in 1938. The consistent claim against the existing definition in chief international documents is the fact that they are irrationally narrow and exclusive in their scheme without enough justification supporting such a scheme. It is a fact that the accepted definition of refugee excludes internally displaced persons from its purview by putting forth 'crossing of international borders' as a necessary condition for designation of refugee status, in spite of the fact that the plight and suffering of the internally displaced persons is every bit as serious as persons crossing international borders.

Such a requirement completely ignores socio-economic and legal impediments to crossing of international borders. This argument against the existing definition has never been satisfactorily countered. Again, exclusion of causes apart from individualized persecution, such as natural disasters and large

scale developmental projects, from the purview of the definition of refugee appears to be unreasonable. This appears especially irrational in light of the fact that these unrecognized causes of flight account for displacement of enormous population in contemporary times and there is enough statistical data to corroborate this argument. Thus, there are enough arguments for remodelling the accepted scheme of definition of refugee so that these unjustified exclusions are rectified. There is a significant case for broadening the definition of refugee by doing away with crossing of international border as a necessary condition for designation of refugee status and recognizing causes other than individualized persecution, especially large scale developmental projects and natural disaster, as legitimate causes of flight.

With the ongoing scheme of development of multilateral treaty framework at the regional level for securing better protection of refugees, in the form of the *Convention Plus*, the time is ripe to consider applicability of the refugee status to internally displaced persons. Especially in states in the subcontinent, where the status of refugees has been a major issue for the past half a century and more, political pressure towards concluding a regional multilateral instrument in lines of *Convention Plus* effort is significant. Modelling a definition that shall take into account the shortcomings of the generally accepted definition of refugees in international law, doing away with crossing of international border as a necessary condition for designation of refugee status and recognizing causes other than individualized persecution such as large scale developmental projects and natural disasters as legitimate causes of flight will ensure better enforcement of rights of the internally displaced persons by the state, and chiefly the right of rehabilitation which has been recognized since long as an essential right of the refugees.

