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DIRECTIVE PRINCIPLES OF STATE POLICY AND DISTRIBUTION OF MATERIAL RESOURCES WITH SPECIAL REFERENCE TO NATURAL RESOURCES – RECENT TRENDS

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Abstract

Distribution of material resources especially natural resources has become a subject of controversy after the *2G spectrum* case. Therefore, this article mainly focuses on the recent trends in the distribution of natural resources under article 39(b) of the Constitution. Natural resources are legally owned by the state on behalf of the actual owner- the people. Accordingly, natural resources have to be distributed to best subserve the common good. Deviating from the earlier economic-centric approach *i.e.* shielding of nationalization measures and distribution by auction, the eco-centric approach is now, emphasized. Thus, the public trust doctrine is also been employed in the distribution of natural resources. After tracing the recent developments and a brief discussion on the distribution of biological resources, this article concludes that now the policy of distribution of natural resources may be out of judicial review, however, the method of distribution is not.

I Introduction

THE DIRECTIVE principles of state policy (DPSP) embodied in part IV of the Constitution contains certain obligations of the state. 'The Directive Principles', according to the chief architect of the Indian Constitution Ambedkar, 'have a great value for they lay down that our ideal is economic democracy'.[1] Thus, the constitutional ideal is not only political democracy but also economic democracy and for that reason only DPSP has been included in the Constitution.

In the twenty first century human rights has gained popularity and has become the ethics of governance of today's welfare state. However, there are two approaches to the concept of human rights namely, individual oriented human rights otherwise known as civil and political rights and community or society oriented collective

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1. III *Constituent Assembly Debates* at 494-95; see also, Mahendra P. Singh, *V.N.Shukla's Constitution of India* 345-46 (Eastern Book Company, 11th Edn 2008).

human rights often referred as socio economic rights.[2] It is generally believed that part III of the Constitution(dealing with fundamental rights) contains civil and political rights and part IV contains some of the socio-economic rights[3] that is why part IV is sometimes referred as the socio-economic Magna Carta.[4]

Natural resources play a vital role in preserving a country's economic self-determination and thus cherish the ideal of economic democracy. While discussing the political, economic and social aspects of the right of self-determination, it was argued[5] that since political independence was based on economic independence, the right of peoples to freely dispose their own natural resources had to be recognized as an essential element of economic independence.[6] This concept is widely known as the concept of permanent sovereignty over natural resources.[7] Though this concept stood for simple idea that each state should be the master of its own wealth, at the core it is the inherent and overriding right of the state to control and dispose of natural wealth and resources in its territory for the benefit of its own people.[8] It is of interest to note that in a similar vein article 39(b) in part IV of the Indian Constitution mandates the distribution of material resources to "best subserve the common good".[9] Therefore, an attempt is made in this article to discuss and analyze the recent trends in the distribution of material resources that includes natural

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2. See David Ambrose, "Human Rights Approach to Refugee Problem – A Midas Touch?" 7(1) *SBRRM Journal of Law* 17 (Mar. 2000).

3. Fundamental rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive state action while the DPSP are aimed at securing social and economic freedoms by appropriate state action; see *Akhil Bharatiya Soshit Karmachari Sangh* v. *Union of India,* AIR 1981 SC 298.

4. "The Directive Principles, being the spiritual essence of the constitution, must receive sweeping signification, being our socio-economic Magna Carta quiddities apart." *State of Karnataka* v. *Ranganatha Reddy,* AIR 1978 SC 215 para 56.

5. During preparation of the Draft International Covenants on Human Rights in pursuance of General Assembly Resolution 545 (VI) of Feb 5, 1952 by which the General Assembly decided to include the right of self determination as a part of human rights covenants; see Somendra Kumar Banerjee,"The Concept of Permanent Sovereignty over Natural Resources An Analysis" 8 *IJIL* 517 (1968).

6. See S.K.Baneerjee, *ibid.*

7. U.N.General Assembly Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII), Dec. 14 of 1962.

8. Kamal Hossain, "Introduction" in Kamal Hossain and Subrata Roy Chowdhry (eds.), *Permananent Sovergnity Over Natural Resources in International Law principle and Practice* XIII (Francis Pinter, London, 1984).

9. Art. 39(b) reads thus: "39. Certain principles of policy to be followed by the State – The State shall in particular, direct its policy towards securing -

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;"

resources also. While doing so, the article mainly focuses on the distribution of natural resources under article 39 (b) of the Constitution, as distribution of natural resources gained significance and got heated up after the *2G spectrum* cases.[10]

II Directive principles of state policy

The main intention of including part IV in the Constitution is that it may form a set of instructions issued to the prospective lawmakers and executives for their guidance for good governance.[11] Part IV enjoys a very high place in the constitutional scheme as it imposes obligations on the state to take positive actions for creating socio economic conditions in which there will be egalitarian social order with social and economic justice to all.[12] Directive principles are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.[13] However, directive principles though impose obligations on the state, they are not enforceable and if a directive is not obeyed or implemented by the state, it cannot be compelled to do so through a judicial proceeding.[14]

DPSP and fundamental rights

As directives are not enforceable by any court[15] it has become common to

10. *2G spectrum* cases, the judgment and order dated 04.02.2012 of the special judge CBI (04) (2G Spectrum Cases), New Delhi in CC No. 01(A)/11; *Centre for Public Interest Litigation* v. *Union of India* (2012) 3 SCC 1; MANU/SC/0089/2012.

11. "[T]hey are instructions to the Legislature and the Executive. Such thing is to my mind to be welcomed, wherever there is grant of power in general terms for peace, order and good government, it is necessary that it should be accompanied by instructions regulating its exercise," Ambedkar, III *Constituent Assembly Debates* at 41.

12. *Minerva Mills* v. *Union of India,* AIR 1980 SC 1789.

13. Art. 37 of Indian Constitution provides thus: "37. Application of the Principles contained in this Part.- The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless *fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws*" (emphasis supplied)

14 "The provisions contained in this Part shall not be enforceable by any court", *ibid*

15 The reason for this, in the words of Supreme Court, "The Directive Principles of State Policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State. Non-justiciable clause was provided for the reason that an infant state shall not be made accountable immediately for not fulfilling these obligations. Merely because the Directive Principles are non-justiciable by the judicial process does not mean that they are of subordinate importance" see *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1 para 173; another reason according to V.N.Shukla is " If the court can compel Parliament to make laws then parliamentary democracy would soon be reduced to an oligarchy of judges. It is for this reason that the Constitution says that the directive principles shall not be enforceable by courts. However, it does not mean that the directive principles are less important than fundamental rights for the simple reason that they are not judicialy enforceable", *supra* note 1 at 346.

explore the relationship between enforceable part III and unenforceable part IV. From the journey through various judicial decisions starting from *Champakam Dorairajan* case,[16] it is possible to discern four stages or judicial approaches with regard to the inter-relationship between part III and part IV especially from part IV perspective. In the first period, primacy was given to part III over part IV by virtue of article 37 accordingly, it is known as the subsidiary period. Thus in *State of Madras* v. *Champakam Dorairajan*, the Supreme Court held that "the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights" because the latter are enforceable in the courts while the former are not.[17] In the second period, which is generally known as harmonious construction period, an attempt was made by the judiciary to draw a balance and harmony between part III and part IV. The observation that the provisions contained in part III and part IV, 'are complementary and supplementary to each other' in the *C.B. Boarding and Lodging* v. *State of Mysore*[18] signalled the dawn of this period. Later in *Minerva Mills Ltd.* v. *Union of India*, it was held that "harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.[19] This judicial approach indeed led to the third stage namely enforcement stage. In this period the DPSP, otherwise unenforceable (non-justiciable) were actually enforced though not directly but indirectly. Initially provisions of part IV were used to justify restrictions imposed on the fundamental rights and in this fashion, they were indirectly accorded judicial recognition.[20]

In determining the reasonableness of a classification under article 14 or the reasonableness of a restriction under article 19, the court had regard to the directives and gave such interpretation to the other articles of the Constitution which aimed at promoting the goal contained in the Preamble and the DPSP, envisaging a socialistic polity.[21]

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16. *State of Madras* v. *Champakam Dorairajan,* AIR 1951 SC 226.

17. *Id.* at 228.

18. AIR 1970 SC 2042.

19. *Supra* note 12 at 1806 para 61.

20. For example in *State of Bombay* v. *F.N.Balsara*, AIR 1951 SC 318 with reference to art. 47 it was held that a restriction imposed by a law on the sale and possession of liquor was a reasonable restriction in the interest of public; in *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 252, art. 39 was taken into consideration while upholding abolition of Zamidari system as it was for a public purpose; art. 43 was used to uphold the validity of Minimum Wages Act, 1948 in *Bijay Cotton Mills Ltd* v. *State of Ajmer*, AIR 1955 SC 33; in similar fashion cattle protection laws prohibiting slaughter of cattle was upheld as it meant to give effect to art. 48 in *Md. Hanif Quereshi* v. *State of Bihar*, AIR 1958 SC 731.

21. S.R Bansali, *Durga Das Basu Human Rights in Constitutional Law* 334 (Lexis Nexis Butterworths, Wadhwa, 3rd Edn, 2008).

In *Kasturi Lal Lakshmi Reddy* v. *State of Jammu and Kashmir*[22] the Supreme Court while upholding the validity of an order dated 27th April, 1979, passed by the Government of Jammu and Kashmir, allotting to the respondents 10 to 12 lacs blazes annually for extraction of resin from the inaccessible chir forests in Poonch Reasi and Ramban Divisions of the state for a period of 10 years held thus: [23]

> The Directive Principles concretise and give shape to the concept of reasonableness envisaged in Articles 14, 19 and 21 and other Articles enumerating the fundamental rights. By defining the national aims and the constitutional goals, they set forth the standards or norms of reasonableness, which must guide and animate governmental action....
> So also the concept of public interest must as far as possible receive its orientation from the Directive Principles. What according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody par excellence the constitutional concept of public interest.

Later being fueled by the international revelation and realization that the two kinds of human rights namely civil and political rights and economic and social rights are actually complementary to one another as civil and political rights cannot be realized without economic and social rights, the judiciary while interpreting part III started reading part IV into part III.[24] Many of the un-enumerated rights are read into the list of fundamental rights by interpreting part III in the light of part IV as both are seen complementary to each other.[25] Thus some DPSPs are actually enforced as fundamental rights.[26] In *Bandhua Mukti Morcha* v. *Union of India*,[27] the Supreme Court found out that right to live with human dignity enshrined in article 21 derives its breath from DPSP and therefore it must include facilities for children to develop in a healthy manner and in conditions of freedom and dignity with

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22. AIR 1980 SC 1992.

23. *Id.* at 2000 para 12-13.

24. Art. 39 A has been found to be an interpretative tool for art. 21 in *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548 para 23.

25. "It is well established by the decisions of this Court that provisions of Part IV and III are supplementary and complementary to one another.....Fundamental rights must be construed in the light of Directive Principles", *Unni Krishnan* v. *State of AP*, AIR 1993 SC 2178 at 2230 para 141.

26. In *Girish Kalyan Kendra Workers Union* v. *Union of India,* AIR 1991 SC 1173 para 6, the Supreme Court held, "equal pay for equal work is not expressly declared as a fundamental right, but in view of the Directive Principles of State Policy as contained in Art. 39 (d) of the Constitution 'equal pay for equal work' has assumed the status of fundamental right in service jurisprudence having regard to the constitutional mandate of equality in Articles 14 and 16 of the Constitution".

27. AIR 1984 SC 802 at 811-12.

educational facility and just humane conditions of work. Likewise the right to education even though not been guaranteed earlier *i.e.* before the insertion of article 21A as a fundamental right, was found out to be a fundamental right after interpreting article 21 in the light of articles 42, 45 and 46.[28] The Supreme Court's observation in *Mohini Jain* v. *State of Karnataka*[29] that "It is no doubt correct that right to education as such has not been guaranteed as fundamental right under part III of the Constitution but reading the above quoted principles (articles 21, 39, 41 and 45) it becomes clear framers of the constitution made it obligatory for the state to provide education for its Subjects", proves the point at hand.

In 1971, through the Constitution 25th Amendment, which was enacted to get over the difficulties placed in giving effect to the DPSP, article 31 C was added to the Constitution. The first limb of article 31C provided that no law, which is intended to give effect to the directive principles, contained in articles 39(b) and (c) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14 or article 19.[30] This legislative effort in fact placed part IV over some of the fundamental rights and in this fashion, the fourth stage namely primacy stage has been ushered in wherein at times supremacy has been given to part IV and some fundamental rights were made subservient to part IV.[31]

Subsequently, article 31C was further amended by the 42nd Amendment Act, 1976 thereby widening the scope of article 31C as to cover all directives as against the principles specified in clause (b) or (c) of article 39.[32]

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28 For a discussion on this see A. David Ambrose, "From Charity to Right: Education, Law and Judiciary" 30 *The Year Book of Legal Studies* 14-15 (2008).

29 AIR 1992 SC 1858 at 1863 para 7.

30 The second limb of art.31 provided that "no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy". It is of interest to note that in *Kesavananda Bharati* v. *State of Kerala,* AIR 1973 SC 1461, the Supreme Court struck down this portion as unconstitutional as it takes away the power of judicial review. However, the Supreme Court in the same case upheld the first part of art. 31C.

31 "But the facets of the principle of equality could always be altered especially to carry out the Directive Principles of the State Policy envisaged in Part IV of the Constitution" see *Ashoka Kumar Thakur* case *supra* note 15 at para 91.

32 The amended art.31C now runs thus: "31C. Saving of laws giving effect to certain directive principles- Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing (all or any of the principles laid down in Part IV) shall be deemed to void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by (article 14 or article 19) (and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy)".

In *Minerva Mills* case,[33] the Supreme Court by 4 to 1 majority struck down article 31C as amended by forty second amendment as unconstitutional on the ground that it destroys the "basic features" of the Constitution. It was further held that "the unamended Art 31C is valid as it does not destroy any of the basic features of the Constitution. The unamended Art 31C gives protection to defined and limited categories of laws, i.e. specified in Articles 39(b) and (c). They are vital for the welfare of the people and do not violate Articles 14 and 19". In *Waman Rao* v. *Union of India*[34] Chandrachud CJI observed that "Article 31 is now out of harm's way. In fact, far from damaging the basic structure of the Constitution, laws passed true and bona fide for giving effect to directive principles contained in Clauses (b) and (c) of Article 39 will fortify that structure".

A five judges bench in *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd*[35] while answering the question, whether Cooking Coal Mines (Nationalisation) Act 1972 is a legislation giving effect to policy of state towards securing principle specified in article 39(b) and is therefore immune under article 31C from the attack on the ground that it violates article 14, held that the extension of constitutional immunity to other directive principles does not destroy the basic structure of the Constitution. Accordingly, the court held that the nationalization of coke oven plants of the petitioner was done in order to securing the principles specified in articles 39(b) and (c) and therefore, the impugned Act is valid even if it is violative of article 14.[36]

The constitutional validity of article 31C was again upheld in *State of Tamil Nadu.* v. *Abu Kavur Bai.*[37] The Supreme Court agreed with the argument that in view of the provisions of article 31C the Nationalization Act in question squarely falls within the protective umbrella of the said article inasmuch as in pith and substance, the Act seeks to subserve and secure the objects contained in clauses (b) & (e) of article 39 and is, therefore, fully protected from the onslaught of articles 14, 19 or 31.

On the basis of the above discussion, the following points inevitably emerge:

- DPSP are fundamental in governance.
- DPSP aims at achieving economic democracy.
- Part IV contains many of economic and social rights and thus imposes an obligation/duty on the state.

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33. *Supra* note 12.

34. (1981) 2 SCC 362.

35. AIR 1984 SC 239.

36. The Supreme Court opined, "Where Article 31C comes in Article 14 goes out. There is no scope for bringing in Article 14 by a side wind as it were, that is, by equating the rule of equality before the law of Article 14 with the broad egalitarianism of Article 39(b) or by treating the principle of Article 14 as included in the principle of Article 39(b)", *id.*, para 17.

37 AIR 1984 SC 326.

- Directive principles are made not enforceable as their implementation would depend on financial capabilities of the state.
- Part IV is viewed as 'Book of Interpretation' to interpret constitutional provisions especially part III.[38]
- Based on the judicial judgments that the state has capacity to implement part IV, the directives in part IV are enforced as fundamental rights.
- At times, to realize socio economic justice primacy is given to part IV over part III.

Material resources under DPSP

By the addition of the word "socialist" by the forty second amendment in 1976, the philosophy of "socialism" has been incorporated in the Constitution and it paved the way for evolving a concept of social democracy, which comes closer to the concept of social welfare state.[39] Socialism means distributive justice that aims at the distribution of material resources of the community in such a way as to subserve the common good thereby achieving socio-economic justice.[40] Moreover, what is socialism all about? In the words of the Supreme Court it is, "Ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Article 39(b) but echo the familiar language and philosophy of socialism as expounded generally by all socialist writers".[41] It is of interest to note that some directives especially articles 39(b)[42] and 39(c)[43] are significant in this respect as they affect the entire economic system in India. Of these, article 39(b) is very much pertinent as it deals with 'the ownership and control of the material resource of the community', and also as the idea of distributive justice is ingrained in it.[44]

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38 *Ashoka Kumar Thakur, supra* note 15 at para 96.

39 Mahendra P Singh, *supra* note 1 at 3.

40 M.P. Jain, *Indian Constitutional Law* 1375 (Lexis Nexis Butterworths, Wadhwa, 5th Edn 2008).

41 *Supra* note 35 at para 19.

42 *Supra* note 9.

43 Art. 39(c) provides that certain principles of policy to be followed by the State – The State shall in particular, direct its policy towards securing 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment'.

44 M.P. Jain, *supra* note 40. See also *State of T.N* v. *His Holiness Srilla Sri Ambalavana Pandara Sannadhi Adheenakartha* (1997) 9 SCC 313 at para 13, wherein the Supreme Court observed that "the tenants are the tillers of the soil and have *fundamental right to economic empowerment under Article 39(b) which enjoins distribution of material resources to accord socio-economic justice* and means for development for social status and dignity of persons" (emphasis supplied); further in the opinion of the Supreme Court "whole article is a social mission".

Article 39(b) uses the expression "material resources of the community" and the said term has been given a very broad interpretation by the courts. In *State of Karnataka* v. *Ranganatha Reddy*[45] the Supreme Court held that "material resources of the community in the context of re-ordering the national economy embraces all the national wealth, not merely natural resources, all the private and public sources of meeting material needs, not merely public possessions. Everything of value or use in the material world is material resource and the individual being a member of the community his resources are part of those of the community".[46] In *State of Tamil Nadu* v. *Abu Kavur Bai*[47] the Supreme Court after referring to various authorities[48]on resources, observed that "In fact, Article 39(b) does not mention either moveable or Immovable property. The actual expression used is 'material resources of the community'. Material resources as enshrined in Article 39(b) are wide enough to cover not only natural or physical resources but also moveable or Immovable properties". In similar vein, emphasizing on Stroud's Judicial Dictionary's meaning of the word 'material'[49] held that "the mere fact that the resources are material will make no difference in the concept of the word 'resources'".

Referring to all the earlier decisions and agreeing with them in *Mafatlal Industries Ltd.* v.*Union of India*[50] the Supreme Court held that "the material resources of the community" are not confined to public resources but include all resources, natural and man-made public and private owned". Thus according to the interpretation given by the judiciary in various decisions now the term "material resources" under article 39 (b) may include to mean everything of value or use in the material world and it could be - natural or physical resources; moveable or immovable properties and both private and public properties of meeting material needs.

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45 *Supra* note 4 at 250, para 95.

46 *Id.* at 250.

47 *Supra* note 37 at para 77, 78 and 79.

48 *Black's Law Dictionary* (Special Deluxe fifth edition) at 1107, wherein, the word 'resources' has been defined as, 'money or any property that can be converted to meet needs; means of raising money or supplies; capabilities of raising wealth or to supply necessary wants'; *Webster's Third New International Dictionary* at 1934, where the word 'resources' has been defined thus : 'available means (as of a country or business) : computable wealth (as in money, property.)'; and 37A *Words and Phrases* (Permanent Edition) at 16, where the word 'resources' has been defined as thus : Resources included products of farm, forest, manufacture, art, education, etc... The "resources" of a county include its land, timber, coal, crops, improvements, railways, factories and everything that goes to make up its wealth or to render it desirable'.

49 3*Stroud's Judicial Dictionary* at 1634, the word 'material' is defined thus: Materials, tools, or implements, to be used by such artificer in his trade or occupation, if such artificer be employed in mining;.... wooden props or "sprigs" though neither "tools or implements" were "materials" within these words ....'Material includes a painter's bucket of distemper and brush.

50 (1997) 5 SCC 536 para 77.

A discussion on 'natural resources' will not be out of place here as the term 'material resources' also includes public or private owned natural resources.

III Natural resources

After conceding to the facts that there is no universally accepted definition of natural resources and even though article 39 (b) deals with the ownership and control of the material resources of the community except for certain environmental legislation dealing with specific natural resources, *i.e.*, forest, air, water, coastal zones, *etc.* there is no comprehensive legislation dealing with natural resources, the Supreme Court in *Centre for Public Interest Litigation* v. *Union of India*[51] held that natural resources are "generally understood as elements having intrinsic utility to mankind. They may be renewable[52] or non-renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural, form".[53] The court further held that 'A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production'. After observing that minerals - like rivers and forests - are a valuable natural resource, the Supreme Court in *Monnet Ispat and Energy Ltd.* v.*Union of India*[54] held that "Minerals constitute our national wealth and are vital raw-material for infrastructure, capital goods and basic industries".

From the jurisprudence evolved by the courts, it is clear that natural resources belonging to natural environment may be renewable or non-renewable and they are valuable to humanity as they provide economic and social service to human beings wherein their value depends upon their availability and demand.

Ownership and control

As natural resources are valuable, the discussion revolving around their ownership and control has attracted both international and national attention. As a state's development, especially economic development, depends upon the exploitation of its own natural resources, the concept of permanent sovereignty over natural resources has been included as a vital component in the Charter of Economic Rights and Duties (CERDS)[55] and in the Declaration of Right to Development.[56]

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51 *Supra* note 10.

52 "Spectrum has been internationally accepted as a scarce, finite and renewable natural resource"; *id.* at para 65

53 *Id.* at para 63.

54 JT 2012 (7) SC 50; MANU/SC/0601/2012 para 3.

55 See art .2(1) of CERDS; GA Res.3281 (XXIX) 12 Dec.1974.

56 See art. 1(3) of the Declaration, 4 Dec, 1985 Rpt in IJIL, Vol 28(1) p.154 (1968).

The natural resources located within the territorial jurisdiction of a sovereign state belong to the community *i.e.* the people themselves,[57] accordingly, each state has a sovereign right to exploit freely its natural resources and use them for their own advantage and development. In other words, states have full possession and absolute control over their natural resources and they can exploit them in any manner which they think fit to their economic development.[58]

This international position is also recognized in India[59] and it has been observed, "Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value".[60] However, in an earlier occasion the Supreme Court in *T.N. Godavarman Thirumulpad* v. *Union of India*[61] has succinctly put this as, "We hold that the natural resources are not ownership of any one State or individual, public at large is its beneficiary". Since natural resources are legally owned by the state on behalf of the actual owners – the people, what is highly emphasized by judiciary is that the people should be the beneficiary of such natural resources[62] and its benefit has to be shared by the whole country.[63]

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57 Subrata Roy Chowdhury, "Permanent Sovereignty over Natural Resources," in *Natural Resources in International Law* 1 (Frances Pinter, London, 1983).

58. A. David Ambrose, "Sustainable Development of Natural Resources and Environmental Duties in International Law" 4 *SBRRM Journal of Law* 12-38(Feb-1997).

59 "The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assembly and then affirmed as a customary international norm by the International Court of Justice in the case opposing the Democratic Republic of Congo to Uganda", *Centre for Public Interest Litigation* v. *Union of India, supra* note 10 para 64.

60 *Id.* at para 63.

61 AIR 2005 SC 4256.

62 "The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where constitutions specifically address ownership of natural resources, the Sovereign State, or, as it is more commonly expressed, 'the people', is designated as the owner of the natural resources" ; *Centre for Public Interest Litigation* v. *Union of India, supra* note 10 para 65.

63 Referring to *Re: Cauvery Water Dispute Tribunal*, AIR 1992 SC 522 wherein it was held that the right to flowing water of rivers was described as a right *'publici juris'*, *i.e.* a right of public, the Supreme Court in *Special Reference No. 1 of 2001* (2004) 4 SCC 489 at para 12 decided on: 25.03.2004 found out that 'the people of the entire country has a stake in the natural gas and its benefit has to be shared by the whole country. There should be just and reasonable use of natural gas for national development'.

Distribution

Experiences suggest that economic development inevitably increases the demand on natural resources, and naturally their supply will drop below the expanding demand, thus leading to rapid environmental degradation.[64] So today, it no longer makes sense to discuss the economic, political and other relations without giving importance to issues concerning natural resources protection. Here the internationally recognized concept of sustainable use of natural resources enables to create an "incentive framework" that consults supplies of resources and controls the demand, so that demand can continue to be shared in the future. Sustainable use of natural resources signifies the exploitation and utilization of world's natural resources, which is also part of environment by the present generation without degrading them for the use of future generations. In short, the present generation can use the natural resources at the same time they have to preserve/conserve them for the future generations.[65] By this, the necessity or an international obligation to conserve/ preserve natural resources is underlined apart from their exploitation.[66] Thus at international level, though the states enjoy sovereign and ownership rights over natural recourses, the obligation/duty to take true preventive action or more precisely precautionary-action, which will ensure that natural resources are used sparingly and that degradation of the environment is reduced to a minimum, is recognized, underlining the importance of sustainable development/ use of natural resources.

This international development with reference to natural resources is also, of late, reflected in the judiciary's approach while dealing with natural resources under part IV of the Constitution.[67] Earlier, when provisions of part IV were used to justify restrictions imposed on the fundamental rights, the state's power to distribute natural resources under part IV was interpreted by the judiciary to justify

64 Fair Clough, "Environmental and Natural Resource Problems – Their Economic Political and Security Implication" *Washington Quarterly* 90-91 (Winter, 1991).

65 E.Brown Weiss, "As a member of the present generation we hold the earth in trust for the future generations. At the same time, we are beneficiaries entitled to use and benefit from them" in "Our Rights and Obligations to Future Generations for the Environment" 84 *AJIL* 199(1990).

66 *Ibid*

67 "Management of minerals should be in a way that helps in country's economic development and which also leaves for future generations to conserve and develop the natural resources of the nation in the best possible way" *Monnet Ispat and Energy Ltd.* v.*Union of India, supra* note 54 para 3.

nationalization or compulsory acquisition of material/natural resources.[68]

While explaining the nexus between nationalization and distribution in upholding a legislation for the nationalization of contract carriages by the Karnataka State, Krishna Iyer J in *Ranganatha Reddy* case[69] observed that, "To 'distribute', even in its simple dictionary meaning, is to 'allot, to divide into classes or into groups' and 'distribution' embraces 'arrangement, classification, placement, disposition, apportionment, the way in which items, a quantity, or the like, is divided or apportioned; the system of dispersing goods throughout a community.... Socially conscious economists will find little difficulty in treating nationalization of transport as a distributive process for the good of the community". While agreeing with this observation, the Supreme Court in *Sanjeev Coke Manufacturing Company* case[70] held that the word "distribute" in article 39 (b) "is used in a wider sense so as to take in all manner and method of distribution such as distribution between regions, distribution between industries, distribution between classes and distribution between public, private and joint sectors. The distribution envisaged by article 39(b) necessarily takes within its stride the transformation of wealth from private-ownership into public-ownership and is not confined to that which is already public-owned"

Again in *Madhusudan Singh* v. *Union of India*,[71] while upholding land reforms measures, the Supreme Court way back in early 1980s itself held as follows:

> Moreover, what could have been a better mode of distribution contemplated by Article 39(b) than to take away the surplus agricultural lands from the landlords and distribute it amongst the poor suffering landless tillers of the soil who had suffered for centuries as vassals and slaves of the rich zamindars.... We are therefore convinced that the impugned amendments were manifestly and pointedly made for the purpose of giving effect to and securing the objects of Article 39(b) because these Acts clearly intended to distribute the material resources of the community, viz., the agricultural lands to a large number of tillers of the soil in order to serve the common good of the aforesaid, people.

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68 See *Thakorebhai Kevelbhai Patel* v. *State of Gujarat,* AIR 1975 SC 270 para 9 wherein the Supreme Court while upholding a land reforms Act held, "It is plain that the main object of the Act being ultimately to distribute the ownership and control of the material resources of the community as best to subserve the common good and to prevent concentration of wealth, a transfer in favour of the Government, local authorities, Government companies or Corporations had to be excluded as such transfer could not possibly defeat the object of the Act, rather, it would give a fillip to it. Permitting transfers of vacant lands in favour of Cooperative Housing Building Societies is obviously a step for the fulfilment of the object of the Act".

69 *Supra* note 4 at para 97.

70 *Supra* note 35 at para 20.

71 AIR 1984 SC 374 para 22.

Likewise in the case of *Tinukhia Electric Supply Co. Ltd.*v. *State of Assam*,[72] it was held that as the electric energy generated and distributed was a "material resource of the community" for the purpose and within the meaning of article 39(b), the idea of distribution of natural resources in article 39(b) envisages nationalization.

Later, apart from the exploitation-centric approach *i.e.* justifying nationalization measures, the judiciary, taking cue from the international practice also started focusing on eco-centric approach *i.e.* the conservation of natural resources. Thus in *Reliance Natural Resources Limited* v. *Reliance Industries Ltd*[73] P. Sathasivam J, with whom Balakrishnan CJI agreed, observed that "It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the public trust doctrine. Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application". Further in *Centre for Public Interest Litigation* v. *Union of India*[74] *(*the *2G* case*)* the Supreme Court held that " by relying upon the provisions contained in articles 38, 39, 48, 48A and 51A(g), for protection and proper allocation/distribution of natural resources and have repeatedly insisted on compliance of the constitutional principles in the process of distribution, transfer and alienation to private persons". After emphasizing that the environment related public trust doctrine is very much relevant for distribution of natural resources under article 39 (b) and the doctrine of equality must guide the state in determining the actual mechanism for distribution of natural resources,[75] in conclusion, held that 'the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good'.[76] Assailing the first-come-first-served policy in the distribution of spectrum the Supreme Court observed as follows:[77]

When it comes to alienation of scarce natural resources like spectrum etc.,

72 AIR 1990 SC 123.

73 (2010) 7 SCC 1.

74 *Supra* note 10 para 66.

75 "As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis a vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis a vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties" *id.* at para 69.

76 *Supra* note 10 at para 72.

77 *Id.* at para 76 (emphasis supplied).

> it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, *while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.*

The above findings of the Supreme Court in the *2G* case created confusion whether all natural resources like spectrum should only be distributed through method of auction and rightly the matter was referred to the apex court through a presidential reference.[78] While answering this question in negative[79] the court in *In Re: Special Reference No. 1 of 2012* found out that in the *2 G* case the court "was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. … the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources."[80]

After having come to the conclusion that the *2G* case does not deal with modes of allocation for natural resources other than spectrum, the court, relying on other earlier cases came to the conclusion that "the term "distribute" undoubtedly, has

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78 "[T]he judgment in the 2G Case triggered doubts about the validity of methods other than 'auction' for disposal of natural resources which, ultimately led to the filing of the present Reference"; see *In Re: Special Reference No. 1 of 2012*, 2012 (9) SCALE 310 para 64.

79 In the esteemed view of the court mandatory auction, *a fortiori*, besides legal logic, may be contrary to economic logic as well because different resources may require different treatment. The reasoning given by the court is as follows: "Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilization of the resource discovered; a prudent business venture, would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry", *id.* at para 130.

80 *Id.* at para 78.

wide amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc".[81] The court, with reference to the basic nature of article 39(b) further held that, a narrower concept of equality under article 14 may frustrate the broader concept of distribution, as conceived in article 39(b) therefore there cannot be a cavil that "common good' and "larger public interests" have to be regarded as constitutional reality deserving actualization.[82] While dismissing that auction method is the best way to distribute/ allocate natural resources the Supreme Court categorically said that "Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. 'Common good' is the sole guiding factor under article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the 'common good' and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in article 39(b)".[83]

The court emphasized that the norm of "common good" has to be understood and appreciated in a holistic manner and that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick - it would depend on the economic and political philosophy of the government.[84] The court discarded the submission that the mandate of article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization through auction, by saying that it "is based neither on law nor on logic".[85] In the end, it was said that "there is no constitutional imperative in the matter of economic policies - Art 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term 'distribution', suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good". As the methodology pertaining to disposal of natural resources is clearly an economic policy, the court opined that it cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, and it respects the mandate and wisdom of the executive for such matters.[86]

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81 *Id.* at para 115.

82 *Ibid*

83 *Id.* at para 116.

84 *Id.* at para 119.

85 *Id.* at para 120.

86 *Id.* at para 146.

Jagdish Singh Khehar J observed thus: [87]

> I would therefore conclude by stating that no part of the natural resource can be dissipated as a matter of largesse, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to 'best subserve the common good'. It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable.

From the advisory opinion of the Supreme Court it may be concluded that:

- Maximization of revenue cannot be the sole permissible consideration, for disposal of all natural resources, across all sectors and in all circumstances, therefore disposal of all natural resources through auctions is clearly not a constitutional mandate.
- Reading auction as a constitutional mandate would be impermissible because such an approach may distort another constitutional principle embodied in article 39(b).
- Out of the two concepts namely, "public trust doctrine" and "trusteeship" referred in *2G* case public trust may be accepted as public trust mandates a high degree of judicial scrutiny.
- A judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles of equality and common good. Failing which, the court, in exercise of power of judicial review.
- While distributing natural resources the state is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest.
- The state action including distribution of natural resources has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms, which are rational, informed with reasons and guided by public interest, *etc.* and this is the mandate of article 14 of the Constitution of India.

It is of interest to note that the Supreme Court has in its advisory opinion found fault with the *2G* case that it has not considered a plethora of laws (and judgments) like the MMRD Act that prescribe methods for dispensation of natural resources.[88]

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87 In his separate but concurrent opinion, *id.* at para 165.

88 "We find that the 2G Case does not even consider a plethora of laws and judgments that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case, it intended to make an assertion as wide as applying auction to all natural resources", *id.* at para 80.

Interestingly the Biological Diversity Act 2002[89] too contains certain provisions relating to access and utilization[90] of natural resources *i.e.* biological resources.[91] Chapter - II of the Act deals with "Regulation of Access to Biological Diversity" and it mandates that persons–such as a person who is not a citizen of India, a nonresident Indian, a corporate body not incorporated or registered in India and an Indian corporate body having non-Indian participation in its share capital or management–are permitted to undertake biodiversity related activity only with the approval of National Biodiversity Authority (NBA).[92]

Sections 19[93] and 21[94] stipulate that prior approval of the NBA is necessary for accessing biological resources and while granting permission the NBA can impose benefit-sharing conditions. The procedure for access to biological resources is further provided in the Biological Diversity Rules, 2004.[95] Under rule 14, the request for

89 Act No.18 of 2003. 5th Feb. 2003. One of the salient features of the Act is to regulate access to biological resources of the country with the purpose of securing equitable share in benefits arising out of the use of biological resources; and associated knowledge relating to biological resources.

90 The Act deals with both "bio-survey and bio-utilization" and "commercial utilization"; see ss. 2 (d) and (f) of the Act.

91 For a discussion see A.David Ambrose, "Utilization of Biological Resources and Access and Benefit Sharing: National and International Legal Regimes", paper presented at the National Conference on "Relevance on Conservation and Sustainable Utilization of Bioresources" organized by PG & Research Department of Zoology, Auxilium College, Vellore on 13-14 Dec. 2012.

92 See s. 3 of the Act, which reads as follows: Certain persons not to undertake Biodiversity related activities without approval of National Biodiversity Authority 3. (1) No person referred to in sub-section (2) shall, without previous approval of the National Biodiversity Authority, obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization.

(2) The persons who shall be required to take the approval of the National Biodiversity Authority under sub-section (1) are the following, namely:

(a) a person who is not a citizen of India;

(b) a citizen of India, who is a non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961;

(c) a body corporate, association or organization-

(i) not incorporated or registered in India; or

(ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management.

93 S. 19(2) deals with application of patent or any other intellectual property protection whether in India or outside India.

94 S. 21(1) provides that the NBA 'shall while granting approvals ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers'.

95 The Biological Diversity Rules, 2004; came into force on 15th Apr. 2004.

access to biological resources or traditional knowledge has to be made to the NBA in a prescribed form appended to the said rules and the approval to access shall be in the form of a written agreement[96] between NBA and the applicant.[97]

The NBA may restrict or prohibit the access request under certain conditions.[98] The NBA shall formulate the guidelines on a case by case basis and describe the benefit sharing formula providing monetary and other benefits such as royalty; joint ventures; technology transfer; product development; education and awareness raising activities; institutional capacity building and venture capital fund.[99] While granting approval to any person for access or for transfer of results of research or applying for patent and IPR or for third party transfer of the accessed biological resource and associated knowledge the NBA may impose terms and conditions for ensuring equitable sharing of the benefits arising out of the use of accessed biological material and associated knowledge.[100] With due regard to the defined parameters of access, the extent of use, the sustainability aspect, impact and expected outcome levels, including measures ensuring conservation and sustainable use of biological diversity the NBA may decide upon the quantum of benefits on mutually agreed terms between the applicants and the NBA.[101] Thus under the Biological Diversity Act "fair and equitable benefit sharing" of biological resources is envisaged as a method for the distribution of biological resources.

IV Conclusion

Unequal access to resources including natural resources will necessarily result in creating classes among human beings. Exploiters and oppressors on the one hand, exploited and oppressed on the other – the rich and poor. Policies should be framed for equitable access to resources. That is why the Indian Constitution in article 39 (a) directs the state to frame policies that will prevent accumulation of wealth and resources. The state who owns the natural resources on behalf of the actual owners – the people, has an obligation to distribute them in a way that that the people should be the beneficiary of such natural resources and its benefit has to

96 Applications and agreements, *available at*: http://nbaindia.org/content/26/23//application.html.(last visited on 15th Feb. 2013).

97 Such agreement may include among others (1) conditions under which the applicant may seek intellectual property rights; (2) quantum of monetary and other incidental benefits; (3) restriction to transfer the accessed biological resources and the traditional knowledge to any third party without prior approval of Authority; (4) commitment to facilitate measures for conservation and sustainable use of biological resources accessed; (5) commitment to minimize environmental impacts of collecting activities. See Biological Diversity Rules, 2004,rule 14 (6).

98 See Biological Diversity Rules, 2004, rule16 .

99 *Id.*, rule 20.

100 *Id.*, rule 20 (4).

101 *Id.*, rule 20 (5).

be shared by the whole country. This obligation is well recognized in article 39(b).

Natural resources a species of material resources because of their economic value play a vital role in the shaping of the economic development of the state thus paving the way for economic democracy. Accordingly, distribution of natural resources as envisaged under article 39 (b) assumes greater importance. The state is under an obligation to distribute natural resources of the country to subserve the common good. Going by the practice that in order to protect the community interest, when necessary, individual rights are made subservient to collective/community rights, distribution of natural resources has been earlier used to shield nationalization measures that affect individual rights under article 19(1)(g) and article14. However, of late along with the economic aspect of natural resources the environmental aspect *i.e* preservation and conservation of natural resources is also taken into consideration.

The economic aspect of natural resources justify nationalization measures and also thanks to article 31 C, judicial scrutiny of state's policy relating to distribution of natural resources is barred as it falls under economic policy of the state. The environment aspect of the natural resources compels the employment of public trust doctrine also in the distribution of natural resources. Since the public trust doctrine mandates high degree of judicial scrutiny, now the state action regarding distribution of natural resources has to satisfy the mandate of equality. Putting it in nutshell, the policy of distribution may be outside judicial review, however, the method of distribution is subject to judicial review. By emphasizing the public trust doctrine in distribution of natural resources the court has once again emphasized and asserted its power of judicial review, thus clearing the cloud of confusion created by article 31C and some judicial pronouncements.