

war on terror".⁴⁶ Only a just and convincing resolution (in terms of arguments and legal procedure) of the question of personal criminal responsibility will enable the countries involved in the dispute, first and foremost the United Kingdom and, subsequently, the "international community", to draw the appropriate lessons for a credible and sustainable counter-terrorist strategy. There can be no justice without truth – and no efficient measures to protect a country's citizens can be taken if political (in particular foreign policy) interests prevent a proper and thorough investigation into the causes of – and possible criminal responsibility for – an incident such as the explosion of the Pan Am jet over Lockerbie in December, 1988.

After an involvement of over more than 15 years in the observation and analysis of the legal and political disputes⁴⁷ between the United Kingdom, the United States and the Libyan Jamahiriya, essentially over an issue of criminal jurisdiction in a suspected case of international terrorism, the author has summarized his conclusions in remarks at the Law Awards of Scotland 2008:

Whether those in public office like it or not, the Lockerbie trial has become a test case for the criminal justice system of Scotland. At the same time, it has become an exemplary case on a global scale that its handling will demonstrate whether a domestic system of criminal justice can resist the dictates of international power politics or simply becomes dysfunctional as soon as "supreme state interests" interfere with the imperatives of justice. Fairness of judicial proceedings is undoubtedly a supreme and permanent public interest. If the rule of law is to be upheld, the requirements of the administration of justice may have to take precedence over public interests of a secondary order, such as a state's momentary foreign policy considerations or commercial and trade interests. The internal stability and international legitimacy of a polity in the long term depend on whether it is able to ensure the supremacy of the law over considerations of power and convenience. Contrary to what skeptics and the advocates of the supremacy of realpolitik try to make us believe, the basic maxim of the rule of law is not *fiat justitia, pereat mundus* but *fiat justitia ne pereat mundus* – let justice prevail so that the world does not perish.⁴⁸

⁴⁶ See, THE "GLOBAL WAR ON TERROR" AND THE QUESTION OF WORLD ORDER – STUDIES IN INTERNATIONAL RELATIONS, XXX (Hans Koechler ed., International Progress Organization 2008).

⁴⁷ For the political implications in the triangle Libya-United States-United Kingdom, see, KHALIL I. MATAR AND ROBERT W. THABIT, LOCKERBIE AND LIBYA: A STUDY IN INTERNATIONAL RELATIONS (McFarland 2003). (Robert W. Thabit was the second observer of the International Progress Organization nominated by the Secretary-General of the United Nations for the Scottish Court sitting in the Netherlands.)

⁴⁸ Hans Koechler, Keynote Address at Law Awards of Scotland 2008 in association with Registers of Scotland (Sept. 18, 2008).

SANJEEV COKE, A CRITIQUE – AN EVALUATION OF ARTICLE 39(B)

Mihir Naniwadekar*

This paper seeks to look at the Directive Principle enshrined in Article 39(b) of the Constitution of India and analyze it in light of the Fundamental Rights enshrined in the Constitution. The author shall demonstrate that the Supreme Court of India has been mistaken in its analysis of the scope of Article 39(b); particularly in relation to Article 31C, and generally in relation to Part III of the Constitution. The interpretation placed by the Court in Sanjeev Coke is currently being reviewed by a larger Bench of nine judges. This paper attempts to posit the argument that Article 39(b) should not be deployed towards the nationalization of private property or the collection of assets/resources by the State, but must, instead, be interpreted such that it applies to the stage of distribution, as distinct from the stage of collection, of assets.

I.	INTRODUCTION	163
II.	THE INTERRELATIONSHIP BETWEEN PARTS III AND IV	165
	A. THE CHANGING JUDICIAL TREND	165
	B. THE DIFFERENT POSSIBLE INTERPRETATIONS	165
	C. THE SUGGESTED APPROACH.....	167
III.	THE INTERPRETATION OF ARTICLE 39(B)	167
	A. THE PRELUDE – ARTICLE 31C	167
	B. THE QUESTION UNDER CONSIDERATION	169
IV.	CONCLUSION	173

I. INTRODUCTION

When Article 39(b) refers to material resources of the community, it does not refer only to resources owned by the community as a whole but also to resources owned by individual members of the community. Resources of the community do not only mean public resources, but include private resources as well.¹

The content of the "socialist" philosophy which is said to permeate our Constitution has consistently evoked great debate. Much of this debate has had to do with the interpretation of Part IV of the Constitution of India, and its

* 4th Year, B. A. LL. B. (Hons.), National Law School of India University, Bangalore.

¹ Per Chinappa Reddy J., Sanjeev Coke Manufacturing Co. v. Bharat Coking Limited, A. I. R. 1983 S. C. 239 [S. C.] [hereinafter "Sanjeev Coke"].

interrelationship with Part III. Part IV of the Constitution deals with the Directive Principles of State Policy. These principles, designed to usher in economic and social equality, are in the form of directions to the legislatures and the executive as to the manner in which they should exercise their powers.² The “socialist” tinge in constitutional interpretation has always been sought to be supported by the Directive Principles, particularly by Article 39(b). Recent judicial pronouncements, however, seem to have taken a re-look at this interpretative philosophy. In this paper, I seek to look at the Directive Principle enshrined in Article 39(b) of the Constitution and analyse that Article in light of the Fundamental Rights enshrined in the Constitution. I shall demonstrate that the traditional understanding of the Supreme Court of India in its analysis of the scope of Article 39(b) in relation to Article 31C in particular, and Part III of the Constitution in general (exemplified through the decision in *Sanjeev Coke*) is mistaken.

In essence, *Sanjeev Coke* decided that the nationalization of private property was included under Article 39(b), so as to protect (through Article 31C) any nationalization law from a fundamental rights challenge. The interpretation placed by the Court in *Sanjeev Coke* is currently being reviewed by a larger bench of the Court.³ In my submission, the newer approach of the judiciary is more in consonance with the Constitution than the approach adopted in *Sanjeev Coke*; and the decision to reconsider *Sanjeev Coke* must be applauded. The correct interpretation of Article 39(b) should not lead to the application of the Article to the nationalization of private property, or to the collection of assets/resources by the State. Instead, it must apply to the stage of distribution of assets, as *distinct from the stage of collection of assets*.⁴

I shall begin by briefly outlining the general relationship between Part III and Part IV of the Constitution. Next, I shall look into the traditional interpretation placed by the judiciary on Article 39(b) taking into account Article 31C of the Constitution, as well as the other provisions of Part III. Finally, I shall proceed to demonstrate why the approach of the judiciary in *Sanjeev Coke* has been mistaken. I shall conclude by laying out what I believe the correct interpretation of Article 39(b) to be.

² VII CONST. ASSEMB. DEB. 493-494, M. P. JAIN, INDIAN CONSTITUTIONAL LAW 1363 (2003) [Hereinafter “JAIN”].

³ Property Owners’ Association v. State of Maharashtra, A. I. R. 2001 S. C. 1668 [S. C.] [hereinafter “Property Owners’ Association”].

⁴ Article 39 reads:

39 –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...

II. THE INTERRELATIONSHIP BETWEEN PARTS III AND IV

*The Fundamental Rights and Directive Principles constitute the conscience of the Constitution... There is no antithesis between the Fundamental Rights and Directive Principles... and one supplements the other.*⁵

A. The Changing Judicial Trend

Part III of the Constitution deals with Fundamental Rights, whereas Part IV deals with the Directive Principles of State Policy. The question of the interrelationship between the two has been one of some difficulty, and the judicial attitude towards the issue has undergone a change over time.⁶ In *Champakam Dorairajan*,⁷ the Supreme Court stated that in case of a conflict between the two, the Fundamental Rights would prevail over the Directive Principles. This view was based on the fact that the former, unlike the latter, were enforceable. In *Kerala Education*,⁸ Das C.J. held that the Directive Principles on free and compulsory education could not be implemented at the expense of the rights of minorities. Thus, support can be drawn from this case for an argument advocating the supremacy of Fundamental Rights over the Directive Principles.⁹ Nevertheless, Das C.J. stated that the Directive Principles could not be ignored entirely, and should be reconciled with the Fundamental Rights by adopting a harmonious construction.¹⁰ In *Kesavananda*,¹¹ it was stated by a number of Judges that Part III and Part IV were supplementary to each other. Thus, it will be noticed that the judicial tendency has been to adopt an integrated reading of the two Parts. The “*harmony and balance between Fundamental Rights and Directive Principles*” has been stated to be a part of the basic structure of the Constitution.¹²

B. The Different Possible Interpretations

It has been argued by Mr. Seervai that the Supreme Court’s attitude is one of shirking its responsibility to deal with the problem. While it is acceptable to assert that the two Parts must be harmoniously constructed, such an approach

⁵ Per Hegde and Mukherjea JJ., *Kesavananda Bharati v. State of Kerala*, A. I. R. 1973 S. C. 1461, 1641 [S. C.] [hereinafter “*Kesavananda*”].

⁶ JAIN, *supra* note 2, at 1367.

⁷ *State of Madras v. Champakam Dorairajan*, A. I. R. 1951 S. C. 226 [S. C.].

⁸ *In re the Kerala Education Bill*, A. I. R. 1958 S. C. 956 [S. C.] [hereinafter “*Kerala Education*”].

⁹ H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 1948 (1993) [hereinafter “SEERVAI”].

¹⁰ *Kerala Education*, A. I. R. 1958 S. C. 956, 966 [S. C.]. See, *State of Kerala v. N. M. Thomas*, A. I. R. 1976 S. C. 490 [S. C.].

¹¹ *Kesavananda* at 1641.

¹² Per Chandrachud C. J., *Minerva Mills v. Union of India*, A. I. R. 1980 S. C. 1789 [S. C.] [hereinafter “*Minerva Mills*”]. See, AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 498-507 (1999).

does not solve the interpretational dilemma that arises when such a harmonious construction is not possible.¹³ *Kerala Education* does demonstrate that such a conflict is possible. Mr. Seervai maintains that a law violating Fundamental Rights cannot be said to be valid and can be declared invalid; however a law violating the Directive Principles cannot be declared to be invalid. Therefore, it must be held in law that the Fundamental Rights are in a superior position to the Directive Principles.¹⁴ He further submits that the argument that Fundamental Rights are the means to achieve the ends of the Directive Principles is wrong; that Fundamental Rights are ends in themselves.¹⁵

Mr. Seervai's argument, which represents one end of the spectrum, may possibly be countered by Mr. Sudarshan's argument that while Article 37 states that the Directive Principles are not "enforceable", they remain "justiciable". There is a distinction between "enforceability" and "justiciability". The former refers to an *execution* of a law, while the latter refers to a *declaration*. Therefore, notwithstanding the unenforceability of the Directive Principles, the Courts should be able to issue declaratory judgments based on them. In other words, the Courts can – notwithstanding Article 37 – *declare* invalid any law which violates a Directive Principle.¹⁶ This, then, would be the other end of the spectrum.

This latter position of Mr. Sudarshan appears unsound. It seeks to create an illusory distinction as Directive Principles cannot be treated as *justiciable* without implying that there is some concrete enforceable right involved.¹⁷ In other words, justiciability implies enforceability since a declaratory act striking down a law for the violation of Directive Principles would carry with it the implication that these Principles are enforceable entitlements which must be protected. Further, although support for Mr. Sudarshan's view may possibly be found in B.N. Rau's Draft of the Constitution,¹⁸ the Constituent Assembly Debates seem to support Mr. Seervai's position.¹⁹ The Courts, however, have stuck to a middle path,²⁰ by seeking to interpret Fundamental Rights in light of the Directive Principles.

¹³ SEERVAI, *supra* note 9, at 1954-1955.

¹⁴ SEERVAI, *supra* note 9, at 1965.

¹⁵ SEERVAI, *supra* note 9, at 1977.

¹⁶ See, Aditya Sudarshan, *Constitutional Perspectives on Good Governance*, 17 STUDENT B. REV. 15, 28-30 (2005).

¹⁷ D. D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 112 (1994) [hereinafter "BASU"].

¹⁸ See, SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 7 (1968).

¹⁹ SEERVAI, *supra* note 9, at 1926. For Dr. Ambedkar's speech in the Constituent Assembly, see VII CONST. ASSEMB. DEB. 41 (recognizing expressly that if the Directive Principles were breached, no remedy was available in the court of law. The remedy was "... before the electorate at election time").

²⁰ BASU, *supra* note 17, at 110-113, Waman Rao v. Union of India, (1981) 2 S. C. C. 362 [S. C.]. See, *Minerva Mills*. See also, Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107 (2000) [hereinafter "ESSAYS"].

C. The Suggested Approach

It is submitted that in light of the specific discussion in the Constituent Assembly Debates, it would not be correct to draw any distinction between "enforceable" and "justiciable". Further, the Supreme Court's approach of harmonious construction – though preferable – may not be capable of application in cases where there is direct conflict between Parts III and IV. In such cases, preference must be given in courts of law to the enforceable rights of Part III.²¹ At the same time, the Directive Principles may be used to determine the scope of Fundamental Rights, or the reasonableness of the restrictions on those rights. For example, the Directive Principles may be used to test the reasonableness of restrictions under Article 19, or may be used as a test to determine the validity of a particular classification for the purposes of Article 14. However, considering that Fundamental Rights are also ends in themselves, fulfilling Directive Principles at the cost of Fundamental Rights is problematic.

III. THE INTERPRETATION OF ARTICLE 39(B)

*The key word is 'distributed' and the genius of the Article, if we may say so, cannot but be given full play as it fulfils the basic purpose of re-structuring the economic order. Each word in the Article has a strategic role and the whole Article is a social mission. It embraces the material resources of the community. Its task is to distribute such resources. Its goal is so to undertake distribution as best to subserve the common good. It re-organizes by such distribution ownership and control.*²²

A. The Prelude – Article 31C

In looking at the interpretation of Article 39(b), Article 31C must be considered. It must be borne in mind that under Article 31C of the Constitution, no law giving effect to Directive Principles, specified in, *inter alia*, Article 39(b), can be deemed to be unconstitutional on the ground that it is inconsistent with, takes away, or abridges any of the rights conferred by Article 14 or Article 19. Thus, once a law is held to be giving effect to Article 39(b), that law is immune from challenge on the grounds of it violating Article 14 and/or Article 19. It is, however, open to judicial review insofar as the question is that of whether it really gives effect to Article 39(b).²³ In other words, Article 31C does not bar judicial review as

²¹ But see M. P. DUBE, ROLE OF THE SUPREME COURT IN THE INDIAN CONSTITUTION 165 (1987).

²² Per Krishna Iyer J., State of Karnataka v. Ranganatha Reddy, A. I. R. 1978 S. C. 215 [hereinafter "Ranganatha Reddy"].

²³ Kesavananda Bharati v. State of Kerala, A. I. R. 1973 S. C. 1461 [S. C.].

to the nexus between the impugned law and Article 39(b).²⁴ The connection between the law and the Directive Principle it purports to give effect to must be a real and substantial one.²⁵

The original Article 31C, as introduced by the Constitution (Twenty-Fifth Amendment) Act, 1971 consisted of two limbs. The *first* limb stated that a law giving effect to a policy securing the principles in Articles 39(b) and (c) could not be struck down as incompatible with Articles 14 or 19. The *second* limb sought to oust the jurisdiction of the courts in determining whether the law in reality gave effect to the principles in Articles 39(b) and (c). A declaration by the law would be sufficient to oust the jurisdiction of the courts. In *Kesavananda*, Sikri C.J., Shelat, Hegde, Grover and Mukherjea JJ. held the entire Article 31C invalid. Ray, Palekar, Mathew, Beg, Dwiwedi and Chandrachud JJ. upheld Article 31C in its entirety. Reddy J. upheld the first limb after deleting certain parts from it, and held the second limb as invalid. Khanna J. held the entire first limb valid and the entire second limb invalid.²⁶ Thus, in effect, *Kesavananda* held by different majorities (a) the first limb to be valid and (b) the second limb to be invalid. By the Constitution (Forty-Second Amendment) Act, 1976, the scope of Article 31C was extended so as to give primacy to all Directive Principles (instead of only Article 39) over Article 14 and 19. This was held to be invalid in *Minerva Mills*.²⁷ In *Sanjeev Coke*, the decision in *Minerva Mills* was scrutinized, and doubted in *obiter* observations.²⁸ The Court now said that the validity of Article 31C had been conclusively decided in *Kesavananda*. The Court recognized that the scope of protection afforded under Article 31C had been extended in 1976. However, it saw no reason why the reasoning in *Kesavananda* could not be applied to the extended Article 31C.²⁹

Thus it will be seen that the interpretation of Article 39(b) has an important bearing, considering that, at the very least, under Article 31C, the nexus of the law with the said Directive Principle is open to judicial review.³⁰

²⁴ Assam Sillimanite v. Union of India, A. I. R. 1992 S. C. 938 [S. C.].

²⁵ State of Maharashtra v. Basantibai, A. I. R. 1986 S. C. 1466 [S. C.].

²⁶ Kesavananda Bharati v. State of Kerala, A. I. R. 1973 S. C. 1461 [S. C.], David Gwynn Morgan, *The Indian "Essential Features" Case*, 30(2) INT'L. & COMP. L. Q. 307 (1981), AK Ganguli, *Right to Property: Its Evolution and Constitutional Development in India*, 48 JILI 489 (2006). See, VN SHUKLA, CONSTITUTION OF INDIA 270-272 (2001). See also, UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (1985).

²⁷ *Minerva Mills v. Union of India*, A. I. R. 1980 S. C. 1789 [S. C.].

²⁸ *Per* Chinappa Reddy J.

²⁹ See, SEERVAI, *supra* note 9, at 2006-2008.

³⁰ K. R. Lakshmana v. State of Tamil Nadu, A. I. R. 1996 S. C. 1153 [S. C.].

B. The Question under Consideration

Turning now to the main question of the interpretation of Article 39(b), it will be useful to set out at the beginning the wording of the Article itself.

39 – *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...

1. The Material Resources of the Community

Insofar as the term “material resources” is concerned, it is wide enough to cover not just natural resources, but also movable and immovable properties as such.³¹ There is no great controversy thus far. The trouble arises with the question of whether the material resources of *individual members* of the community are also included in the phraseology of the Article. An argument often raised before the courts has been that the material resources of the community means property vested in the community, i.e. the State. Thus, it does not include private property. As such, the material resources of *individual members* of the community are not included in the material resources of the community. The majority of a seven-judge bench of the Supreme Court in *Ranganatha Reddy* felt it necessary to assess the validity of the Karnataka Contract Carriages (Acquisition) Act, 1976, with reference to Articles 14 and 19.³² The Act was held valid in light of its compatibility with Articles 14 and 19. It was felt necessary to assess the validity of the acquisition Act against the touchstone of Articles 14 and 19, *without* using Article 31C read with Article 39(b) as a shield.

2. Krishna Iyer J.’s Opinion and Sanjeev Coke

In his concurring judgment in *Ranganatha Reddy*, Krishna Iyer J. stated (in *obiter*) that the phraseology used in Article 39(b) includes private property. This view is based on the idea that the key word in Article 39(b) is “distribute”, and that distribution includes nationalization. Now, if nationalization is allowed under Article 39(b), clearly, the subject-matter of the distribution must include private property. This view has been accepted in *Sanjeev Coke* in the judgment delivered by Chinappa Reddy J. However, no basis for this approach can be seen in either Krishna Iyer J.’s judgment or in *Sanjeev Coke*. In the second *Minerva Mills* case too (this was decided after *Sanjeev Coke*), Krishna

³¹ State of Tamil Nadu v. Abu Kavur Bai, A. I. R. 1984 S. C. 326 [S. C.][hereinafter “*Kavur Bai*”].

³² *Per* Untwalia J.

Iyer J.'s approach has been followed.³³ The Court in that case refused to adjudicate upon the question of whether the Sick Textiles Undertakings (Nationalization) Act, 1974 violated Articles 14 and 19. Co-incidentally, the two-judge bench in this case included Chinappa Reddy J. This approach has been strengthened further in *Kavur Bai* where the Tamil Nadu State Carriages and Contract Carriages (Acquisition) Act, 1971 was held valid under Article 39(b). However, a Constitution Bench of the Supreme Court in *Property Owners Association* has opined, while dealing with provisions regarding acquisition in the Maharashtra Housing and Area Development Act, 1976 that the views in *Sanjeev Coke* require reconsideration by a larger bench. Thus, judicial opinion on the issue is divided.

3. The Correct Legal Position

The other approach, distinct from that of Krishna Iyer J., would be to say that “material resources of the community” would mean those resources which vest in the community, i.e. the State, and distribution, therefore, cannot include nationalization. The State may nationalize as part of a reasonable restriction on the right to property, and this must be in accordance with the Fundamental Rights. The protection of Article 39(b) read with Article 31C cannot protect nationalization. Article 39(b) only kicks in *after* the nationalization is over; with respect to the distribution of proceeds of the government. In other words, taking the example of taxation, the Article 31C protection applies not to the collection of taxes, but to the distribution of the proceeds *after* collection.

In Krishna Iyer J.'s view, even the *collection* of assets would be included under “distribution”. In a hypothetical case, then, a tax law would not be subject to challenges under Articles 14 or 19. Even if a tax were prohibitory, it would not be subject to a challenge on the grounds of Article 19. If it was entirely discriminatory and arbitrary, it would not be susceptible to an Article 14 challenge. Clearly, this is an absurd result and out of touch with constitutional realities. A number of cases have struck down laws levying taxes on the grounds of violations of Articles 14 and 19.³⁴ For example, the Supreme Court, in *Indian Express*, held that the impugned tax on newspapers was in the common good. However, it was *necessary to reconcile the social interest with the fundamental freedoms*. Clearly, then, a taxing statute may be in the common good – yet it will be subjected to the scrutiny of the Fundamental Rights.³⁵ If Krishna Iyer J.'s statement of law,

which was relied upon in *Sanjeev Coke*, is correct, this would have been entirely impossible. *Sanjeev Coke* ignores this aspect entirely. It does not show – nor does it make any attempt to show – how the acquisition of property is fundamentally distinct from the collection of taxes. If tax laws can be subjected to the tests of Articles 14 and/or 19, the collection of assets by measures other than taxation must also be so subjected. In that event, distribution under Article 39(b) cannot refer to the collection of assets, whatever the measure of such collection. A collection of assets has a much more direct impact on the Fundamental Rights than the distribution *after* the collection. Any *collection of assets by whatsoever measure* which involves a violation of Articles 14 and/or 19 *cannot*, in reality, subserve the common good (although the fruit of such collection might subserve the common good) and, therefore, cannot come within the ambit of Article 39(b). This approach also appears to be in accordance with the meaning of the verb “to distribute” – “to distribute” means “to give out”, and not, “to collect”.

The correct legal position, then, is that “distribution” refers only to the distribution, *as distinct from* the collection, of assets. Therefore, in the case of the collection of assets from a private party, Articles 14 and 19 must be complied with. The bar of Article 31C read with Article 39(b) comes into operation only in deciding *what to do with the collected assets*. In such a case, *material resources of the community* in Article 39(b) can only mean those resources which are already vested in the State. In cases of resources vested with private parties, the State must first acquire them *without* relying on Article 39(b).

Additionally, in *Sanjeev Coke*, it was contended by the Petitioner (Respondent in the Supreme Court) that Article 31C basically *codified the existing constitutional scheme* developed by the judiciary. The existing constitutional scheme, allowing for classification under Article 14, and for reasonable restrictions under Article 19, itself meant that an Act genuinely giving effect to Articles 39(b) and (c) would necessarily be compatible, and in consonance with, Articles 14 and 19. If the Act was not in consonance with Article 14 or 19, it *could not* be said to be giving effect to Articles 39(b) and (c). In support of this argument, reliance was placed on *Minerva Mills*. The Court stated that accepting the argument would mean that Article 31C was devoid of any new meaning, and, therefore, the said argument could not be accepted. The point, however, is that the Petitioner was contending that Article 31C did *not* have any new meaning, but codified the existing judicial practice. Therefore, the Court's answer that the interpretation which allowed for no new meaning cannot be preferred fails to deal with the Petitioner's contention substantively. To answer that question, the Court should have looked into whether Article 31C did have any new meaning – instead it proceeded on the assumption that it did. In effect, the argument was rejected by

³³ *Minerva Mills v. Union of India*, A. I. R. 1986 S. C. 2030 [S. C.].

³⁴ *K. T. Moopil Nair v. State of Kerala*, A. I. R. 1961 S. C. 552 [S. C.], *State of Andhra Pradesh v. Raja Reddy*, A. I. R. 1967 S. C. 1458 [S. C.], *Indian Express Newspapers v. Union of India*, A. I. R. 1986 S. C. 515 [S. C.] [hereinafter “*Indian Express*”].

³⁵ *Soli Sorabjee, Constitution, Courts, and Freedom of the Press and the Media*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 334 (2000), at 341.

assuming it to be false. Clearly, courts cannot, and in any event should not, reject substantive arguments by unfoundedly *assuming* them to be devoid of merit. To reject the argument, it was necessary to go into the Statement of Objects and Reasons of the Twenty-Fifth Amendment. Had the Court done that, it would have found that the new element in Article 31C was that of the second limb - which was struck down in *Kesavananda*. Therefore, after *Kesavananda*, Article 31C was nothing more than a codification of judicial practice.³⁶ Therefore, the argument of the Petitioner clearly possessed at least some merit, and should not have been dismissed in the casual way in which it was. It seems incomprehensible that the right to equality or the right to freedom is required to be violated to implement a Directive Principle. It seems hard to believe that a law blatantly violating the basic Fundamental Rights can ever be in the common good – indeed, common good would require that the balance between the Fundamental Rights and the Directive Principles be maintained, and that the latter not be privileged by the Courts.³⁷ This proposition draws even greater support from the fact that the Supreme Court itself has consistently held that the balance between Parts III and IV is a basic feature of the Constitution.

The drafting history of Article 39(b) also supports the conclusion that it was not meant to apply to private property. Article 39(b) was incorporated into the Draft Constitution as Draft Article 31(ii). It read exactly as the present Article 39(b) does. An amendment was moved in the Constituent Assembly by Prof. K.T. Shah, wishing to qualify “material resources of the community” with words making it clear that the phrase does not encompass private property.³⁸ Prof. Shah’s amendment was objected to by Dr. Ambedkar as unnecessary because the language of the Draft Article *in any case included the propositions* of Prof. Shah. The basis on which the amendment (which clarified that the Article did not apply to private property) was rejected was that *it made no change to the position under the Draft Article*.³⁹ Thus, clearly, the intention of the framers was to not include private property within the ambit of Article 39(b).

One argument against the view taken above would be to say that the phraseology in question is open to ambiguity. That ambiguity must be resolved

³⁶ See, SUBHASH KASHYAP, CONSTITUTION MAKING SINCE 1950 77 (2004).

³⁷ Michael Henderson, *Setting India’s Democratic House in Order: Constitutional Amendments*, 19(10) ASIAN SURVEY 946, 954 (1979) (citing Soli Sorabjee and Nani Palkhivala in support of this proposition).

³⁸ VII CONST. ASSEMB. DEB. 506 (stating that the Amendment proposed adding the words “natural resources of the country” and “in the shape of forests, rivers and flowing waters...” to clarify that private property was not included in the scope of the Article).

³⁹ VII CONST. ASSEMB. DEB. 518-519.

by reference to the Preamble, which mentions the words “socialist” and “social justice”. In this light, it is necessary to include private property under the terminology of Article 31C. However, it must be noted that *first*, the above discussion shows that the wording is not really ambiguous. *Secondly*, in the context of India, socialism must be understood in the context of a mixed economy which is presently rapidly moving towards privatization. Further, excluding private property from Article 39(b) does not harm the interests of “socialism”. Socialism, in the Indian context, is not doctrinaire socialism, and cannot be understood as being against the idea of private property.⁴⁰ Also, the concept of socialism must be balanced with the Fundamental Rights. The approach suggested in this paper provides the best means of doing so, and will also further the cause of a harmonious construction of the Directive Principles and the Fundamental Rights.

IV. CONCLUSION

In this paper, I have looked at the interrelationship between the Fundamental Rights and the Directive Principles of State Policy. In my submission, the approach of the Supreme Court in *Kesavananda* and *Minerva Mills*, of balancing and harmonizing the two is the most appropriate one. I have then looked into Article 31C, read with Article 39(b), of the Constitution. Particular focus has been given to the wording of the “material resources of the community” and “distribute”. It is submitted that the decision in *Sanjeev Coke*, that ‘material resources of the community’ includes private property, and that “distribute” includes acquisition/ collection of assets is, in its entirety, incorrect. The reasoning in *Sanjeev Coke* can easily be extended to other areas besides nationalization, particularly taxation. Are we to suppose that tax laws are immune from Articles 14 and 19? The approach of the Supreme Court shows clearly that this is not so. If tax laws are susceptible to challenges under Articles 14 and 19 (and it is most proper that this be so), there is no reason why acquisition or nationalization laws should not be so susceptible. The intention of the framers in enacting Article 39(b) has been demonstrated as not including private property within the “material resources of the community”. The approach of balancing the Fundamental Rights and the Directive Principles must be preferred. Article 39(b) must then be read in light of Articles 14 and 19. In any event, even assuming that there is a disjoint between the two, and that Article 31C as it exists now is more than a codification of already existing judicial practice, the approach of balancing and harmonizing Parts III and Part IV would require that “distribute” in Article 31C be read narrowly.

In this light, it is submitted that the decision in *Sanjeev Coke* flowing from the concurring opinion in *Ranganatha Reddy* is clearly wrong and must be

⁴⁰ Per Khanna J., *Kesavananda Bharati v. State of Kerala*, A. I. R. 1973 S. C. 1461, 1492-6.

overruled. The correct position, for the reasons discussed above, is that which was taken by Untwalia J. for the majority in *Ranganatha Reddy* – that of testing the validity of acquisition laws against the touchstone of Articles 14 and 19. The interrelationship between the Fundamental Rights and the Directive Principles is a complex one. A law *purportedly* in the common good may be presumed to be a valid restriction/classification. If, however, this presumption can be defeated (perhaps because of excessive discrimination), then it cannot be said to *actually* be in the common good. In other words, a law, the fruits of which are to be used for the common good, for fulfilling the purposes of Article 39(b) (for example, taxation or acquisition laws) may be strongly presumed to be creating a valid classification/restriction. If, however, this presumption (perhaps stronger than the usual presumption of constitutionality, as is common in fiscal and economic statutes) is rebutted, the law is not really in furtherance of the common good (even though its fruits are to be used for the common good).

To conclude, it may be stated that what is protected under Article 39(b), read with Article 31C, is the *allocation* of the fruits, i.e. the resources already vested in the State. In *gathering* those fruits, the State must respect all Fundamental Rights (and in this it will be aided by the presumption of constitutionality) including those enshrined in Articles 14 and 19.

With respect, therefore, it is submitted that the recent approach of the judiciary, calling in question the interpretation placed in *Sanjeev Coke*, is far from reproachable and deserves to be commended. It is submitted, with respect, that the decision in *Sanjeev Coke* be reconsidered in this light.

PRESIDENTIAL REFERENCES AND THEIR PRECEDENTIAL VALUE: A CONSTITUTIONAL ANALYSIS

Deepaloke Chatterjee*

This article discusses the precedential value of presidential references to the Supreme Court. The author analyses the history of presidential references in India, jurisprudence of the Supreme Court on this point, the practice in other jurisdictions and important constitutional law concepts which influence the binding nature of these references, such as the doctrine of stare decisis and the system of constitutional democracy prevalent in India. He then examines the arguments for and against treating presidential references as precedent and finally concludes by stating that while the advisory jurisdiction of the Supreme Court is significant, it is not to be considered as binding law.

I.	INTRODUCTION	175
II.	THE CONFLICT WITHIN	176
III.	THE PRACTICE OF THE SUPREME COURT	178
IV.	A QUESTION OF INTERPRETATION	181
V.	IN CONCLUSION	185

I. INTRODUCTION

Articles 141¹ and 143(1)² of the Constitution of India provide for the doctrine of precedent and for the presidential power to refer cases to the Supreme Court, respectively.³ The interface between the advisory opinions, provided for by Article 143(1) of the Constitution of India, and the doctrine of *stare decisis*, has always been a problematic area of Indian constitutional jurisprudence. While the significance of Article 141 is beyond doubt, its importance with respect to reference cases

* 4th Year student at the West Bengal National University of Juridical Sciences, Kolkata. The author would like to acknowledge the encouragement and assistance that he has received from Mr. Shiju M. V., Ms. Vaneesha Jain and Mr. Arunaloke Chatterjee.

¹ Article 141 of the Constitution of India states as follows: "The law declared by the Supreme Court shall be binding on all courts within the territory of India."

² Article 143(1) of the Constitution of India states as follows: "If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that court for consideration and the court may, after such hearing as it thinks fit, report to the President its opinion thereon."

³ Order XXXVII of the Supreme Court Rules provides the procedure for the consideration of a Special Reference under Article 143 by the Supreme Court.