2024 INSC 835

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

Civil Appeal No. 1012 of 2002

Property Owners Association & Ors. …Appellants

Versus

State of Maharashtra & Ors. …Respondents

With
SLP(C) No. 5777 of 1992
With
SLP(C) No. 5204 of 1992
With
SLP(C) No. 8797 of 1992
With
SLP(C) No. 7950 of 1992
With
SLP(C) No. 4367 of 1992
With
W.P.(C) No. 934 of 1992
With
SLP(C) Nos. 6191-6192 of 1992
With
SLP(C) No. 6744 of 1993
With
SLP(C) No. 2303 of 1995
With
SLP(C) No. 13467 of 1995

With
W.P.(C) No. 660 of 1998
With
W.P.(C) No. 342 of 1999
With
W.P.(C) No. 469 of 2000
With
W.P.(C) No. 672 of 2000
And With
W.P.(C) No. 66 of 2024

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

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1. The reference to this Constitution Bench raises significant questions about Articles 39(b) and 31-C of the Constitution. Answering the reference has been an adventure through the intricacies of constitutional interpretation and the annals of constitutional history. However, an interpretation of these provisions must involve an understanding of not only their historical context but also the social and economic values which guide the present and are likely to guide the future. Directive Principles of State Policy[1] such as Article 39(b) and safe harbour provisions such as Article 31-C are unique creations of our Constitution. Understanding them is a delicate task that involves balancing competing yet coexistent values embedded in our Constitution – the recognition of the individual rights of all citizens and an aspiration towards a welfare state which secures socio-economic justice.

2. Before proceeding, it would be appropriate to briefly refer to the provisions of the Constitution which form the heart of the reference and controversy before this Court. Article 39(b), a part of the Directive Principles contained in Chapter IV of the Constitution, reads as follows:

> **"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;"

[1] "Directive Principles"

3. Article 31C of the Constitution provides certain legislations a safe harbour and protects them from being challenged under Articles 14 and 19. The only requirement is that the legislation must give effect to "the principles specified in clause (b) or clause (c) of Article 39". In a sense, Article 31C is the ying to the yang of Article 39(b), which gives it a unique colour and texture and provides it with far-reaching consequences. Once it is established that a particular legislation has a nexus with the principles specified in Article 39(b), Article 31C provides the legislation with a lifeboat – protecting it from a challenge to its constitutionality under Articles 14 and 19 of the Constitution.

4. With this broad context in mind, we first delve into the journey of the reference to this Constitution Bench and define the scope of this judgement.

A. Background

i. Genesis of the Reference

5. Mumbai is the most populous city in India and one of the most densely populated cities in the world. A persistent problem faced by its residents has been the large number of old, dilapidated buildings which continue to be inhabited despite becoming unsafe due to lack of repairs and reconstruction. It is estimated that over sixteen thousand buildings in the city were constructed before 1940.[2] The antiquity of the buildings in the island city is compounded by the geographical location of the city. Situated on the western coastline, the

[2] Maharashtra Housing and Area Development Authority, Number of Cessed Buildings, https://www.mhada.gov.in/en/content/m-b-r-r-board-history.

saline air of the city contributes to the reduction in the lifespan of its structures. The monsoon rains create pressing challenges for the safety of human settlements and residential buildings. Every year before the monsoon, the Mumbai Building Repair and Reconstruction Board issues a list of dangerous buildings deemed unfit for human habitation. It issues eviction notices to the people living in such buildings and asks occupants to vacate the buildings to avert untoward incidents. Yet, despite these efforts, the city still grapples with the recurring tragedy of building collapses, resulting in loss of life and property, a reminder of the ongoing struggle to ensure safe and secure housing for its residents.[3]

6. The erstwhile Bombay was originally a group of seven islands. These islands were merged by a series of land reclamation projects to create the present-day 'Island City of Bombay'. By the beginning of the twentieth century, the island city emerged as a major textile centre. With the growth of the textile industry, there was a significant inflow of workmen from outside of the city. This necessitated the construction of additional residential buildings to house the workmen and their families. The colonial government leased properties for this purpose and a large number of buildings were constructed. During World War II, the scarcity of housing accommodation became even more acute and there

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[3] *See* Hindustan Times, 1 dead, four hurt as portion of nearly 100-year-old building collapses in Grant Road, 21 July 2024, https://www.hindustantimes.com/cities/mumbai-news/1-dead-four-hurt-as-portion-of-nearly-100-year-old-building-collapses-in-grant-road-101721503683871.html; Indian Express, Dongri building collapse: In 37 years, 894 people died in accidents involving MHADA, 17 July 2019, https://indianexpress.com/article/cities/mumbai/dongri-building-collapse-in-37-years-894-people-died-in-accidents-involving-mhada-buildings-5832965/; Indian Express, Mumbai building collapse: Bhendi Bazaar accident leaves 24 dead, CM Devendra Fadnavis assures strict action, 31 August 2017, https://indianexpress.com/article/cities/mumbai/mumbai-building-collapse-bhendi-bazaar-accident-death-toll-rises-to-22-4822665/

was an unprecedented increase in the rents. To mitigate this, Rent Control legislations were introduced.

7. The use of the buildings by more people than they could accommodate resulted in a steady deterioration of the structures and the dilapidation of the buildings over a period of time. Therefore, the Bombay Housing Board Act 1948 was enacted which provided for the setting up of a Housing Board of Bombay to execute housing schemes and construct new residential buildings in the island city. Although the enactment helped increase the housing stock, it could not address the issue of existing buildings, which were collapsing from time to time, resulting in loss of life and property. To address the alarming rate of collapses, which were resulting in the loss of life and property, and exacerbating the existing housing shortage, urgent measures were needed, particularly in light of the rapid population growth of the city due to influx from various parts of the country. The Bombay Repairs and Reconstruction Board Act 1969 was introduced. Under this enactment, the Bombay Building Repairs and Reconstruction Board was set up and a cess was introduced to generate funds for the repair and reconstruction of dangerous buildings. A part of the cess was borne by the owners, while the remaining part was borne by the tenants. However, despite these efforts, due to the unprecedented scale of the problem and lack of financial resources, the problem persisted.

8. Accordingly, the state legislature of Maharashtra enacted the Maharashtra Housing and Area Development Act 1976,[4] which received the assent of the President on 25 April 1977. The long title stipulates that it is an Act to "unify, consolidate and amend the laws relating to housing, repairing and reconstructing dangerous buildings and carrying out improvement works in slum areas." Pre-existing laws such as the Bombay Housing Board Act 1948, the Madhya Pradesh Housing Board Act 1950, the Bombay Building Repairs and Reconstruction Board Act 1969 and the Maharashtra Slum Improvement Board Act 1973 were repealed on the enactment of the MHADA Act.[5]

9. Chapter VIII of the MHADA Act provides for the repairs and reconstruction of dilapidated buildings in 'Brihan Mumbai' or the erstwhile 'Greater Bombay'[6]. A cess is levied on the owners which is utilised by the Mumbai Building Repair and Reconstruction Board to carry out repairs and reconstruction of such buildings. For this purpose, the buildings in Brihan Mumbai are divided into three categories. Category A consists of buildings erected before 1 September 1940, Category B consists of buildings erected between 1 September 1940 and 31 December 1950 and Category C consists of buildings erected between 1 January 1951 and 30 September 1969.[7]

10. On 26 February 1986, the Governor of Maharashtra introduced an Ordinance to amend the MHADA Act.[8] Subsequently, an amending Act came into force,

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[4] "MHADA Act"
[5] Section 188, MHADA Act.
[6] Section 1(2), MHADA Act.
[7] Section 84, MHADA Act.
[8] Maharashtra Housing and Area Development (Amendment) Ordinance, 1986

which inserted Chapter VIII-A of the MHADA Act.[9] The chapter deals with the 'acquisition of cessed properties for co-operative societies of occupiers', and its provisions apply to the buildings in Category A, i.e. cessed buildings erected before 1 September 1940 in Brihan Mumbai.[10] The provisions of the Chapter envisage the acquisition of such properties by the state and their transfer to a cooperative society on payment of a hundred times the monthly rent of the premises if seventy per cent of the occupiers of the building make an application to this effect. [11] Such acquisition may be for the better preservation of the buildings; for carrying out structural repairs or for the reconstruction of a new building. After the land is transferred to the cooperative society, it must be used solely for its original purpose, and there is a restriction on transferring the land or building.[12]

11. The intention behind inserting Chapter VIII-A has been stated by the legislature in the Preamble and the Statement of Objects and Reasons of the Amending Act. It is stated that the provisions were introduced to address the urgent need for repairs and reconstruction of old, dilapidated buildings in urban areas, particularly in 'Greater Bombay'. These buildings pose a significant danger due to their poor condition and risk of collapse. Previous efforts, including levying a cess and establishing an authority for structural repairs, failed to achieve the desired results due to the scale of the problem and insufficient financial

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[9] Maharashtra Housing and Area Development (Second Amendment) Act, 1986 [Mah. XXI of 1986] ("**Amending Act**")
[10] Section 103A, MHADA Act.
[11] Section 103B, MHADA Act.
[12] Section 103C, MHADA Act.

resources. Thus, a new approach was adopted by introducing Chapter VIII-A, involving occupiers in structural repairs or reconstruction by acquiring the old buildings and transferring ownership and control to the occupiers. The aim, according to the legislature, is to protect the occupiers' shelter, prevent building collapses, and promote equitable distribution of ownership and control of tenements to subserve the 'common good'.

12. Significantly, by the same Amending Act, Section 1A was also inserted in the MHADA Act containing the following declaration:

> "**1-A. Declaration.—**It is hereby declared that this Act is for giving effect to the policy of the State towards securing the principle specified in Clause (b) of Article 39 of the Constitution of India and the execution of the proposals, plans or projects therefor and the acquisition therefor of the lands and buildings and transferring the lands, buildings or tenements therein to the needy persons and the co-operative societies of occupiers of such lands or buildings."

13. The appellants instituted proceedings under Article 226 of the Constitution before the High Court of Judicature at Bombay [13] challenging the constitutionality of the provisions of Chapter VIII-A of the MHADA Act. The case of the appellants before the High Court was that the provisions of Chapter VIII-A are violative of Articles 14 and 19 of the Constitution. It was urged that the provisions are arbitrary, deprive property owners of their rights for illusory amounts and the classification of the buildings had no rational nexus to their object. On the other hand, the respondents submitted that the provisions were

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[13] "High Court"

not discriminatory or unreasonable. Further, the respondents argued that the MHADA Act gives effect to the principles laid down in Article 39(b) and in view of the immunity granted by Article 31C, the constitutionality of the Act cannot be challenged under Articles 14 and 19.[14]

14. On 13 December 1991, a Division Bench of the High Court dismissed the writ petitions and upheld the constitutionality of the provisions of Chapter VIII-A of the MHADA Act.[15] Relying on the decision of this Court in **State of Maharashtra v Basantibai Khetan**[16], the High Court held that the provisions of Chapter VIII-A are saved by Article 31C as they were enacted to give effect to the principles laid down in Article 39(b). In **Basantibai Khetan**, this Court held certain other provisions of the MHADA Act to be protected by Article 31C. The High Court held that the same principle applies to Chapter VIII-A as well. Further, the High Court also rejected the challenge to the constitutionality of the provisions on their merits and held that they do not violate Article 14.

15. Aggrieved by the judgement of the High Court, the appellants instituted Special Leave Petitions before this Court. These petitions have culminated in the underlying civil appeals.

ii. The three reference orders

16. The appeals have travelled through three separate reference orders before being placed before this bench of nine judges. The batch of appeals was first

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[14] Property Owners' Association v. State of Maharashtra, 1991 SCC OnLine Bom 521, para 10.
[15] *Ibid*.
[16] (1986) 2 SCC 516; 1986 INSC 40.

placed before a bench of three judges of this Court. By an order dated 1 May 1996,[17] the three-Judge Bench recorded the submission of Mr Fali S Nariman, the learned counsel appearing for the appellants that Article 31C no longer survives in the Constitution after an amendment to the provision was invalidated by this Court in **Minerva Mills v. Union of India**[18]. It was argued that since Article 31C no longer survived, it could not exclude an attack on the constitutional validity of the Act on the grounds of Articles 14 and 19.

17. A brief history of Article 31C and the layers of this contention are discussed in Part C of this judgement. However, at this stage, to understand the scope of the reference, it is sufficient to note that in **Kesavananda Bharati v. State of Kerala**[19], this Court upheld the validity of Article 31C in part. Subsequently, Article 31C was amended by the Constitution (Forty-second Amendment) Act, 1976[20] to expand the protection of Article 31-C to laws framed in furtherance of *any* Directive Principle and not only Articles 39(b) and (c). This amendment to Article 31C by the forty-second amendment was invalidated by this Court in **Minerva Mills** for being violative of the basic structure of the Constitution.

18. Before the bench of three judges, Mr Nariman *inter alia* urged that the doctrine of revival, as it applies to ordinary statutes does not apply to a constitutional amendment. Hence, he urged that when the part of the forty-second amendment which amended Article 31C was invalidated, it did not result in the

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[17] (1996) 4 SCC 49; 1996 INSC 598 ("**three-judge bench order**")
[18] (1980) 3 SCC 625; 1980 INSC 142
[19] (1973) 4 SCC 225; 1973 INSC 91
[20] "Forty-Second Amendment"

automatic revival of the unamended Article 31C. He argued that the decision in **Minerva Mills** proceeded on a concession that Article 31C remained in force and an unexplained assumption that the unamended Article 31-C (to the extent that it was upheld in **Kesavananda Bharati**) stood revived. He argued that the question never arose nor was it decided in the case or subsequently in **Waman Rao v Union of India**[21] or **Sanjeev Coke Manufacturing Co vs. Bharat Coking Coal Ltd.**[22]

19. On the other hand, Mr Ashok Desai appearing for the respondents contended that the matter stood concluded by the decisions in **Minerva Mills**, **Waman Rao** and **Sanjeev Coke**, wherein revival of the unamended Article 31C was undisputed because it was an 'obvious position of law' and had held the field for a long period of time.

20. The three-judge bench of this Court observed since the decisions in **Minerva Mills**, **Waman Rao** and **Sanjeev Coke** were all rendered by a bench of five judges and the assumption that Article 31C remains in force was disputed, it would be appropriate to refer the matter to a larger bench. The reference was made in the following terms:

> "**8.** Having heard learned counsel for some time, we have formed the opinion that it would be more appropriate for a Bench of not less than five Judges to consider and decide these questions for an authoritative pronouncement on the same. The decisions in **Minerva Mills** [(1980) 3 SCC 625], **Waman Rao** [(1980) 3 SCC 587] and **Sanjeev Coke** [(1983) 1 SCC 147] are all by a Bench of five Judges. The question in the form it is raised by Shri F.S.

[21] (1980) 3 SCC 587; 1980 INSC 216
[22] (1983) 1 SCC 147; 1982 INSC 93

> Nariman did not arise for consideration in any of those decisions which were rendered on a certain premise as indicated therein, which assumption is now seriously challenged by Shri F.S. Nariman. **Even if it is assumed that Article 145(3) of the Constitution is not attracted, it does appear to us that in order to settle the controversy on this point which is of some significance and to avoid the question being reagitated before another Bench of less than five Judges, the more appropriate course is to refer these matters for being heard and decided by a Bench of not less than five Judges**."
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> (emphasis supplied)

21. The underlying appeals were then placed before a bench of five judges of this Court. By an Order dated 21 March 2001, [23] the five-judge bench noted the contentions which had been raised before the three-judge bench about the revival of Article 31-C. Further, it was observed that the counsel were heard by the Bench at length on the "various issues" that arose in the case, including the interpretation of Article 39(b). The bench went on to express the need to reconsider the view taken by this Court in **Sanjeev Coke** on the interpretation of Article 39(b), where this Court relied on a concurring opinion authored by Justice Krishna Iyer in **State of Karnataka v. Ranganatha Reddy**[24], on behalf of a minority of judges.

22. Part D of this judgement will explore these decisions and their interpretation of Article 39(b) in further detail. At this stage, to understand the scope of the reference, it is sufficient to note that in **Ranganatha Reddy**, the validity of the

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[23] (2001) 4 SCC 455 ('**five-judge bench order**")
[24] (1977) 4 SCC 471; 1977 INSC 196.

Karnataka Contract Carriages (Acquisition) Act 1976 was under challenge. The majority opinion authored by Justice Untwalia (for himself and three other judges) upheld the constitutionality of the legislation on its merits. However, Justice Krishna Iyer (for himself and two other judges) authored a concurring opinion, where the enactment was upheld on the ground that it had a nexus with Article 39(b), which protected the legislation under Article 31C. The majority opinion expressly noted that it did not consider it necessary to deal with Article 31C or Article 39(b) and must not be construed to agree with the observations of Justice Krishna Iyer. Subsequently, in **Sanjeev Coke**, while upholding the validity of the Coking Coal Mines (Nationalisation) Act 1972, a five-judge Bench of this Court adopted the view taken in the judgement authored by Justice Krishna Iyer, on behalf of the minority in **Ranganatha Reddy**.

23. In this backdrop, the Bench of five judges expressed the view that the interpretation of Article 39(b) in **Sanjeev Coke**, requires reconsideration and referred the cases to a larger bench, in the following terms:

> "6. The interpretation put on Article 39(b) by Krishna Iyer, J. in **Ranganatha Reddy case** [(1977) 4 SCC 471 : (1978) 1 SCR 641] was not specifically assented to in the majority decision but in **Sanjeev Coke** case [(1983) 1 SCC 147 : (1983) 1 SCR 1000] it is the observations in the judgment of Krishna Iyer, J. which have been followed.
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> 7. Having heard the counsel at length, we are of the opinion that the views expressed in **Sanjeev Coke** case [(1983) 1 SCC 147 : (1983) 1 SCR 1000] require reconsideration. **Keeping in view the importance of the point in issue, namely, the interpretation of Article 39(b) it will be**

> **appropriate if these cases are heard by a larger Bench of not less than seven Judges**."
>
> (emphasis supplied)

24. Finally, the batch of cases was placed before a Bench of seven judges of this Court. The learned Solicitor General (at the time) brought the attention of the bench to an observation in the majority opinion in **Mafatlal Industries Ltd vs. Union of India,**[25] a decision by a bench of nine judges of this Court. In the majority opinion in **Mafatlal,** Justice Jeevan Reddy (speaking for himself and four other judges) observed: *"[t]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' is repeatedly affirmed by this Court"* and referred *inter alia* to the decisions of this Court in **Ranganath Reddy** and **Sanjeev Coke** to advance this proposition.

25. In its order dated 19 February 2002, [26] the Bench of seven judges took the view that the interpretation of Article 39(b) requires reconsideration by a larger bench of nine judges. The bench expressed "some difficulty in sharing the broad view" that material resources owned by the community, the phrase employed by Article 39(b), includes privately owned resources. It was directed that the case be listed before a bench of nine judges after the hearing in **IR Coelho vs. State of Tamil Nadu**[27] is concluded**,** as there appeared to be similar issues raised. The reference was made in the following terms:

> "**5.** Having given due consideration, **we are of the opinion that this interpretation of Article 39(b) requires to be reconsidered by a Bench of nine**

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[25] 1997 (5) SCC 536; 1996 INSC 1514.
[26] (2013) 7 SCC 522 ("**seven-judge bench order**")
[27] (1999) 7 SCC 580; 1999 INSC 394.

> **learned Judges: we have some difficulty in sharing the broad view that material resources of the community under Article 39(b) covers what is privately owned**.
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> **6.** Given that there is some similarity in the issues here involved and in I.R. Coelho v. State of T.N. [(1999) 7 SCC 580. Ed. : The nine-judge Bench decision therein is reported as **I.R. Coelho v. State of** T.N., (2007) 2 SCC 1.] which already stands referred to a larger Bench, preferably of nine learned Judges, we are of the view that these matters should be heard by a Bench of nine learned Judges immediately following the hearing in **I.R. Coelho**"
>
> (emphasis supplied)

26. The above seven-Judge Bench order has resulted in the present reference before this bench of nine judges.

iii. Scope of the present reference

27. During the course of the hearing, the learned Solicitor General appearing on behalf of the respondents, submitted that the reference made in the seven-judge bench order only pertains to the interpretation of Article 39(b) and not the survival of Article 31-C. It was urged that, unlike the three-judge bench order, the five-judge bench order and the seven-judge bench order dropped the issue concerning Article 31C and only referred the Article 39(b) question to a larger bench. Therefore, it was urged that this Court restrict the scope of this judgement to the interpretation of Article 39(b) and more specifically, only to the question of whether "material resources of the community" include privately owned resources.

28. On the other hand, the learned counsel for the appellants urged this Court to understand the scope of the reference more expansively. They broadly submitted that this Court may consider five issues and filed detailed submissions on each of these questions. The issues which they raised are: *firstly*, whether the unamended Article 31C survives after the amendment to the provision by the forty-second amendment was struck down in **Minerva Mills**. *Second*, the meaning of Article 39(b) and whether the phrase 'material resources of the community' includes privately owned resources. *Third*, whether the MHADA Act gives effect to the principles laid down in Article 39(b) and is protected by Article 31C. *Fourth,* in view of the decision in **IR Coehlo,** whether a challenge under Articles 14, 19 and 21 can continue to be mounted even if the Act is protected by Article 31C. *Finally*, the appellants have also filed their submissions challenging the constitutionality of specific provisions of Chapter VIII-A of the MHADA Act on other grounds.

29. Eventually, during the course of the hearing, the counsel for the appellants fairly conceded that the last three issues may be argued before a regular bench after the present reference is answered. They urged that this Court, however, must determine the question about whether Article 31C survives in the Constitution as it was a central theme in the reference orders and also has a bearing on the interpretation of Article 39(b). We agree with this understanding.

30. In our considered view, although the seven-judge bench order does not directly refer the question regarding the survival of Article 31C to this bench of nine judges, it must form a part of our analysis for the following reasons:

i. The issue about the survival or revival of Article 31C is intrinsically connected to the question of interpreting Article 39(b). If this Court concludes that Article 31C does not survive as part of the Constitution after the decision in **Minerva Mills**, no protection will be provided to the MHADA Act even if it has a nexus with the principles laid down in Article 39(b). Therefore, logically, in the context of this reference, this Court must first decide the question about the survival of Article 31C before adjudicating on the interpretation of Article 39(b).

ii. The question about the survival of 31-C has never been conclusively answered by this Court. The question was specifically referred to the bench of five judges in the three-judge bench order. However, the five-judge bench did not decide the question about the survival of Article 31-C and instead referred the case to a larger bench on the question of the interpretation of Article 39(b). Similarly, even the seven-judge bench did not answer the Article 31-C question and only referred the Article 39(b) question to this bench. Therefore, the 31-C question has remained unanswered.

iii. Several judgements of this Court post-**Minerva Mills** have proceeded on the assumption that Article 31C (as upheld in **Kesavananda Bharati**) remains part of the Constitution. However, none of these decisions directly deals with the legal question of its survival. These decisions are addressed in further detail in Part C below. This Court must provide certainty on questions of law that have remained unanswered over

prolonged periods of time, particularly, when the question has a direct bearing on the reference before it. In the event that this Court concludes that Article 31C is not revived, it will impact numerous legislations that have been protected by this provision. Therefore, it is incumbent on this Court to decide this significant constitutional question at the earliest occasion. A bench of nine judges is best suited to carry out this exercise and bring finality to this question of law.

B. Issues

31. In view of the above, the scope of this judgment can be tied down to determining two issues:

a. **Article 31C:** Whether Article 31C (as upheld in **Kesavananda Bharati**) survives in the Constitution after the amendment to the provision by the forty-second amendment was struck down by this Court in **Minerva Mills**; and

b. **Article 39(b):** Whether the interpretation of Article 39(b) adopted by Justice Krishna Iyer in **Ranganatha Reddy** and followed in **Sanjeev Coke** must be reconsidered. Whether the phrase 'material resources of the community' in Article 39(b) can be interpreted to include resources that are owned privately and not by the state.

32. All other issues, including the constitutionality of the MHADA Act, are not being determined in the present judgment. Parties are at liberty to raise submissions on these issues before the regular bench that will decide the underlying appeal.

33. A Writ Petition challenging *inter alia* the standard rent provisions of the Bombay Rent Hotel and Lodging House Rates Control Act 1947 and the Maharashtra Rent Control Act 1999 has also been tagged with the underlying appeals.[28] The petitioners contend that the provisions of these legislations contravene the decision of this Court in **Malpe Vishwanath Acharya vs. State of Maharashtra.**[29] A determination of the constitutionality of these individual enactments does not form part of our analysis in this judgement and may be determined by a regular bench after this Court answers the present reference.

34. Further, several intervenors before this Court, including the State of West Bengal are parties to a pending batch of appeals before this Court relating to the constitutionality of the West Bengal Land Reforms Act 1955 and the amendments made to the Act in 1981 and 1986.[30] Akin to the declaration in the MHADA Act, the West Bengal Land Reforms Act 1955 also contains a declaration that it has been enacted to give effect to the "policy of the State towards securing the principle specified in Clauses (b) and (c) of Article 39 of the Constitution". By an Order dated 17 July 2014, a three-judge Bench of this Court has referred several questions arising from these appeals to a Bench of

[28] Writ Petition No 660 of 1998.
[29] (1998) 2 SCC 1; 1997 INSC 831.
[30] Civil Appeal No. 16879 of 1996.

five judges.[31] On 26 February 2016, the five-Judge Bench of this Court so constituted directed that these appeals be listed after the disposal of the underlying civil appeals in the present case. It is clarified that the intervenors have only been heard on the issues that arise from the reference before us. This judgement does not deal with the West Bengal Land Reforms Act 1955 or any other related enactment. A determination on the questions of law referred to the five-judge bench and adjudication of the constitutionality of the West Bengal Land Reforms Act 1955 will be carried out by appropriate benches of this Court.

C. Article 31C

i. Brief History of Article 31-C

35. Article 31-C provides statutes with immunity against constitutional challenges for alleged breaches of Articles 14 and 19 provided that the statutes give effect to the principles set out in clauses (b) or (c) of Article 39. Article 31-C represents a constitutionally sanctioned limitation on the operation of certain Part III rights insofar as they give effect to the Directive Principles contained in clauses (b) and (c) of Article 39.

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[31] Questions referred: "a. Whether Article 300 A, which does not contain a provision like Article 31(2), would mandate payment of any amount as compensation for depriving of a person of his property under the authority of law? If yes, then what are the parameters of adjudging the principles for payment of amount or the amount fixed by the Acquiring Act as illusory?
b. Whether the Constitutional Amendments inserting the amending Acts in the 9th Schedule would be violative of the Basic Structure of the Constitution and would therefore be open to challenge in the light of the judgment of this Hon'ble Court in I.R. Coelho (Dead by LRS) Vs. State of Tamil Nadu [(2007) 2 SCC 1] and therefore be liable to be struck down?
c. Whether the Section 4-D inserted by the 1981 Amendment Act of the West Bengal Land Reforms Act, 1955 which prescribes the offences and penalties with retrospective effect from 07.08.1969 in the face of the prohibition contained in Article 20(1) of the Constitution of India is valid?"

36. When inserted into the Constitution in 1971, Article 31-C provided that no law giving effect to a State policy securing the principles set out in clauses (b) or (c) of Article 39 was void on the ground that it impermissibly abridged the rights conferred by Articles 14, 19, or 31. However, Article 31-C has been amended by Parliament and interpreted by this Court on several occasions. It is therefore necessary to clearly lay out the history of this constitutional provision before adverting to the current controversy concerning the provision. Article 31-C was inserted into the Constitution by Section 3 of the Constitution (Twenty-Fifth Amendment) Act, 1971. At the time of its inclusion in the Constitution, it read as follows:

> "**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 the principles specified in clause (b) or clause (c) of article 39 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, article 19 or article 31; 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:
>
> Provided that when such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

37. Article 31-C, along with Article 31-A, was challenged in **Kesavananda Bharati v State of Kerala**.[32] In the decision in that case, a majority comprising of seven of the thirteen judges consisting of Justices KK Mathew, AN Ray, DG Palekar,

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[32] 1973 (4) SCC 225; 1973 INSC 91

HR Khanna, YV Chandrachud, MH Beg, and SN Dwivedi upheld the constitutional validity of the first part of Article 31-C which provided immunity from challenges under Article 14, Article 19, and Article 31 to laws giving effect to the Directive Principles set out in clauses (b) or (c) of Article 39.[33] In the case of six of the Judges (Mathew, Ray, Palekar, Chandrachud, Beg, and Dwivedi JJ), this flowed from their reasoning that Parliament's power to amend the Constitution was unbounded and courts could not judicially review the validity of a constitutional amendment even if it modified the application of fundamental rights. Justice Khanna, however, did not subscribe to the view that Parliament's power to amend the Constitution was unlimited.[34] Nonetheless, on an independent analysis of Article 31-C, Justice Khanna found that the first part of Article 31-C which immunised laws from Article 14, Article 19, and Article 31 challenges did not violate the basic structure of the Constitution.[35]

38. In **Kesavananda Bharati**, there also arose substantial disagreement concerning the second half of Article 31-C which stated that no law containing a declaration that the statute gave effect to a policy furthering the principles in clause (b) or (c) of Article 39 could be questioned by a court on the ground that it did not in fact give effect to such policy. A majority of seven judges consisting of Chief Justice SM Sikri, and Justices JM Shelat, AN Grover, KS Hegde, AK Mukherjea, P Jaganmohan Reddy, and HR Khanna found that the latter half of

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[33] *Ibid* [1035]-[1040], [1065] (Ray J); [1323], [1331], [1333] (Palekar J); [1518] (Khanna J); [1770]-[1771], [1787]-[1788] (Mathew J); [1855] (Beg J); [1995] (Dwivedi J); [2118] (Chandrachud J).
[34] *Ibid* [1537] (Khanna J).
[35] *Ibid* [1518] (Khanna J).

Article 31-C violated the basic structure and was therefore invalid.[36] Thus, the final outcome of the decision in **Kesavananda Bharati** as concerns Article 31-C was that (i) the first half of Article 31-C granting immunity to laws enacted in furtherance of clauses (b) or (c) of Article 39 against challenges based on Articles 14,19 and 31 was valid; and (ii) the second half of Article 31-C excluding judicial review over whether a law in truth furthers the principles set out in clauses (b) or (c) of Article 39 was struck down. As Justice HR Khanna succinctly recorded in his conclusions:

> "**1537.** … (xiii) The first part of Article 31-C introduced by the Constitution (Twenty-fifth) Amendment Act is valid. The said part is as under:
>
> > "31-C. Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (a) or clause (c) of Article 39 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, Article 19 or Article 31:
> >
> > Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply there to unless such law, having been reserved for the consideration of the President, has received this assent."
>
> (xiv) The second part of Article 31-C contains the seed of national disintegration and is invalid on the following two grounds:
>
> (1) It gives a carte blanche to the legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration. Article 31-C taken along with its second part gives in effect the power to the legislature including a State Legislature, to amend the Constitution in important respects.

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[36] *Ibid* [417]-[429] (Sikri CJ); [599]-[605] (Shelat and Grover JJ); [726]-[735] (Hedge and Mukhrejea); [1203]-1210] (Reddy J); [1530]-[1535-A] (Khanna J).

> (2) The legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. The vice of the second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for the object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368.
>
> The second part of Article 31-C can be severed from the remaining part of Article 31-C and its invalidity would not affect the validity of the remaining part. I would, therefore, strike down the following words in Article 31-C –
>
> "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."

39. In essence, the second half of Article 31-C was severed from the first half and struck down. The second half of Article 31-C was thus no longer legally enforceable. What follows from the above conclusions is that after the decision in **Kesavananda Bharati**, Article 31-C ought to be read as follows:

> **"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 the principles specified in clause (b) or clause (c) of article 39 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, article 19 or article 31; *[~~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~~:]

> Provided that when such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."
>
> *No longer enforceable after *Kesavananda Bharati*

40. Subsequently, Article 31-C was further amended by the Constitution (Forty-second Amendment) Act, 1976 ("**Forty-Second Amendment**"). By Section 4 of this Act, the words "*the principles specified in clause (b) or clause (c) of article 39*" were replaced with the words "*all or any of the principles laid down in Part IV*." The effect of the Forty-Second Amendment was that Article 31-C was amended as follows:

> **"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 ~~the principles specified in clause (b) or clause (c) of article 39~~] 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, article 19 or article 31; **[~~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~~:]
>
> Provided that when such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."
>
> *Substitution effected by the Forty-Second Amendment
> ** No longer enforceable after *Kesavananda Bharati*

Shortly thereafter, Article 31-C was once again amended by Section 8 of the Constitution (Forty-fourth Amendment) Act, 1978. This amendment removed reference to Article 31 of the Constitution contained in Article 31-C. This was a

logical corollary to the omission of Article 31 itself from the Constitution. As Article 31 had been removed from the Constitution, it was no longer necessary that Article 31-C provide legislation with immunity from Article 31 challenges. Thus, after the Constitution (Forty-fourth Amendment) Act, 1978, Article 31-C read as follows:

> **"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 ~~the principles specified in clause (b) or clause (c) of article 39~~] 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 **[~~or article 31~~]; ***[~~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~~:]
>
> Provided that when such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."
>
> *Substitution effected by the Forty Second Amendment
> **Omission by Forty Forth Amendment
> *** No longer enforceable after *Kesavananda Bharati*

The amendment to Article 31-C by Section 8 of the Constitution (Forty-fourth Amendment) Act, 1978 and its legal effect are not in dispute.

41. The amendment to Article 31-C by Section 4 of the Forty-Second Amendment was challenged in **Minerva Mills v Union of India**.[37] The petitioners had challenged the Sick Textile Undertakings (Nationalisation) Act, 1974, and the order dated 19 October 1971 nationalising their business. However, at the time

[37] 1980 (3) SCC 625; 1980 INSC 142.

of the challenge, the impugned legislation had already been inserted into the Ninth Schedule of the Constitution. Thus, to secure the ultimate relief of reversing the nationalisation, the petitioners in **Minerva Mills** also challenged the thirty-ninth amendment to the Constitution which had inserted the impugned legislation into the Ninth Schedule of the Constitution and Section 55 of the Forty-Second Amendment which modified Article 368 to exclude constitutional amendments from judicial review. As part of this broader challenge, the petitioners in **Minerva Mills** also separately challenged Section 4 of the Forty-Second Amendment on the ground that the amendment to Article 31-C violated the basic structure of the Constitution. Parallel to the Constitution Bench proceedings in **Minerva Mills,** a separate Constitution Bench heard the challenge to the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 in **Waman Rao v Union of India**.[38] Although Chief Justice YV Chandrachud and Justice PN Bhagwati sat on both Constitution Benches (and indeed Justice Bhagwati authored a common opinion for both cases), the remaining three judges on both Constitution Benches were different and the two cases dealt with separate issues. In **Waman Rao**, the petitioners sought to assail the *unamended* portion of Article 31-C. We shall advert to the decision in **Waman Rao** shortly, but at present, it is sufficient to note that in **Minerva Mills,** the Constitution Bench decided the validity of the changes wrought to Article 31-C *by* the Forty-Second Amendment while in **Waman Rao,** the Constitution Bench dealt with arguments concerning the validity of Article 31-C as it stood *prior* to

[38] 1981 (2) SCC 362;

the Forty-Second Amendment. This is clarified by the observation of Chief Justice YV Chandrachud, speaking for the majority in **Minerva Mills**, where he noted:

> "**24.** … Mr. Palkhivala did not challenge the validity of the unamended Article 31-C, and indeed that could not be done. The unamended Article 31-C forms the subject-matter of a separate proceeding and we have indicated therein that it is constitutionally valid – to the extent to which it is upheld in *Kesavananda Bharati*."

The separate proceedings that the learned Chief Justice was adverting to were those in **Waman Rao**. It is also worth referring to the opinion of Justice PN Bhagwati (as he then was) in the decision of **Minerva Mills**. Justice Bhagwati authored a common judgment for both the decisions in **Minerva Mills** and **Waman Rao**. In his common judgment he stated:

> "**84**. Now, in *Wamanrao case* the broad argument of Mr Phadke on behalf of the petitioners […] that the fundamental rights enshrined in Articles 14 and 19 form the basic structure of the Constitution and therefore Article 31-A, Article 31-B read with Ninth Schedule and the **unamended Article 31-C insofar as they exclude the applicability of Articles 14 and 19 to certain kinds of legislation** emasculate those fundamental rights and thereby damage the basic structure of the Constitution…
> […]
> **The argument of Mr. Palkhivala on behalf of the petitioners in the *Minerva Mills case* was a little different.** He too attacked the vires of clause (4) and 5) of Article 368 since they barred at the threshold any challenge against the constitutional validity of the amendment made in Article 31-C but so far as Article 31-A, Article 31-B and the unamended Article 31-C were concerned, he did not dispute their validity and, as pointed out by us earlier, he conceded and in fact gave cogent reasons showing that they were constitutionally valid. **His only attack was against the validity of the amendment made in Article 31-C by Section 4 of the Constitution (Forty-second Amendment) Act, 1976** and he contended that this amendment, by making the

> directive principles supreme over the fundamental rights, damaged or destroyed the basic structure of the Constitution…."
>
> (emphasis supplied)

The opinion of Justice PN Bhagwati clearly delineates the scope of the contentions, and consequently the decisions in **Minerva Mills** and **Waman Rao.** In the former case, the amendment to Article 31-C, which expanded the scope of immunity provided to legislation, was challenged. In the latter case, the petitioners sought to challenge the unamended Article 31-C that had already been partly upheld and partly invalidated in **Kesavananda Bharati.**

42. The Constitution Bench of five judges of this Court in **Minerva Mills** invalidated Section 4 of the Forty-Second Amendment.[39] Chief Justice YV Chandrachud, speaking for the majority held:

> "**58**. … On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31-C. The startling consequence which the amendment has produced is that even if a law is in total defiance of the mandate of Article 13 read with Articles 14 and 19, its validity will not be open to question so long as its object is to secure a directive principle of State policy. […] A large majority of laws, the bulk of them, can at any rate be easily justified as having been passed for the purpose of giving effect to the policy of that State towards securing some principle or the other laid down in Part IV. In respect of such laws, which will cover an extensive gamut of the relevant legislative activity, the protection of Articles 14 and 19 will stand wholly withdrawn…"

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[39] *Minerva Mills* [75] (Chandrachud CJ).

Chief Justice YV Chandrachud noted that the amendment to Article 31-C provided immunity to a sweeping range of legislation and the threshold for availing of such immunity was remarkably low. This severely undermined the protections granted to citizens by Articles 14 and 19. This reasoning led the majority in **Minerva Mills** to conclude that:

> "**75.**…Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure to the total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution."

Before examining the legal effect of the **Minerva Mills** decision on Article 31-C, we may briefly advert to the decision in **Waman Rao** which was delivered four months after the decision in **Minerva Mills**. As noted above, the Constitution Bench in **Waman Rao** was faced with arguments that the unamended Article 31-C was also unconstitutional.

43. The petitioners in **Waman Rao** challenged the Maharashtra Lands (Ceiling on Holdings) Act, 1961 which had been placed in the Ninth Schedule of the Constitution. The respondents relied on Articles 31A, 31B, and 31C to contend that the impugned legislation was immunised from constitutional challenges grounded in Articles 14 and 19. In response to this defence, the petitioners contended that the aforementioned constitutional provisions were themselves unconstitutional and assailed the constitutional amendments which inserted them into the Constitution. In doing so, the petitioners challenged Article 31-C

(as it stood prior to the Forty-Second Amendment). To obviate the precedent in **Kesavananda Bharati**, where the *vires* of Article 31-C had already been disputed and arguably settled, the petitioners in **Waman Rao** contended that no clear holding concerning Article 31-C was discernible from the numerous opinions in **Kesavananda Bharati**. The Constitution Bench in **Waman Rao** rejected this contention. Chief Justice YV Chandrachud, speaking for the majority, held:

> "**53**. Shri M.N. Phadke, who led the argument on behalf of the petitioners, built a formidable attack against the vires of Article 31-C. But, with respect to the learned counsel, the effort is fruitless because the question as regards the validity of Article 31-C is no longer res integra. The opening clause of Article 31-C was upheld by the majority in *Kesavananda Bharati* and we do not quite see how the petitioners can be permitted to go behind this decision. […] It is well known that six learned Judges who were in minority in *Kesavananda Bharati* upheld the first part of Article 31-C, which was a logical and inevitable consequence of Parliament's power to amend the Constitution. Khanna, J. did not subscribe to that view but, all the same, he upheld the first part of Article 31-C for different reasons. The question of the validity of the Twenty-fifth Amendment by which the unamended Article 31-C was introduced into the Constitution was specifically raised before the court and the arguments in that behalf were specifically considered by all the six minority Judges and by Khanna, J. It seems to us difficult, in these circumstances, to hold that no common ratio can be culled from the decision of the majority of the seven judges who upheld the validity of Article 31-C. Putting it simply, there is no reason why simple matters should be made complicated, the ratio of the majority judgements in *Kesavananda Bharati* is that the first part of Article 31-C is valid."

The majority of the Constitution Bench in *Waman Rao* ultimately held that:

> "**68**. … (3) Article 31-C of the Constitution, as it stood prior to its amendment by Section 4 of the Constitution (42nd Amendment) Act, 1976, is valid to the extent to

> which its constitutionality was upheld in *Kesavananda Bharati*. Article 31-C, as it stood prior to the Constitution (42nd Amendment) Act does not damage any of the basic or essential features of the Constitution or its basic structure…."

The decision in **Waman Rao** upheld the validity of Article 31-C (as it stood prior to the Forty-Second Amendment) insofar as it had already been upheld in **Kesavananda Bharati**.

44. To sum up, the decision in **Kesavananda Bharati** upheld the first half of Article 31-C to the extent that it provided immunity to statutes from Article 14 and Article 19 challenges if they gave effect to the principles in clause (b) or clause (c) of Article 39. The decision in **Kesavananda Bharati** also struck down the second half of Article 31-C which prevented judicial review of whether a law in fact gave effect to these principles. The decision in **Minerva Mills** invalidated Section 4 of the Forty-Second Amendment which expanded the scope of the immunity provided by Article 31-C from laws giving effect to the principles in clause (b) or clause (c) of Article 39 to laws giving effect to *any* Directive Principle. The decision in **Waman Rao**, which concerned Article 31-C prior to the Forty-Second Amendment, reiterated the position set out in **Kesavananda Bharati,** that the first half of the unamended Article 31-C was constitutionally valid and the second half was not.

ii. The present dispute concerning Article 31-C and rival contentions

45. It is here that the present controversy concerning Article 31-C arises. Both the appellants and the respondents before us accept that after the decision in **Minerva Mills**, the words "*all or any of the principles laid down in Part IV*" in

Article 31-C are legally unenforceable. But this is where the agreement ends. In the respondents' view, the consequence of **Minerva Mills** invalidating these words is that the words that existed in Article 31-C prior to the Forty-Second Amendment stand revived. In other words, as the Forty-Second Amendment has been struck down by the Court, Article 31-C will now read as it did after the decision in **Kesavananda Bharati** but prior to the Forty-Second Amendment. The Respondents submit that after **Minerva Mills**, Article 31-C should be read as follows:

> **"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]~~ the principles specified in clause (b) or clause (c) of article 39 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, article 19 or article 31; ~~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 contrast to this, the appellants submit that since the words "*the principles specified in clause (b) or clause (c) of Article 39*" were omitted by the Forty-Second Amendment and substituted with different words, the invalidation of the substituted words by the *Minerva Mills* decision cannot revive words specifically omitted by Parliament. Thus, in the view of the appellants, Article 31-C reads as follows:

> **"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] the principles specified in clause (b) or clause (c) of article 39~~ 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, article 19~~ or article 31~~; ~~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~~:"

The appellants acknowledge that such an interpretation would effectively render the protection granted to legislation by Article 31-C nugatory. However, this is not an inadvertent consequence of the appellants' argument but rather a central plank. It is their case that after the decision in **Minerva Mills**, Article 31-C may no longer be relied on to immunise legislation, even if such legislation can be justified as giving effect to the principles specified in clause (b) or clause (c) of Article 39. Thus, the tests of Articles 14 and 19 would be unequivocally applicable even to such legislations. The contentions and interpretation advanced by the appellants have significant ramifications not only for the legislations impugned in the underlying appeals before us but also for countless others whose constitutional validity is dependent on the immunity provided by Article 31-C.

46. At its core, the present dispute concerns whether the text of Article 31-C as it stood prior to the Forty-Second Amendment can continue to be given legal effect after the Court in **Minerva Mills** invalidated Section 4 of the Forty-Second Amendment. The appellants contended that the unamended Article 31-C (as it stood prior to the Forty-Second Amendment) does not automatically revive after the decision in **Minerva Mills**. Mr Zal Andhyarujina, learned senior counsel and Mr Sameer Parekh, learned counsel represented the appellants. Their position

was supported by Ms Uttara Babbar, learned senior counsel for one of the intervenors. The argument may be briefly summarised as follows:

(i) The act of substitution by the Forty-Second Amendment consists of two steps, first the old provision is erased and next, the new provision is inserted. After the new provision is inserted, the old text ceases to exist and cannot be given legal effect. This was described as the "pen and ink" theory. Thus, even if **Minerva Mills** invalidated the amended text, the judgement's effect was only to stop the inserted text from being enforced and a judicial order cannot reverse the first step of erasure. Only a legislature can modify words in a statute. As a result, after **Minerva Mills**, the words erased by the Forty-Second Amendment do not revive and the unamended Article 31-C cannot be given effect to.

(ii) Further, when a court declares a law to be unconstitutional, this declaration does not repeal the law from the statute books, it merely renders it legally unenforceable. Only the legislature can add or repeal the text from the statute books. Thus, the decision in **Minerva Mills** only renders the amended text of Article 31-C unenforceable and cannot repeal the Forty-Second Amendment in totality or reinstate the unamended Article 31-C.

47. Mr R Venkatramani, learned Attorney General for India and Mr Tushar Mehta, learned Solicitor General of India, representing the respondents, countered the above understanding. Their position was supported by Mr Rakesh Dwivedi and

Mr Gopal Sankarnarayan, learned senior counsel appearing for the intervenors. Their arguments may be briefly summarised as follows:

(i) When an amendment is set aside, the entire legal effect of the amendment is invalidated and thus the text preceding the amendment will be restored. There are no distinct steps of erasure and insertion. All the stages of the Forty-Second Amendment stand cumulatively negated by the decision in **Minerva Mills**;

(ii) When exercising basic structure scrutiny, this Court grounds its reasoning in the relationship between the unamended provision and the amended provision and the impact the amendment has on the Constitution. If the Court finds an amendment impermissible and invalidates it, the position as it stood prior to the amendment must stand revived for the basic structure theory to have effect. If the invalidation of an amendment by the Court led to some third result, where the insertion was invalidated but the erased text did not revive, this would not result in a return to the unamended Constitution but some third uncontemplated result which may itself violate the basic structure. Thus, the revival of the unamended constitutional provision is the approach consistent with the theoretical foundation of basic structure review;

(iii) The decision of a Constitution Bench of this Court in **Supreme Court Advocates-On-Record Association v Union of India**[40] squarely covers the present scenario and holds that when a constitutional amendment is struck down, the position that existed prior to the amendment stands revived;

(iv) This Court in the decisions in **Maharao Sahib Shri Bhim Singhji v Union of India**,[41] **Sanjeev Coke** and **Basantibal Khetan** has repeatedly held that Article 31-C as it stood prior to the Forty-Second Amendment is operative; and

(v) If the words struck down by **Minerva Mills** relating to clauses (b) and (c) of Article 39 were omitted by judicial fiat from Article 31-C, the entire provision would be unworkable despite this precise text of Article 31-C having been upheld by thirteen judges in **Kesavananda Bharati** and the constitutional validity of the provision having been reaffirmed in **Waman Rao**.

Before delving further into our analysis, we may briefly advert to the decisions relied on by the Respondents where this Court has applied Article 31-C after the decision in **Minerva Mills**. If these decisions provide a cogent answer as to the status of Article 31-C after **Minerva Mills**, our inquiry need not go any further.

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[40] 2016 (5) SCC 1; 2015 INSC 285.
[41] 1981 (1) SCC 166; 1980 INSC 219.

48. In **Bhim Singh**, a Constitution Bench of this Court upheld the Urban Land (Ceiling and Regulation) Act, 1976 on the ground that the Act gave effect to the Directive Principles in clauses (b) and (c) of Article 39 of the Constitution. The impugned legislation in **Bhim Singh** sought to inhibit the concentration in ownership of urban land and was *inter alia* challenged on the ground that it was not in furtherance of clause (b) or (c) of Article 39 and thus not protected under Article 31-C. Rejecting this submission, Chief Justice YV Chandrachud, speaking for himself and Justice PN Bhagwati held:

> "**1.** We have perused the judgement prepared by Brother Tulzapurkar with care but, with respect, we are unable to agree with him that the Urban Land (Ceiling and Regulation) Act, 33 of 1976, does not further the Directive Principles of State Policy in clauses (b) and (c) of Article 39 of the Constitution. The vice from which a provision here or a provision there of the impugned Act may be shown to suffer will not justify the conclusion that the Act is not intended to or does not, by its scheme, in fact implement or achieve the purpose of clause (b) and (c) of Article 39."[42]

Justice Krishna Iyer, concurring with Chief Justice Chandrachud and Justice Bhagwati and thus forming a majority in **Bhim Singh**, held:

> "**16-A**. … The purpose of the enactment, garnered from the preamble, is to set a ceiling on vacant urban land, to take over the excess and to distribute it on a certain basis of priority. The whole story of the legislation, the long gestation of pre-legislative consideration, the brooding presence of Article 39(b) and (c) and the emphasis in Section 23(4) on common good as the guiding factor for distribution point to public purpose, national development and social justice as the cornerstone of the policy of distribution…"[43]

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[42] Maharao Sahib Shri Bhim Singhji v Union of India 1981 (1) SCC 166 [1] (Chandrachud CJ).
[43] Maharao Sahib Shri Bhim Singhji v Union of India 1981 (1) SCC 166 [16-A] (Krishna Iyer J).

The decision in **Bhim Singh** was delivered after that in **Minerva Mills**. The majority opinions in **Bhim Singh** proceeded on the basis that the text of Article 31-C stood as it had prior to the Forty-Second Amendment to the Constitution. In other words, the judges began their analysis with the presumption that the Union could rely on Article 31-C and that the appropriate test under Article 31-C was whether the legislation in question furthered the principles set out in clauses (b) or (c) of Article 39. If the Court had adopted the present appellants' interpretation of Article 31-C, they could not have proceeded on this basis because according to the appellants, references to clauses (b) or (c) of Article 39 are deemed to be omitted from Article 31-C after the Forty-Second Amendment and **Minerva Mills**. While the decision in **Bhim Singh** would fortify the position of the present respondents, the judgment does not provide any rationale as to how and why the text of the unamended Article 31-C stood revived.

49. In **Sanjeev Coke**, a challenge was brought to various legislations including the Coking Coal Mines (Emergency Provisions) Act, 1971 which vested the management of coking coal mines and coke oven plants with the State, the Coking Coal Mines (Nationalisation) Act, 1972 which resulted in the nationalisation of certain coking coal mines, the Coal Mines (Taking Over of Management) Act, 1973 and finally the Coal Mines (Nationalisation) Act, 1973 which together resulted in nationalisation of all coal mines irrespective of whether they were a coking coal mine or not. The petitioners in **Sanjeev Coke** argued that the State had discriminated between certain coke oven plants and their coke oven plants. In response, the Union Government contended that the

legislations were immunised against an Article 14 challenge as they were protected by Article 31-C. The majority opinion in **Sanjeev Coke** raised certain concerns regarding the reasoning in **Minerva Mills** but observed that as a review petition against **Minerva Mills** was pending before the Court, it was not appropriate to examine this issue further.[44] Nonetheless, in the ultimate analysis of the petitioners' arguments, Justice Chinnappa Reddy speaking for the Constitution Bench in **Sanjeev Coke**, held:

> "**17.** We are firmly of the opinion that once Article 31-C 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).To insist on nexus between the law for which protection is claimed and the principle of Article 39(b) is not to insist on fulfilment of the requirement of Article 14. They are different concepts and in certain circumstances, may even run counter to each other. That is why the need for the immunity afforded by Article 31-C. Indeed there are bound to be innumerable cases where the narrower concept of equality before the law may frustrate the broader egalitarianism contemplated by Article 39(b)…."
>
> "**18.** The next question for consideration is whether the Coking Coal Mines (Nationalisation) Act is a law directing the policy of the State towards securing "that the ownership and control of the material resources of the community are so distributed as best to subserve the common good"…"

As in the decision in **Bhim Singh**, the above paragraphs evince that the Constitution Bench in **Sanjeev Coke** proceeded on the basis that Article 31-C was operative and that it ought to be interpreted as it stood prior to the Forty-Second Amendment. The Court noted that once an Article 31-C defence is

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[44] Sanjeev Coke [10]-[13] (Chinnappa Reddy J).

claimed, Article 14 cannot be resorted to if there is a nexus between the law and the aims set out in clause (b) and clause (c) of Article 39. The explicit references to Articles 31-C and 39(b) demonstrate that the Court proceeded on the basis that the protection afforded to legislations by Article 31-C continued to operate after **Minerva Mills**. However, as with **Bhim Singh**, the decision in **Sanjeev Coke** offers no explanation as to the exact legal mechanics which lead to the continued legal operation of the unamended Article 31-C. Thus, these decisions leave unaddressed the contentions raised by the present appellants.

50. It is also pertinent to refer to the approach of the two-judge Bench of this Court in **Basantibal Khetan**. In that case, Special Leave Petitions were filed against the judgement of the High Court of Judicature at Bombay invalidating certain provisions of the MHADA Act which permitted the acquisition of private property. It was contended that the provisions of the legislation which set out the basis for determining compensation were violative of Articles 14 and 19 of the Constitution. In invalidating these provisions, the High Court held that the impugned provisions were not protected by Article 31-C of the Constitution and were violative of Article 14. However, when the matter was heard by a Division Bench of this Court, Justice ES Venkataramiah (as the learned Chief justice then was) held that the law would be entitled to immunity under Article 31-C. The learned judge observed:

> "**13.** Even granting for purpose of argument that sub-sections (33) and (4) of Section 44 are violative of Article 14 of the Constitution, we are of the view that the said provisions receive the protection of Article 31-C of

> the Constitution. […] Let us proceed on the basis that after *Kesavananda Bharati v. State of Kerala* and *Minerva Mills Ltd. v. Union of India*, Article 31-C reads as:
>
> > "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 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."
>
> Clause (b) or Article 39 of the Constitution which is relevant for our purpose states that the State shall, in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed as best to subserve common good.
> […]
> **14.** … The High Court erred in taking a very narrow view of the objects of the Act and the functions of the Authority under it. We are satisfied that the Act is brought into force to implement the Directive Principle contained in Article 39(b) and hence even if there is any infraction of Article 14 it is cured by Article 31-C which is clearly attracted to the case."

The extracted paragraphs demonstrate that the Division Bench explicitly proceeded on the basis that the unamended Article 31-C had revived and was in legal effect. The two-Judge Bench cited both the decisions in **Kesavananda Bharati** and **Minerva Mills**. It concluded that after **Kesavananda Bharati**, the second half of Article 31-C was no longer in effect. It also concluded that after **Minerva Mills** struck down the Forty-Second Amendment, the text of Article 31-C as it stood prior to the Forty-Second Amendment stood revived. This approach would support the arguments of the respondents concerning the interpretation of Article 31-C. However, like the decisions in **Bhim Singh** and **Sanjeev Coke**, no argument was raised that the unamended Article 31-C did not automatically revive absent legislative intervention and the two-judge

Bench has proceeded on an assumption that the unamended Article 31-C is enforceable.

51. In the above decisions interpreting Article 31-C, this Court has consistently taken the position that Article 31-C, as it stood prior to the Forty-Second Amendment, has legal effect and can be invoked to defend legislations against Article 14 and Article 19 challenges. However, as the appellants correctly point out, no jurisprudential explanation has been provided for why this is the case and, in most decisions, this Court has assumed that Article 31-C continues to have legal effect. In light of the specific contentions raised by the appellants in the present case, and the significant consequences flowing from the appellants' arguments, this Court must examine the constitutional question of whether, after **Minerva Mills** invalidated the Forty-Second Amendment, the text of the unamended Article 31-C can be enforced.

iii. Precedents concerning invalidation of amendments

52. The first decision which the appellants relied on was **Shamarao Parulekar v District Magistrate, Thana**.[45] The case concerned the Preventive Detention Act, 1950 which at the time was scheduled to expire on 1 April 1952. A few months prior to this, on 15 November 1951, the petitioner (Shamarao) was detained. However, the statute was subsequently amended to extend its lifespan by six months till 1 October 1952. Shamarao contended that the extension of the Act could not extend his detention past 1 April 1952, when the

[45] 1952 (2) SCC 1; 1952 INSC 63.

Act was originally scheduled to expire. Justice Vivian Bose, speaking for a Constitution bench of this Court observed that the amendment to the Preventive Detention Act, 1950 expressly stated that detention orders shall remain in force "*so long as the principal Act is in force*" and "*principal Act*" had been defined as the 1950 Act. The learned Judge went on to explain:

> "**7.** … The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to a repugnancy, inconsistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. This is the rule in England [citation omitted]; it is the rule in America [citation omitted] and it is the law which the Privy Council applied in India in *Keshoram Poddar v. Nundo Lal Mallick*. Bearing this in mind it will be seen that the 1950 Act remains the 1950 Act all the way through even with its subsequent amendments. Therefore, the moment the 1952 Act was passed and Section 2 came into operation, the Act of 1950 meant the 1950 Act as amended by Section 2, that is to say, the 1950 Act now due to expire on 1-10-1952."

The decision in **Shamarao Parulekar** outlines the "Pen and Ink" theory advocated by the appellants. When an amending statute effectuates a substitution, it modifies the original statutory text by omitting certain words and inserting certain other words. After the amending Act, the statute must be read to exclude the omitted words and to include the inserted words. The appellants rely on **Shamarao Parulekar** to highlight that a court cannot give effect to the omitted words after they have been removed by the amending Act. This rule is subject to certain well-recognised exceptions (such as in respect of rights which have been created under the original statutory text and limitations on the

retrospective operation of laws). The exceptions are not of concern to us presently. However, the appellants argue that **Shamarao Parulekar** represents an authority for the proposition that after the Forty-Second Amendment, the words "*the principles specified in clause (b) or clause (c) of article 39*" can no longer be enforced as they were omitted by a constitutional amendment. However, the decision in **Shamarao Parulekar** is not strictly applicable to the present situation as it did not deal with the legal effect of the amending act itself being declared void. While the decision undoubtedly lays down the correct position of law where a valid amendment is enacted, it offers no insight into whether a court can give effect to the words omitted by an amendment if the amendment is declared unconstitutional. In such cases, do the omitted words revive? This question is not answered by Justice Bose in **Shamarao Parulekar** for the amendment to the Preventive Detention Act was not invalidated.

53. The Appellants next placed significant emphasis on the decision in **ATB Mehtab Majid v State of Madras**.[46] The case concerned a challenge to Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. Rule 16 had been amended to include a proviso which resulted in the differential taxation of tanned hides based on whether they had been tanned within the state of Madras or outside the state. When the issue reached this Court, it was observed that under the amended Rule 16, a dealer who both purchased the untanned hides and tanned them within the State, was only required to pay the duty on the purchase price but a dealer who purchased the untanned hides

[46] 1963 14 STC 355; 1962 INSC 342.

from outside the state and tanned them within the state, would be liable to pay sales tax on the sale price of the tanned hides, which was substantially higher.[47] Speaking for a Constitution Bench of this Court, Justice Raghubar Dayal, struck down the amended Rule 16 as violative of Article 304(a) of the Constitution on the following terms:

> "We are therefore of the opinion that the provisions of rule 16(2) discriminate against imported hides or skins which had been purchased or tanned outside the State and that therefore they contravene the provisions of Article 304(a) of the Constitution.
>
> It has been urged for the respondent that if the impugned rule be held invalid, old rule 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid."[48]

The Court in **ATB Mehtab Majid** found that when an amendment to a rule is invalidated by a court, the old rule does not revive. It draws on the underlying rationale of the **Shamarao Parulekar** decision in that once a rule is substituted, it ceases to have any legal force and cannot be given legal effect. Hence, the Court held that if the amendment is found to be unconstitutional, the unamended text does not revive and cannot be enforced. While the decision does support the argument of the appellants, that the unamended text of Article 31-C does not revive, the judgement does not elaborate on why the pre-existing rule does not revive. Thus, the decision is of no more assistance to us

[47] ATB Mehtab Majid v State of Madras 1963 14 STC 355.
[48] *ATB Mehtab Majid v State of Madras* 1963 14 STC 355.

than the decisions in **Bhim Singh** and **Sanjeev Coke** which, without providing detailed reasons, found that Article 31-C stood revived.

54. However, further elucidation on the view in **ATB Mehtab Majid** is found in **Koteswar Vittal Kamath v Rangappa Baliga**.[49] The decisions has its roots in a contractual dispute where the appellants contended that the contracts in question were forward contracts and void considering the prohibition on forward contracts in the Travancore-Cochin Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1950. The respondents in the case alleged that the 1950 Prohibition Order was unenforceable as it was passed under a law that had since been repealed. After tracing the history of the relevant legislation, a three-judge bench of this Court observed that the 1950 Prohibition Order was potentially still in force due to the Section 73(2) of the Travancore-Cochin Public Safety Measures Act, 1950, which stipulated that orders passed under certain repealed legislations continued in force.[50] However, the respondents in the case raised a secondary contention that the state legislature of Travancore was not competent to enact the Public Safety Measures Act, 1950 because Parliament had the exclusive power to legislate on the issue of stock exchanges and forward contracts under Entry 48 of List I of the Seventh Schedule of the Constitution. Justice Bhargava, speaking for a three-Judge Bench of this Court opined that this contention was not relevant for the following reasons:

> "**7.** … if it be held that the State Government could not competently pass the Prohibition Order, 1950, because it was a piece of legislation on Forward Contracts, that

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[49] 1969 (1) SCC 255; 1968 INSC 335.
[50] *Ibid* [4] (Bhargava J).

> Order would be treated as void and non-est. Thereupon, the earlier Prohibition Order 1119, would continue in force right up to 30th March, 1950. […] When the Prohibition Order of 1950, was purported to be issued on 8th March, 1950, it was not laid down that it was being issued so as to supersede the earlier Prohibition Order of 1119. If it had been a valid Order, it would have covered the same field as the Prohibition Order of 1119, and, consequently, would have been the effective Order under which the rights and obligations of parties have to be governed. On the other hand, if it be held to be void, this Order will not have the effect of superseding the earlier Order of 1119."

Justice Bhargava observed that even if the 1950 Prohibition Order was held to be void, the consequence would merely be that the parties would have been governed by the earlier Prohibition Order 1119. Justice Bhargava held that if the later Order was found to be void, it would "*not have the effect of superseding the earlier Order*."[51] The learned Judge went on to distinguish the decision in **ATB Mehtab Majid** in the following manner:

> "**7.** … Learned counsel for the respondent, however, urged that the Prohibition Order of 1119, cannot, in any case, be held to have continued after 8th March, 1950, if the principle laid down by this Court in *Firm A.T.B. Mehtab Majid & Co. v. State of Madras* is applied….
> […]
> **8.** On that analogy, it was argued that, if we hold that the Prohibition Order of 1950, was invalid, the previous Prohibition Order of 1119, cannot be held to be revived. This argument ignores the distinction between supersession of a rule, and substitution of a rule. In the case of *Firm A.T.B. Mehtab Majid & Co.*, the new Rule 16 was substituted for the old Rule 16. **The *process of substitution* consists of two steps. First, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. Even if the new rule is invalid, the first step of the old rule ceasing to exist comes into effect, and it was for this reason that the court held that, on declaration of the new**

[51] *Ibid* [7] (Bhargava J).

> **rule as invalid, the old rule could not be held to be revived.** *In the case before us, there was no substitution of the Prohibition Order of 1950, for the Prohibition order of 1119. The Prohibition Order of 1950, was promulgated independently of the Prohibition Order of 1119 and because of the provisions of law* it would have had the effect of making the Prohibition Order of 1119 inoperative if it had been a valid Order. If the Prohibition Order of 1950 is found to be void ab initio, it could never make the Prohibition Order of 1119 inoperative."
>
> (emphasis supplied)

Justice Bhargava observed that unlike in **ATB Mehtab Majid**, in **Koteswar Vittal Kamath**, the later order did not substitute the earlier order but it merely superseded the earlier order. Thus, the earlier order was never expressly repealed and hence if the later order was struck down, the earlier order continued to be in force. However, beyond this distinction, Justice Bhargava went on to explain what in his view was the reason for the holding in **ATB Mehtab Majid,** namely that the process of substitution had two distinct steps, first, an omission and second, an insertion. According to Justice Bhargava, the reason for the outcome in **ATB Mehtab Majid** was that where an amending rule is struck down, only the second step of inserting new words is invalidated but the first step of omitting old words continues to have legal effect. The appellants rely on this reasoning to contend that when **Minerva Mills** stuck down the Forty-Second Amendment, only the newly inserted language expanding Article 31-C's exemption to cover all Directive Principles was struck down. However, the Amendment's function of omitting the words "*the principles specified in clause (b) or clause (c) of article 39*" still stands. Hence, it was urged that even after the decision in **Minerva Mills**, these words stand omitted

from Article 31-C. This is in essence the heart of the argument of the appellants. As a matter of interpreting precedent, it is important to note that the two-step process of substitution relied on by the appellants is only found in the three-judge bench decision in **Koteswar Vittal Kamath**, and not in the Constitution Bench decision in **ATB Mehtab Majid**. Further, Justice Bhargava's explanation of the process of substitution as having two steps after he had already distinguished **ATB Mehtab Majid** on facts is at best an *obiter dictum*. However, ultimately neither of these judgments is binding on us, sitting in a composition of nine, and we must independently evaluate the correctness and completeness of the view taken regarding the legal effect of invalidating an amendment.

55. The Respondents resist the reasoning of a two-step substitution process set out in **Koteswar Vittal Kamath** by relying on a second line of decisions, beginning with the 1951 decision of the High Court of Nagpur in **Laxmibai v State of Madhya Pradesh**.[52] The case concerned the Central Provinces & Berar Regulation of Letting Accommodation Act, 1946 which, when originally enacted, stipulated that the statute would expire at the end of one year. However, by an Ordinance, and later a validating legislation, the lifespan of the statute was extended till such date as the provincial government may specify. The Ordinance and validating legislation were challenged on the grounds of excessively delegating legislative functions (concerning the lifetime of a statute) to the executive. A Full Bench of the Nagpur High Court upheld the Ordinance

[52] AIR 1951 Nag 94.

and the validating legislation extending the operation of the 1946 Act.[53] Justice Hidayatullah, as the learned Chief Justice then was, speaking for the majority of the Full Bench went on to discuss the question of whether, if the amending Ordinance had been *void*, the original text would have been revived or not. The learned Judge observed:

> "**144.** The original section read:
>
> "It shall come into force on 1-10-1947 & shall *remain in operation for a period of one year.'*
>
> **145.** The underlined (here italicised) words alone were amended. If the amendment is unconstitutional we must leave it completely out. We cannot use the intention underlying that amendment to take the place of enactment. **We cannot read the legislative act of the Governor as involving a repeal & a reenactment & give effect to the repeal though not the enactment. To do so would leave the original section truncated**, & besides, there is no authority to give effect to a mere legislative intent or purpose…
>
> […]
>
> **146.** … When the amendment comes later & is unconstitutional it has no effect whatever."
>
> (emphasis supplied)

The judgement in **Laxmibai** outlines a different approach to analysing the legal effect of a judicial decision invalidating an amendment. Justice Hidayatullah found that where an amendment is invalid, the legal effect of the amendment is nullified in its entirety. The learned Judge relied on several decisions of the US Supreme Court, most notably, **Frost v Corporation Commissioner**[54] where Justice Sutherland held:

> "Here it was conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the Legislature which enacted it.

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[53] *Ibid* [142] (Hidayatullah J); [157] (Mangalmurti J).
[54] 278 U.S. 505.

> Without an express repeal, a different Legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and therefore, powerless to work any change in the existing statute, that statute must stand as the only valid expression of the legislative intent."

According to **Frost** and **Laxmibai**, where an amendment is invalidated both the amendment's omission of old words and its insertion of new words have no legal effect. Justice Hidayatullah noted that giving effect to the legislative intent of repeal while simultaneously striking down the new enactment could lead to a truncated statutory provision rendering the law unworkable. The effect of the judgement may be to inadvertently invalidate two provisions, both the new and the old, despite there being no constitutional fault with the old. This observation is directly applicable to the case before us because if the unamended Article 31-C does not revive after the decision in **Minerva Mills**, Article 31-C would be truncated and unworkable despite the validity of the Article being upheld by thirteen Judges in **Kesavananda Bharati**. In terms of precedential value, Justice Hidayatullah's observations are admittedly also *obiter dictum* given that the High Court had upheld the Ordinance. However, these observations were subsequently relied on by the High Court of Nagpur in **Shriram Gulabdas v Board of Revenue, Madhya Pradesh**[55] and in the decisions of this Court that we shall now advert to.

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[55] 1952 (3) STC 343.

56. In **Mulchand Odhavji v Rajkot Borough Municipality**[56] a Constitution Bench of this Court invalidated the Municipality of Rajkot's levy of octroi duty. The case originated from the United States of Saurashtra where the Saurashtra Terminal Tax and Octroi Ordinance of 1949 allowed the state government to levy octroi duty from the towns and cities specified in Schedule I until these municipalities enacted their own rules for the levy of octroi duty. Rajkot was one such town and in 1953 the municipality enacted its own rules for the levy of octroi duty. In 1956, the state government removed Rajkot from Schedule I of the 1949 Ordinance. However, in **Mulchand Odhavji**, the 1953 rules for levying octroi duty were invalidated by the trial court for violating the rule-making procedure in the parent legislation.[57] Following this invalidation and in appeal to this Court, a secondary question arose as to whether the municipality could still collect octroi duty for the period that the 1953 rules were in force. In other words, did the levy of octroi duty by the state government under the 1949 Ordinance revive after the 1953 rules were invalidated? Justice JM Shelat, speaking for a Constitution Bench of this Court held:

> "**8.** … As already stated, Ordinance 47 of 1949, was promulgated to meet the transitional situation when municipalities in towns and cities of Saurashtra were yet to be constituted. […] The rules framed by the Government were thus put in the field until the time when the municipalities could frame rules of their own and levy and collect the octroi duty. […] While issuing the said notification, the intention obviously was that once the municipal rules came into operation the Government rules, insofar as they pertained to the respondent-Municipality, would cease to operate. The Government rules, however, were to cease to operate

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[56] 1971 (3) SCC 53.
[57] *Ibid* [10].

> as the notification provided "from the date the said Municipality put into force their independent bye-laws." It is clear beyond doubt that the Government rules would cease to apply from the time the respondent Municipality brought into force its own bye-laws and rules under which it could validly impose, levy and recover the octroi duty. **The said notification did not intend any hiatus when neither the Government rules nor the municipal rules would be in the field. Therefore, it is clear that if the bye-laws made by the respondent Municipality could not be legally in force for some reason or the other, for instance, for not having been validly made, the Government rules would continue to operate** as it cannot be said that the Municipality had "put into force their independent bye-laws."
>
> (emphasis supplied)

The decision in **Mulchand Odhavji** admittedly did not concern an amendment simpliciter and relied on the text of the state government rules which stipulated when they would operate. However, two important observations may be made. First, this Court observed that it would be an anomalous situation whereby a court invalidated a freshly enacted rule, but because of such invalidation and the courts' simultaneous enforcement of the repeal of the earlier rule, no rule of taxation held the field despite the state government having such power and there being no fault with the earlier rule. Second, the court gave effect to the state government's rules despite Rajkot being removed from Schedule I of the 1949 Ordinance. This was a recognition that the omission of Rajkot was only done because of the corresponding enactment of the municipality's separate rules. This was even though the omission was done by an entirely separate authority (the state government) from the enacting authority (the municipality). Thus, the Constitution Bench in **Mulchand Odhavji** adopted a broader approach of examining the entirety of the legislative circumstances and

reversed both the omission and insertion steps of the legislative process after invalidating the unconstitutional rule.

57. The respondents next relied on **State of Maharashtra v Central Provinces Manganese Ore**.[58] In a taxation dispute, the assessee challenged an amendment to the Explanation to clause (g) of Section 2 of the Central Provinces and Berar Sales Tax Act, 1947. The amendment to the Explanation modified the regime of taxation from one concerning goods that were in the Central Provinces and Berar when the contract was made, to one covering even future goods that were in the provinces after the contract was made. The High Court invalidated the amendment on the ground that it had not secured the assent of the Governor General under Section 107 of the Government of India Act, 1935.[59] After the High Court declared the amendment as void, a question arose before this Court as to whether the unamended Explanation to clause (g) stood revived. The assessee adopted the two-step argument concerning substitution found in **Koteswar Vittal Kamath** and contended that as the assent of the Governor General was not required to *repeal* the earlier Explanation to clause (g), the repealing step of the substitution was valid while only the insertion step of the substitution was hit by the failure to secure the Governor General's assent under Section 107 of the Government of India Act. Therefore, the assessee contended that the unamended Explanation to clause (g) did not

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[58] 1977 (1) SCC 643; 1976 INSC 269.
[59] *Ibid* [8] (Beg J).

stand revived. Justice Beg, speaking for a Three-Judge Bench of this Court rejected this contention and held:

> *"***17**. In the case before us although the word "substitution" is used in the amending Act, yet, the whole legislative process termed substitution was itself abortive. The whole of that process did not take effect as the assent of the Governor-General, required by Section 107, Government of India Act, was lacking. […]
> **18. We do not think that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word "substitution" is to indicate that the process cannot be split up into two pieces like this. If the process describes as substitution fails, it is totally ineffective as to leave intact what was sought to be displaced.** That seems to be the ordinary and natural meaning of the words "shall be substituted". This part could not become effective without the assent of the Governor-General. The State Governor's assent was insufficient. **It could not be inferred that, what was intended was that, in case the substitution failed or proved ineffective, some repeal, not mentioned at all, was brought about and remained effective so as to create what may be described as a vacuum in the statutory law on the subject matter.** Primarily, the question is one of gathering the intent from the use of words in the enacting provisions seen in the light of the procedure gone through. **Here, no intention to repeal, without a substitution, is deducible. In other words, there could be no repeal if substitution failed.** The two were a part and parcel of a single indivisible process and not bits of a disjointed operation."
>
> (emphasis supplied)

This extracted paragraph has several strands of important reasoning that build on the decisions of **Laxmibai** and **Mulchand Odhavji**. First, the Court cast doubt on whether substitution always entails two distinct steps of repeal and enactment as outlined in **Koteswar Vittal Kamath**. Second, the Court reiterated that this two-step approach, where repeal is given effect to but insertion is not given effect to, can result in an unintended legislative vacuum.

Third, the Court highlighted that it was necessary to examine whether there was any intention to repeal without insertion. This is relevant because there may exist cases where a legislature independently seeks to repeal a provision and also enacts another provision. In such cases, it may be appropriate to differentiate the two steps if there is cogent evidence to demonstrate that independent of the enactment step, the legislature would have nonetheless repealed the provision in question. In the words of Justice Beg, is there an "*intention to repeal, without a substitution*"? However, absent clear legislative intent to independently repeal without substitution, where the legislature engages in substitution, it is in fact a single indivisible process and the effect of a court invalidating the amended text is to bring back the unamended text. This is because, in the case of substitution, an inference can be made that the legislature would never have repealed the unamended text without simultaneously inserting the new amended text. Thus, to invalidate the amended text but also refuse to give effect to the unamended text would be to give effect to a third outcome that could lead to absurd consequences and was never intended by the legislature. Thus, where the intent is substitution and the inserted or amended text is declared invalid, the result is to invalidate the combined exercise of repeal and enactment and the pre-amendment provision continues in force.

58. The above approach was also adopted by a two-Judge Bench of this Court in **DK Trivedi & Sons v State of Gujarat**.[60] The case concerned three

[60] 1986 Supp SCC 20.

notifications issued by the state government of Gujarat under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (MMRD Act) specifying rates of royalty and dead rent to be paid by mining companies. Section 15(3) of the MMRD Act prohibited the state government from increasing the rates of royalty (and as a result dead rent)[61] more than once in a period of four years. For the four-year period between 1974 and 1978, this Court found that the State of Gujarat had increased the rates of royalty and dead rent in 1974 and then again impermissibly increased royalty rates in 1975 and dead rents in 1976. The Court struck down these subsequent enhancements as violative of Section 15(3) of the MMRD Act.[62] A question then arose, as to whether after invalidating these subsequent notifications, the rate of royalty and dead rent under the last valid notification of 1974 stood revived or not. Justice DP Madon, writing for the Bench, cited the decision in **Central Provinces Manganese Ore** with approval and held:

> "**72**. The position before us is the same. It was not the intention of the Government of Gujarat that even if the new schedule of royalty substituted by the 1975 Notification was void and inoperative Schedule I as substituted by the 1974 Notification nonetheless stand repealed. It was equally not the intention of the Government of Gujarat that even if the rates of dead rent substituted in Schedule II by the 1976 Notification were void and inoperative, the rates of dead rent as substituted by the 1974 Notification would nonetheless stand repealed. **If the contention in this behalf were correct, it would lead to the startling result that on and from the date of the coming into force of the 1975 Notification no royalty was payable in respect of minor minerals and that on and from the date of the coming into force of the 1976 Notification no**

[61] *See Ibid* [55] (Madon J).
[62] *Ibid* [65], [67] (Madon J).

> **dead rent was payable in respect of any leased area.** The rates in Schedule I and Schedule II were intended to be substituted by new rates. **The intention was not to repeal them in any event. If the substitutions effected by the 1975 and 1976 Notifications were invalid, such substitutions were equally invalid to repeal the 1974 Notification.** The result is that the 1974 Notification continued to be operative both as regards the rates of royalty and the rates of dead rent until they were validly substituted with effect from April 1, 1979, by the 1979 Notification."
>
> (emphasis supplied)

The above extract comports with the reasoning in **Central Provinces Manganese Ore**. The two-Judge bench observed that it could never have been the intention of the Government of Gujarat to independently repeal the existing 1974 rates of royalty and dead rent when it substituted them by subsequent notifications enhancing the rates. This is doubly evident from the fact that the government had *enhanced* the rates of royalty and dead rent. Therefore, it cannot be presumed that the Government ever independently intended to repeal the 1974 notification which would have led to a cessation in the collection of revenue. This being the position, the result of invalidating the subsequent notifications while simultaneously giving effect to repeal of the 1974 Notification would lead to an absurd result which was never intended by the government. Thus, rather than breaking down the process of substitution into two distinct steps of repeal and enactment and analysing the effect of the invalidation disjunctively, in **Central Provinces Manganese Ore** and **DK Trivedi & Sons,** the Court asks whether it is plausible that the legislature intended to independently repeal the substituted provision. In the absence of clear evidence of such legislative intent, the process of substitution is

invalidated in its entirety and the original, unamended provision continues to have legal force.

59. The position adopted in **Central Provinces Manganese Ore** and **DK Trivedi & Sons** also finds support from decisions in the US. We have already noted Justice Hidayatullah's reliance on the US Supreme Court's decision in **Frost v Corporation Commissioner**.[63] However, decisions in state Courts of the United States following **Frost** are even more explicit in their reasoning. For example, in **Texas Company v Cohn**[64] the Supreme Court of Washington was tasked with determining whether a 1937 taxation statute continued in force after a 1939 statute had replaced it, but the subsequent statute had been invalidated by the Court. Justice Drive, speaking for the Supreme Court of Washington sitting en banc held:

> "The 1939 petroleum products tax law specifically repealed the 1937 statute, but it is the position of the appellants that, when the repealing act was wholly vitiated as unconstitutional by the *Inland* case, its repealing clause also fell. Therefore, they assert, the 1937 statute has never been legally repealed and has remained in full force and effect in contemplation of law, assuming, of course, that it is constitutional.
>
> This position, we think, is sound. It is too apparent to require much comment that the legislature, when it enacted the 1939 act, attempted to set up a new and complete fuel oil tax law in place of the 1937 statute. **The earlier law was repealed only to clear the decks and give the new act unobstructed operation and effect. It does not appear that the legislature intended in any event, to repeal the prior law.** Under such circumstances, the repeal clause falls within the unconstitutional statute of which it is part."

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[63] 278 U.S. 505.
[64] 8 Wash 2d 360 (17 April 1941, Supreme Court of Washington).

(emphasis supplied)

The approach adopted by the Supreme Court of Washington was to examine the totality of the legislative circumstances and proceedings, and absent any express intention of the legislature to independently repeal the 1937 law, hold that the repeal of the 1937 law was reversed by the 1939 law being invalidated. Thus, the 1937 law continued in force. This reasoning was also adopted by the Supreme Court of Pennsylvania in **Mazurek v FM Ins Company, Jamestown**.[65] In that case, an 1857 statute allowed individuals to sue insurers in the county where the insured property was located. The 1857 statute was repealed by a 1921 law, but Section 344 of the 1921 law preserved the jurisdiction of individuals to sue insurers in the jurisdiction where the insured property was located. The 1921 law was later invalidated, and a question arose as to whether the 1857 law and the preservation of jurisdiction by Section 344 could still be given effect. Justice Maxey held that it could be:

> "The only question is whether where, as here, an act expressly repeals another act and provides a substitute for the act repealed and the substitute is found unconstitutional, is the other act so expressly repealed, to be judicially accepted as repealed. **Such a construction is not warranted unless it clearly appears that the legislature would have passed the repealing clauses even if it had not provided a substitute for the acts repealed.** Not only was there no such intention on the part of the legislature in the present case, but it is apparent that exactly the opposite was intended. The precise question now being discussed has not heretofore been passed upon by this court. However, other courts have enunciated the principle that **a repealing clause expressly repealing**

[65] 320 Pa 33 (Pa. 1935) (25 November 1935, Supreme Court of Pennsylvania)

> **a prior statute is itself ineffective where the substitute for the prior statute provided in the repealing statute is unconstitutional, and where it does not appear that the legislature would have enacted the repealing clause without providing a substitute for the act repealed** [citations omitted]. There is no doubt that the legislature in enacting section 344 of the Act of 1921 intended to preserve to courts of countries in which insured properties were located the jurisdiction in insurance cases created by the Act of 1857. **It is a legitimate inference that the Act of 1857 would not have been repealed by the Act of 1921 if the legislature had known that section 344 of that act would be declared invalid for defect in the title of the act.**"
>
> (emphasis supplied)

The above extracts make it evident that the appropriate test in cases of substitution is whether the legislature intended to repeal the law if they knew that the law they were enacting would not have legal effect. Looked at from another perspective, the question is, would the legislature have given effect to the repeal if they did not also simultaneously intend to enact an alternative provision or statute. These decisions from the United States of America are of particular relevance, as like in India, courts in the United States have long followed the doctrine of judicial review and invalidation of both primary and secondary legislation. Therefore, the experience of American courts on the consequences of a legislation being struck down is undoubtedly of assistance in the Indian context where courts are similarly empowered.

60. Although the decisions of **Central Provinces Manganese Ore** and **DK Trivedi & Sons** were rendered by a three-Judge Bench and a two-Judge Bench of this Court respectively, they were also endorsed by a Constitution Bench of five judges of this Court in **Supreme Court Advocates-On-Record Association v**

Union of India.[66] The **NJAC Decision** is particularly relevant to the case before us because it expressly concerns the legal consequences arising out of the invalidation of a constitutional amendment. In the **NJAC Decision**, a Constitution Bench of this Court was seized of a challenge to the Ninety-Ninth Constitutional (Amendment) Act, 2014.[67] The amendment replaced the collegium-led system of appointing judges with a National Judicial Appointments Committee. The Constitution Bench invalidated the ninety-ninth amendment as violating the basic structure. However, the Union of India contended that upon the invalidation of the ninety-ninth amendment, the earlier collegium-led system of judicial appointments would not revive because Article 124(2) in its original form (upon which the collegium-led system is based) had been repealed by the ninety-ninth amendment. A majority of four judges in the **NJAC Decision** all rejected this argument and held that the earlier system of judicial appointments would stand revived upon the invalidation of the ninety-ninth amendment.[68] The opinion of Justice JS Khehar (as the learned Chief Justice then was) expressly relied on the decision in **Central Provinces Manganese Ore.** The learned Judge held:

> "**412.10** What needs to be kept in mind as we have repeatedly expressed above is that the issue canvassed in the judgements relied upon [by the Solicitor General of India] was the effect of a voluntary decision of a legislature in amending or repealing an existing provision. That position would arise, if Parliament had validly amended or repealed an existing constitutional provision. Herein, the impugned constitutional amendment has definitely the effect of

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[66] 2016 (5) SCC 1; 2015 INSC 285 ("**NJAC Decision**").
[67] "Ninety-ninth amendment"
[68] NJAC Decision [413] (Khehar J); [963] (Lokur J); [989] (Joseph J); [1110] (Goel J).

> substituting some of the existing provisions of the Constitution, and also, adding to it some new provisions. **Naturally substitution connotes that the earlier provision ceases to exist and the impugned constitutional amendment by a process of judicial review has been set aside. Such being the position, whatever be the cause and effect of the impugned constitutional amendment, the same will be deemed to be set aside and the position preceding the Amendment will be restored. It does not matter what are the stages or steps of the cause and effect of the Amendment, all the stages and steps will stand negated**, in the same fashion as they were introduced by the Amendment, when the amended provisions are set aside."
>
> (emphasis supplied)

Justice Khehar endorsed the approach whereby the invalidation of an amendment would also reverse any repeals brought about by the amendment. The learned Judge rejected the approach of disaggregating the process of substitution into the two steps of repeal and enactment. When Parliament acted to substitute one provision with the other, it cannot be said to have intended to independently repeal the original provision absent clear evidence to the contrary. Where no intention to independently repeal the existing provision of law is to be found, the effect of invalidating a substitution is that the entirety of the substitution stands at nullity. In the **NJAC Decision**, Justice Khehar also opined on the dire consequences of the pre-existing appointment process for judges not reviving. He wrote:

> "**413.** … it would have to be kept in mind that if the construction suggested by the learned Solicitor General was to be adopted, it would result in the creation of a void. We say so, because if neither the impugned constitutional provision nor the amended provisions of the Constitution would survive, it would lead to a breakdown of the constitutional machinery inasmuch as

> there would be a lacuna or a hiatus insofar as the manner of selection and appointment of Judges to the higher judiciary is concerned. Such a position, in our view, cannot be the result of any sound process of interpretation..,"

The above extract highlights a key issue originally expounded by Justice Hidayatullah in **Laxmibai** and reiterated by **Central Provinces Manganese Ore** and **DK Trivedi & Sons**; namely, that giving effect to the repeal while simultaneously invalidating the enactment could lead to a lacuna in the law, rendering a provision unworkable, or as in the case of the **NJAC Decision**, lead to a "constitutional crisis".

61. The opinion of Justice MB Lokur in the **NJAC Decision** also highlights another aspect of this issue that must be kept in mind. Justice Lokur assessed the outcome of non-revival of the unamended text *vis-à-vis* the principles expressed in the judgement. The learned Judge wrote:

> "**961.** … If the contention of the learned Solicitor General is accepted, then on the facts of the case, the result would be calamitous. The simple reason is that if the 99th Constitutional Amendment Act is struck down as altering the basic structure of the Constitution and if Article 124(2) in its original form is not revived then Article 124(2) of the Constitution minus the words deleted (by the 99th Constitution Amendment Act) and minus the words struck down (those inserted by the 99th Constitution Amendment Act) would read as follows:
>
> > "(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal and shall hold office until he attains the age of sixty-five years:"
>
> **962.** This would give absolute power to the President to appoint a Judge to the Supreme Court without consulting the Chief Justice of India (and also to appoint

> a Judge to a High Court). The result of accepting his submission would be to create a tyrant […]
>
> **963.** This was put to the learned Solicitor General and it was also put to him that if his submissions are correct, then it would be better for the Union of India to have the 99th Constitution Amendment Act struck down so that absolute power resides in the President making him/her an *imperium in imperio* so far as the appointment of Judges is concerned. The learned Solicitor General smiled but obviously had no answer to give. It must, therefore, be held that the constitutional provisions amended by the 99th Constitution Amendment Act spring back to life on the declaration that the 99th Constitution Amendment Act is unconstitutional."

The above extract highlights how following a two-step approach advanced by the appellants may result in a situation where the ultimate consequence of invalidating an amendment is a graver perpetuation of the harms sought to be prevented by the striking down of the amendment. The Constitution Bench in the **NJAC Decision** invalidated the Ninety-Ninth Amendment on the ground that it interfered with judicial independence which is part of the basic structure of the Constitution. But as Justice Lokur's opinion points out, disaggregating the substitution and giving effect to the repealing portion of the amendment while also invalidating the new enactment would lead to a situation where judicial independence was further compromised. Such an approach would be neither legally tenable nor normatively desirable.

62. We may briefly advert to three more decisions on the relationship between the principles of the judgement in question and the outcome of invalidating an amendment to demonstrate the significance of this issue. In the **NJAC**

Decision, it was evident that absent the pre-existing regime reviving, the principles set out in the judgement would be significantly undermined. However, the opposite may also be true. This may be seen from the decision in **BN Tewari v Union of India**,[69] which was a writ petition under Article 32 filed on the heels of the decision of this Court in **T Devadasan v Union of India**.[70] The case concerned a Union Public Service Commission (UPSC) notification reserving 12.5 per cent of seats for candidates from the Scheduled Castes and 5 per cent of seats for candidates from the Scheduled Tribes. In 1952, the UPSC instituted a carry-forward rule whereby unfilled reserved seats each year were added to the subsequent year's reserved seats for up to two years. This rule was subsequently amended in 1955, challenged in **T Devadasan**, where the carry forward rule "*as modified in 1955*" was struck down as unconstitutional.[71] In **BN Tewari,** the petitioners contended that it was only the 1955 substitution that was invalidated, and as a result the 1952 carry-forward rule was revived and continued to be in effect. Justice KN Wanchoo, speaking for a Constitution Bench of this Court, negatived this contention by noting:

> "**6.** … It is true that in *Devadasan case*, the final order of this Court was in these terms:
>
> > "In the result the petition succeeds partially and the carry forward rule as modified in 1955 is declared invalid."
>
> That however does not mean that this Court held that the 1952-rule must be deemed to exist because this Court said that the carry forward rule as modified in 1955 was declared invalid. The carry forward rule of 1952 was substituted by the carry forward rule of 1955. On this substitution the carry forward rule of 1952

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[69] 1965 (2) SCR 421.
[70] 1964 (4) SCR 680; 1963 INSC 183.
[71] *T Devadasan* [22] (Mudholkar J).

> clearly ceased to exist because its place was taken by the carry forward rule of 1955. Thus by promulgating the new carry forward rule in 1955, the Government of India itself cancelled the carry forward rule of 1952. When therefore this Court struck down the carry forward rule as modified in 1955 that did not mean that the carry forward rule of 1952 which had already ceased to exist, because the Government of India itself cancelled it and had substituted a modified rule in 1955 in its place, could revive it. We are therefore of the opinion that after the judgment of this Court in *Devadasan case* there is no carry forward rule at all, for the carry forward rule of 1955 was struck down by this Court while the carry forward rule of 1952 had ceased to exist when the Government of India substituted the carry forward rule of 1955 in its place."

The Court in **BN Tewari** found that after the rule was amended in 1955, the 1952 rule ceased to exist and even after the 1955 rule was struck down, the 1952 rule did not revive as it had been repealed by the Government itself. At first glance, the decision in **BN Tewari** also supports the "Pen and Ink" theory propounded by the appellants and results in an identical outcome to that in **ATB Mehtab Majid**. We have already adverted to the limitations and inconsistencies with this approach as highlighted in the cases of **Laxmibai**, **Central Provinces Manganese Ore**, and **DK Trivedi & Sons**. However, this case also demonstrates the practical difficulties that may arise if an unconstitutional provision revives. In **T Devadasan**, the Court had held the underlying basis for the carry forward rule to be unconstitutional. If the Court in **BN Tewari** had found the carry forward rule stood revived, it would have resulted in the revival of a rule that was (at the time) *ex-facie* unconstitutional and repugnant to the holding in the **T Devadasan**. Thus, in addition to the narrower issue of whether a pre-existing rule is revived, the Court in **BN Tewari** was also mindful of the relationship between the unamended provision and the

decision to invalidate the amendment. **BN Tewari** is an example of where allowing the unamended rule to revive would have revived a (at the time) unconstitutional rule.

63. The need to assess not only the entirety of the legislative circumstances but also the judicial decision invalidating the amending statute is also apparent from the decision in **Shaukat Khan v State of Andhra Pradesh**.[72] The case concerned the Hyderabad Inams Abolition Act, 1955 which was eventually repealed as amended by the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1967. During proceedings concerning the validity of the 1955 Act before this Court, the High Court of Andhra Pradesh Act invalidated the entirety of the 1967 legislation. Before this Court, a question arose that as the 1967 statute had repealed the 1955 law, and the 1967 statute itself had been struck down, whether the 1955 was now in force. Justice P Jaganmohan Reddy, speaking for a two-Judge Bench of this Court observed:

> "**10**. On the main question whether the impugned Acts were revived by reason of the High Court of Andhra Pradesh striking down Act 9 of 1967, a perusal of that judgment would show that the Division Bench considered the question and held that as the inam lands had already vested in the Government on July 20, 1955, there was no need to abolish inams which already stood abolished long before the date when the impugned Act, namely, Act 9 of 1967, was enacted."

The learned Judge quoted the judgment of the High Court of Andhra Pradesh where the High Court had held:

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[72] 1974 (2) SCC 376; 1974 INSC 118.

> "The effect of the impugned Act in pith and substance is really not agrarian reform but to destroy the rights of the inamdars and others who were assured compensation under the repealed Act."

Based on this finding of the High Court, Justice Jaganmohan Reddy concluded:

> "**10.** … The striking down of Act 9 of 1967 must be construed in the light of the reasoning given by the learned Judges of the Division Bench of the Andhra Pradesh High Court that the Abolition Act 8 of 1955 and the Amendment Act 10 of 1956 had already achieved the result which Act 9 of 1967 was intended to achieve, and once the inams had already vested in the Government, compensation had to be paid in accordance with the terms of those laws and cannot again be re-opened by vesting the inams which had already vested as if they had not already vested in the Government. This postulates the existence of the Acts impugned before us as a ground for striking down Act 9 of 1967, so that when the High Court says that the latter Act 9 of 1967 is void it could not have intended to say that even the Acts now impugned before us did not revive."

This Court in **Shaukat Khan** observed that the High Court of Andhra Pradesh had invalidated the 1967 statute precisely on the ground that the inams had already vested in the state government under the 1955 law and the regime of compensation could not subsequently be altered by the 1967 statute. This reasoning presupposes the existence of the 1955 laws being in force. The High Court could not invalidate the 1967 law but also simultaneously enforced the repeal of the 1955 statute which it had expressly stated would govern compensation. Thus, where a court assesses whether a law revives or not after an amendment or subsequent enactment is invalidated, the court must assess both the totality of the legislative circumstances but also the logical

consequences that flow from the decision to invalidate the statute or provision in question.

64. An even more explicit demonstration of this rationale can be found in **Indian Express Newspapers (Bombay) v Union of India.**[73] The case concerned a 1977 notification under Section 25 of the Customs Act, 1962 granting a wholesale exemption from customs duty on newsprint. However, by a fresh notification in 1981, the Union Government amended its policy and stated that for the printing of newspapers, books and periodicals, the exemption from customs duty would only apply beyond 10 per cent. In effect, the 1981 notification imposed a 10 per cent ad valorem customs duty on imported newsprint from newspapers and periodicals. The 1981 notification was struck down by a three-judge bench of this Court on the ground that it impermissibly restricted the freedom of speech guaranteed by Article 19 of the Constitution.[74] On the secondary question of whether the earlier 1977 notification stood revived, the Court held that it did. Justice ES Venkataramiah, as the learned Chief Justice then was, speaking for the Court held:

> "**107**. … We may also state that the legal effect on an earlier law when the later law enacted in its place is declared invalid does not depend merely upon the use of words like, 'substitution', or 'supersession'. It depends upon the totality of the circumstances and the context in which they are used.
> […]
> **109.** Hence, if the notification dated July 15, 1977 cannot revive on the quashing of the impugned notifications, the result would be disastrous to the petitioners as they would have to pay customs duty of

[73] 1985 (1) SCC 641; 1984 INSC 231.
[74] *Ibid* [102] (Venkataramiah J).

> 40% ad valorem from March 1, 1981 to February 28, 1982 and 40% ad valorem plus Rs 1000 per MT from March 1, 1982 onwards. […] Such a result cannot be allowed to ensue."

The Court in **Indian Express Newspapers (Bombay)** observed that the consequence of the pre-existing law not reviving would in fact result in greater prejudice to the petitioners than if there had been no judgment of the court at all. If after the 1981 notification was invalidated, the 1977 notification granting a general exemption from customs duty on newsprint did not continue in force, the net outcome would be a higher customs duty on news publishers. This was because the original notification itself was framed in the manner of an exemption from customs duty. The above extract makes it clear that in addition to the question of whether the legislative intent was indivisible, the issue of the legal effect of invalidation in cases of substitution must take into account the facts of a given case, the rationale for invalidation, and the practical effect of the unamended text being revived or not.

iv. Analysis and Conclusions concerning Article 31-C

65. Based on the above precedents, certain principles governing the consequence of an amendment resulting in a substitution being invalidated come to the fore. It is not appropriate to separate an amendment which substitutes certain words with certain other words into multiple steps and examine the legal effect of invalidation on each of these steps independently. This is because when a legislature enacts a substitution, it is only removing certain text to make space for the new text it wishes to enact. Simply put, the legislature would not remove

the text in question without at the same time inserting alternate text. Given that the legislative intent is composite and indivisible, to remove and insert simultaneously, a judicial approach which disaggregates these two steps and treats them differently would amount to the court re-writing the law contrary to the legislative intent. As the decisions from the United States note, in such cases, there are two expressions of legislative intent, the original text and the amended text. If the amended text is invalidated, the only valid expression of legislative intent is the original text. If a court were to find that even the original text could not be given legal effect because it had been repealed, this would result in a third outcome, a legal vacuum which was neither intended by the legislature that enacted the original text nor by the legislature which adopted the amended the text. Crucially, this third outcome would fail to give effect to either legislative intent despite there being no constitutional fault in the original provision. As the decisions in **Laxmibai, Central Provinces Manganese Ore,** and **DK Trivedi & Sons** note, if a court were to not only invalidate the newly inserted text but also hold that the old text stands repealed it could lead to absurd outcomes or render the text wholly unworkable. The practical effect of such an outcome would be that a judicial decision invalidating an unconstitutional amendment would also inadvertently nullify a valid and constitutional provision which the legislature would never have repealed without providing a replacement.

66. Insofar as the argument that the original rule had been repealed by the legislature itself and thus ought not to be given effect, as noted above, this reasoning is negated by the inference that the legislature would never have

repealed the original text without simultaneously adopting the amended text. While a court cannot give effect to text that the legislature has repealed, as noted in **Shamarao Parulekar**, a case where a legislature has engaged in substitution, and the newly enacted text has been invalidated, is materially different. There may exist a narrow sub-set of cases where it is evident from the legislative circumstances or external aids to statutory interpretation, that the legislature would have in fact repealed the provision or words in question *independent of* its enactment of an alternative provision. Therefore, it is incumbent on courts to ask the question posed by Justice Beg in **Central Provinces Manganese Ore**, is there "*intention to repeal, without a substitution*"? Although some of the precedents discussed frame the question as 'would the legislature have repealed the original text if it knew a court would invalidate the amended text?', a more appropriate framing of the question would be, "Would the legislature have repealed the original text without giving effect to the amended text?" for this is the result of a court invalidating the amended text. If in cases where a legislature has repealed text and inserted other text, there is clear evidence that the legislature would have repealed the text in question independent of its decision to give effect to new or alternate language, then a court can continue to give effect to the repeal despite invalidating the new text. This is because, in such cases, the legislative intent is not composite or indivisible, and it is evident that the legislature contemplated that the original text would be repealed independent of whether the new text was given effect or not. However, absent such clear legislative intent, where a legislature

substitutes a text by amendment and the amendment is invalidated, it is presumed that the unamended text stands revived.

67. This analysis of whether legislative intent is composite or not is relevant to the case of substitutions. However, there is another reason why the argument of the appellants that repealed text can never be enforced after a court invalidates an amendment may be flawed, and that is the case of a repeal simpliciter. Let us imagine a situation where Parliament were to by constitutional amendment, repeal protections concerning tenure or salary granted to constitutional functionaries such as Judges or Election Commissioners. This would be a case of an amendment that only repealed constitutional text. Such an amendment would likely violate the basic structure of the Constitution. If this Court were to invalidate such an amendment, could it be contended that the protections do not revive? The only logical relief in such a case is the revival of those protections. These protections would be enforceable despite the fact that they have been omitted from the statute book or constitutional text by the legislature. This would not be a case of the court re-writing the law but merely nullifying the effect of the repeal. Thus, it cannot be said that a court cannot nullify the effect of a repeal. The case of substitutions is admittedly more complicated, as the Court must investigate whether the legislative intent to repeal and enact is composite and indivisible. However, once it is demonstrated that the legislature would not have repealed without simultaneously enacting, there can be no doubt that a court can reverse both the effects of the enactment and the repeal.

68. Finally, in addition to looking at the totality of the legislative circumstances, the court must also examine the consequence of the original text reviving or not reviving vis-à-vis the principles espoused in the judgement. Ordinarily, where an unconstitutional provision is struck down, it is presumed that the original text is constitutional and thus there are no adverse consequences flowing from its reviving. However, there may exist cases where the underlying or original rule itself is unconstitutional or that to revive the situation that existed prior to the amendment would either severely undermine the legal principles set out in the judgement invalidating the amendment or result in some other adverse consequences. In such cases, courts have the flexibility to appropriately shape reliefs. Having clarified the position of law, we now apply the tests outlined above to the question concerning Article 31-C before us.

69. By Section 4 of the Forty-Second Amendment the words "*the principles specified in clause (b) or clause (c) of article 39*" in Article 31-C were replaced with the words "*all or any of the principles laid down in Part IV*." This is a case of substitution. Section 4 of the Forty-Second Amendment was subsequently struck down in **Minerva Mills**. As noted above, where an amendment substituting certain text with certain alternate text is invalidated, the effect is that the unamended text continues in force. This is because the legislative intent of repeal and enactment in such cases is composite and cannot be separated. To give effect to the repeal and not the enactment would result in an outcome which does not correlate with legislative intent, and, as Justice Hidayatullah noted in **Laxmibai** "*leave the original section truncated*" resulting in absurd outcomes. This would in effect invalidate the original, valid and constitutional provision

despite there being no constitutional fault with it nor the legislature intending to repeal it. Thus, the presumption would be that after **Minerva Mills**, the unamended Article 31-C would continue in force. Indeed, it is evident that cases such as **Bhim Singh** and **Sanjeev Coke** proceeded on this presumption.

70. The only plausible exception to this presumption would be if it could be demonstrated that Parliament, when enacting the Forty-Second Amendment would have repealed the words "*the principles specified in clause (b) or clause (c) of article 39*" independent of their enactment of the words "*all or any of the principles laid down in Part IV*." In this case, no reference to the broader legislative proceedings or external aids is necessary to arrive at the inference that Parliament would not have independently repealed these words. The text of the amendment adopted by Parliament itself makes it abundantly clear that there was no independent intention to repeal. The effect of Section 4 of the Forty-Second Amendment was to expand the scope of the immunity provided by Article 31-C to legislation. Under the unamended Article 31-C, immunity was only provided to legislation if it gave effect to the Directive Principles found in clause (b) or clause (c) of Article 39. However, by Section 4 of the Forty-Second Amendment, the scope of this immunity was significantly expanded to immunise legislations that gave effect to any or all of the Directive Principles in Part IV of the Constitution. Thus, the intention of Parliament in enacting Section 4 of the constitutional amendment was undoubtedly to expand the scope of the immunity granted by Article 31-C. This being the situation, it cannot be suggested that Parliament would have repealed the words "*the principles specified in clause (b) or clause (c) of article 39*" if it did not simultaneously

enact the broader language expanding the scope of Article 31-C. If Parliament had independently repealed these words, it would have not just reduced the scope of Article 31-C but altogether eliminated the effect of the Article. Without the words "*the principles specified in clause (b) or clause (c) of article 39*" in Article 31-C, the provision would have been rendered nugatory. Given Parliament's manifest intention to expand the scope of Article 31-C by Section 4 of the Forty-Second Amendment, it is not plausible to hold that Parliament independently sought to repeal the words "*the principles specified in clause (b) or clause (c) of article 39*" from Article 31-C. Therefore, it is evident that the legislative intent of Parliament when adopting Section 4 of the Forty-Second Amendment was composite, to repeal and enact (i.e., to substitute) through one single action. This Court cannot therefore disaggregate the steps of repeal and enactment and give effect to the repeal even after invalidating the enactment. After **Minerva Mills** invalidated Section 4 of the Forty-Second Amendment, the composite legal effect of Section 4 is nullified and the unamended text of Article 31-C stands revived.

71. The final question is whether the revival of the unamended text of Article 31-C would in some way manifestly contravene the principles laid down in the judgment of **Minerva Mills** or result in some other adverse consequence. The text of the unamended Article 31-C was challenged, and the first part of the Article was upheld by thirteen-judge decision in **Kesavananda Bharati** while the latter half of the Article was invalidated. Therefore, the first half of unamended Article 31-C, which is the subject matter of the present controversy, was undoubtedly constitutional as held by the thirteen-judge decision in

Kesavananda Bharati and further by the Constitution Bench in **Waman Rao**. Therefore, if as a consequence of the decision in **Minerva Mills,** the unamended Article 31-C continues in force, there can be no question of any unconstitutionality or adverse consequences associated with the unamended Article 31-C. Indeed, both the Constitution Benches in **Minerva Mills** and **Waman Rao** expressly noted that the first half of Article 31-C had been held to be constitutional in **Kesavananda Bharati**. Further, given that the unamended Article 31-C has been given effect for over four decades as demonstrated by the decisions in **Bhim Singh** and **Sanjeev Coke**, no argument can be raised concerning any legal or practical difficulties with the operation of the unamended Article 31-C. Given these findings, we conclude that the unamended Article 31-C continues in force.

72. One final observation may be made. The principles discussed in this section of the judgement concerning the consequences of a substitution being invalidated emanate from cases concerning the invalidation of statutory provisions or delegated legislation. While constitutional amendments undoubtedly stand on a different footing legally, there is no reason that these principles concerning statutory interpretation would not apply equally to constitutional amendments. Indeed, the respondents before us highlighted a reason for them to apply with even greater force to constitutional amendments. The underlying rationale of the basic structure doctrine concerning constitutional amendments is that the amendment must not impermissibly deviate from the core principles that structure and govern our constitutional democracy. An amendment can be invalidated when it modifies, obliterates, or adds some feature to the

Constitution that is anathema to the principles that emerge upon a structural reading of the constitutional text. While Parliament undoubtedly has a constitutional prerogative to amend the Constitution and continually give constitutional character to the citizens' democratic aspirations, the question in basic structure review is a question of the degree of deviation from the principles that undergird the Constitution. If an amendment is invalidated because it causes a drastic deviation from the principles that govern our constitutional democracy, the consequences must be a *return to those principles*. Article 31-C represented a delicate balance between the goals of Part IV and the rights of Part III of the Constitution. This balance was held to not impermissibly deviate from the core principles that govern our Constitution by the thirteen judges' decision of this Court in **Kesavananda Bharati**. However, in **Minerva Mills**, Section 4 of the Forty-Second Amendment was held to violate these core principles that form the basic structure. The logical result of such a ruling is that the constitutional text must return to within the fold of the basic structure. To give effect to the repealing portions of Section 4 of the Forty-Second Amendment while also invalidating the enactment would not result in a return to a constitutional text that is in conformity with the basic structure. Rather, it would result in a novel third outcome, the constitutionality of which would be uncertain, untested, and may itself violate the basic structure. Therefore, the consequence of invalidating Section 4 of the Forty-Second Amendment must be that the unamended Article 31-C is revived.

D. Article 39(b)

73. The second question framed for our determination is:

> "Whether the interpretation of Article 39(b) adopted by Justice Krishna Iyer in **Ranganatha Reddy** and followed in **Sanjeev Coke** must be reconsidered. Whether the phrase 'material resources of the community' in Article 39(b) can be interpreted to include resources that are owned privately and not by the state."

74. To answer this question, we will first briefly summarise the submissions of the counsel on this issue. Next, we will address the arguments that relate to the judicial discipline followed in the judgments of this Court which have given rise to the reference. Finally, we analyse the interpretation of Article 39(b) adopted in the judgements that have been doubted and determine the correctness of such an interpretation.

i. Submissions

a. Submissions of the appellants and intervenors

75. Mr Zal Andhyarujina, learned senior counsel, and Mr Sameer Parekh, learned counsel for the appellants broadly made the following submissions:

a. Article 31C gives primacy to the Directive Principles contained in Articles 39(b) and overrides the fundamental rights guaranteed in Articles 14 and 19. As this is a significant immunity, the requirements of Article 39(b) must be strictly complied with and read narrowly;

b. Article 39(b) requires that there must not only be a ‘material resource’, but such resource must also be ‘of the community’. If the material cannot be traced to the ‘the community’, it cannot be the subject of the policy;

c. The object that must be “distributed” under Article 39(b) is the “ownership and control” of the resources. The mere distribution of the resources, without disturbing the element of its ownership and control cannot be the subject of the policy;

d. From various dictionary definitions of the terms ‘material’, ‘resource’, and ‘resources’, it emerges that ‘material resources of the community’ mean either natural resources (which are those of the country or the nation) or the means of production which in a large sense can be said to be of community, even though they may be in private hands;

e. The formulation of ‘material resources’ advanced by Justice Krishna Iyer in **Ranganatha Reddy** and subsequently followed in several judgements of this Court is too wide. Merely because a privately owned resource meets the qualifier of “material needs” does not make it a ‘material resource of the community’. The Constitution does not embody the social theory that because the individual is a member of the community, his resources however small are a necessary part of the community;

f. As evidenced from the debates in the Constituent Assembly, Article 39(b) has been deliberately drafted in language which provides flexibility to adapt to changing constitutional and social values. It cannot be restricted to a ‘Marxist reading’ of the Constitution;

g. Despite the purported socialist aims of the Constituent Assembly in incorporating the Directive Principles, private property was included as a fundamental right at the inception of the Constitution and continues to be given importance in *inter alia* Article 300A. This must be considered while interpreting the "community" element of Article 39(b); and

h. The observations of this Court in **Mafatlal** on whether Article 39(b) encompasses private property are *obiter dicta*. The decision merely proceeds on the basis that the same has been "repeatedly affirmed by this Court" and the question was not before the Court.

76. Mr H Devarajan, counsel appearing on behalf of the appellants supplemented the arguments of Mr Andhyarujina and Mr Parekh. In the context of the MHADA Act, he made the following submissions:

a. If Article 39(b) is to be read to include privately owned resources, the provision would have to be worded differently. It would either expressly contain the words "private material resources" or in any event, not contain the rider after material resources that they must be "of the community";

b. 'Material resources of the community' refers to resources which must produce goods or services for the community or be 'capable of producing wealth for the community'. While dilapidated buildings in the island city of Mumbai may fall within the ambit of 'resources', they cannot constitute 'material resources of the community'; and

c. The minority opinion authored by Justice Krishna Iyer in **Ranganatha Reddy** and subsequently followed in **Sanjeev Coke** was rendered in the

context of ‘nationalisation’ and the same context cannot be supplanted in the context of the MHADA Act.

77. Ms Uttara Babbar, senior counsel for one of the intervenors[75] supplemented the arguments of the counsel for the appellants and made the following submissions:

a. The decision in **Sanjeev Coke** and the observations in **Mafatlal** that ‘material resources of the community’ include privately owned resources are not good law. The interpretation of Article 39(b) advanced by Justice Krishna Iyer in **Ranganatha Reddy** relied on in these decisions was part of the minority opinion, from which the majority had distanced itself;

b. Further, in **Sanjeev Coke**, the Court expressed its ‘misgivings’ about the decision in **Minerva Mills**. However, this was not permissible as **Minerva Mills** was rendered by a bench of co-equal strength. Similarly, observations in **Sanjeev Coke** about the validity of Article 31-C as amended by the Forty-Second Amendment were beyond the *lis* before it;

c. In **Mafatlal Industries**, the nine-judge bench carried forward the error by relying on the decision in **Sanjeev Coke** and the observations of Justice Iyer in **Ranganatha Reddy**;

d. The words “of the community” used in Article 39(b) must be understood as distinct from the ‘individual’. An interpretation of the Article that provides that

[75] I.A. No. 28541 of 2024.

resources of the individual are part of the community, renders the use of the phrase “of the community” *otiose*;

e. Article 39(b) mandatorily requires “distribution” of “ownership and control” of the resources in question. This pre-supposes the acquisition of the resource by the state and cannot include laws that provide for the acquisition of private resources by the state. The protection of Article 31-C and Article 39(b) comes in only at the stage of distribution and not at the anterior stage of acquisition of assets by the state or vesting;

f. Acquisition of resources is permissible under the various other powers of the legislature, including the power of eminent domain and would get other protections such as the protection of Article 31-A. However, laws which provide for acquisition cannot be interpreted to be giving effect to Article 39(b) and must meet the muster of Articles 14 and 19; and

g. The Constituent Assembly discussed the proposal for an amendment to the draft text of the present Article 39(b). The proposal entailed that the provision be read as “material resources…shall be **vested** in and belong to the country collectively”. However, this amendment was rejected. The assembly consciously chose to use the phrase “material resources…are so distributed”, rather than “material resources …shall be vested”, indicating that it does not encompass the acquisition or vesting of private resources.

78. The counsel for the appellants also sought to argue that the constitutional jurisprudence with regard to fundamental rights has undergone a sea change since **Kesavananda Bharati.** In **I.R. Coelho**, in the context of Article 31-B, a

bench of nine judges of this Court held that even constitutional amendments by which laws are inserted in the ninth schedule are amenable to a basic structure challenge. This Court further held that the essence of Articles 21, 14 and 19 is a part of this basic structure and amendments inserting laws in the ninth schedule can be tested on this anvil. According to the appellants, in view of this judgement, it is difficult to envisage a situation where Articles 14 and 19 can be abrogated by a mere legislation under the protection of Article 31-C without even requiring a constitutional amendment. As noted during the course of the hearing, such arguments essentially involve a challenge to the constitutionality of Article 31-C itself, which falls outside the ambit of this judgement and has already been settled by a thirteen-judge bench of this Court in **Kesavananda Bharati.** We are not inclined to address these arguments. However, parties are at liberty to raise arguments relying on **IR Coehlo** to advance their submissions on the constitutionality of the MHADA Act before the regular bench.

b. Submissions of the Respondents and Intervenors

79. Mr R Venkataramani, the learned Attorney General appearing on behalf of the respondents, contested the interpretation of Article 39(b) advanced by the appellants and advocated for a wider reading of the provision. He submitted:

a. Given the constitutional context of Article 39(b) and its relevance towards realising an egalitarian social order, any narrow reading of the provision would offend the free play that is desirable in the working of the provision;

b. Nothing in Article 39 suggests any limitation of the words used therein. The distinction between public and private resources, or natural and human-made resources is alien to the spirit of Article 39 (b) and (c); and

c. A wide range of resources have been considered as part of the phrase 'material resources of the community' and within the ambit of Article 39(b). These include housing[76], contract carriages[77], land[78], coke oven plants[79], assets of sick textile undertakings[80], drugs[81], electricity[82], capital[83], licenses for felling bamboo[84], refractory plants[85], grant of dealerships of petroleum products[86], mines and minerals[87], mining lease[88], refund of excise,[89] natural gas[90]and the grant of natural resource[91].

80. Mr Tushar Mehta, the learned Solicitor General, supplemented the arguments of the learned Attorney General. He argued:

a. The interpretation that Article 39(b) includes privately owned resources, has been a consistent position of this Court and has acquired the status of stare decisis. The opinion of Justice Krishna Iyer in **Ranganatha Reddy** has

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[76] B Banerjee v Anita Pan, (1975) 1 SCC 166; 1974 INSC 246.
[77] State of Karnataka & Anr v. Shri Ranganatha Reddy & Anr. (1977) 4 SCC 471; State of Tamil Nadu & Ors. v. L. Abu Kavur Bai & Ors. (1984) 1 SCC 515
[78] Maharao Sahib Shri Bhim Singhji v. Union of India & Ors. (1981) 1 SCC 166; Jijubhai Nanbhai Kachar v State of Gujarat (1995) Supp 1 SCC 596
[79] Sanjeev Coke.
[80] National Textile Corp Ltd v. Sitaram Mills Ltd, AIR 1986 SC 1234; 1986 INSC 61.
[81] Union of India v. Cynamide India Ltd., (1987) 2 SCC 720; 1987 INSC 100.
[82] Tinsukhia Electric Supply Co. Ltd. v. State of Assam & Ors. (1989) 3 SCC 709; 1989 INSC 128.
[83] N. Parthasarathy v. Controller of Capital Issues, (1991) 3 SCC 153; 1991 INSC 104.
[84] Orient Paper and Industries Ltd. v. State of Orissa, 1991 Supp (1) SCC 81;
[85] Assam Sillimanite Ltd & Anr v. Union of India & ors. (1992) Suppl (1) SCC 692; 1990 INSC 89.
[86] Mahinder Kumar Gupta v. Union of India, Ministry of Petroleum and Natural Gas, (1995) 1 SCC 85
[87] Tata Iron & Steel Co v UOI, (1996) 9 SCC 709; 1996 INSC 770; 1996 INSC 770.
[88] Victorian Granites Pvt. Ltd. v. P. Rama Rao & Ors (1996) 10 SCC 665; 1996 INSC 1018.
[89] Mafatlal Industries Ltd. & Ors. v. Union of India & Ors. (1997) 5 SCC 536
[90] Reliance Natural Resources Ltd. v. Reliance Industries Ltd. (2010) 7 SCC 1, 2010 INSC 290
[91] In Re Natural Resources Allocation (2012) 10 SCC 1,

been followed in **Sanjeev Coke**, **State of Tamil Nadu & Ors vs. L. Abu Kavur Bai & Ors.**,[92] and also by a bench of eleven judges in **Mafatlal Industries.** There is no conflict of opinion between different judgements;

b. The observations in **Mafatlal Industries** on the interpretation of Article 39(b) do not constitute *obiter dicta*. The interpretation of Article 39(b) is discussed by three opinions in the decision, including the dissenting opinion and the issue was specifically argued;

c. The meaning of the phrase "material resources of the community" cannot be whittled down to only include public resources and exclude private property. The phrase specifically uses the word 'community' to include the resources of every individual;

d. The inclusion of the phrase "securing that the ownership and control" in Article 39(b) indicates that the phrase that follows it i.e. "material resources of the community" includes resources which are not public resources. The 'ownership and control' of public resources would not be required to be secured and it is only private property that is required to be "secured" for the purposes of ownership and control;

e. The terms 'ownership' and 'control' are disjunctive and there may be situations where the state does not acquire ownership but only acquires control. For instance, if a mineral is found on private land, the ownership may remain with the private person, but control over the mineral and the

[92] 1984 (1) SCC 515; 1984 INSC 17.

land is taken over by the government. Therefore, the term ‘and’ must be read as ‘and/or’;

f. The securing of ownership and control must be of any identifiable class of “material resources” and not in general terms as a wholesale acquisition of all private property without any defined principle;

g. Article 39(b) leaves it entirely to the wisdom of the legislature to decide what should constitute ‘material resources’ at a given point in time, keeping in mind the dynamics of national and international economic configurations. It allows the legislature to enact a law for the distribution of particular material resources, irrespective of its pattern of ownership;

h. The debates in the Constituent Assembly indicate that the framers of the Constitution deliberately framed Article 39(b) in the broadest possible terms. The idea was to leave enough room for future governments to determine the best way of achieving ‘economic democracy’;

i. The deletion of the right to property as a fundamental right, under the erstwhile Article 31 and Article 19(1)(f), points towards the inclusion of private property within the ambit of ‘material resources of the community’ under Article 39(b);

j. Provisions akin to Article 39(b) are present in various constitutions across the world and have not posed any problems. Even in the absence of Article 39(b), the formation of any nation State, includes within itself, the power to acquire an identifiable class of property or “material resource” from an identifiable “community” for the larger public or “common good”; and

k. The preservation of ‘material resources’, such as buildings constitutes the ‘common good’. The principle of ‘inter-generational equity’ propounded by this Court in the context of natural resources, provides that resources need to be used judicially to ensure that future generations are also able to enjoy the fruits of the resources.

81. Mr Rakesh Dwivedi, senior counsel appearing for the State of West Bengal advanced the view that this Court should refrain from laying down a water-tight interpretation of the resources and forms of distribution that fall within the ambit of Article 39(b). Such an exercise, Mr Dwivedi urged, is context-specific and must be left for experimentation by the Parliament, in view of changing economic priorities. In the context of this formulation, he broadly made the following submissions:

a. The phrase ‘material resources” includes privately owned resources within its ambit. Only resources that are earmarked for personal use and do not act as a source of income or wealth are excluded from the phrase;
b. The proposal to amend the existing provision to include specific resources was rejected by the Constituent Assembly. Dr Ambedkar stated that it was a deliberate choice to keep the phraseology extensive to account for future economic priorities. Thus, Article 39(b) must be construed liberally.;
c. The provision uses the term “community” instead of “State/Government”. The phrase includes all citizens or sections of citizens or a community of individuals and thus, encompasses privately owned resources;

d. Various forms of private property inherently have a bearing on ecology and the well-being of the community, for instance, privately owned forests, large ponds, fragile areas and wetlands. Such properties by their nature, would be included in the phrase “material resources of the community”.

e. The word “distributed” in Article 39(b) has been used as a part of the phrase, “so distributed as best to subserve the common good” and must be widely interpreted. The intent is that the State may adopt any mode of distribution as long as it subserves the common good. Such distribution may be piecemeal or the resources may be kept in the control of a governmental or private agency, provided the benefits reach the people as a ‘common good’; and

f. Articles 38, 39(b) and (c), must be read together. They indicate that the provisions are not limited to the material resources owned by the State and its agencies. They enable the state to make a law for distributing ownership and control of the material resources which may be in the hands of private persons to achieve economic justice and redistribution.

82. Mr Gopal Sankarnaryanan, senior counsel, appearing for an intervenor, supplemented the arguments advanced by the counsel for the respondents and the State of West Bengal. He broadly made the following submissions:

a. The purport of clauses (b) and (c) of Article 39 must be interpreted in the context of whether Article 31C was meant to apply to laws dealing with privately owned property or resources. Article 31C was inserted in the Constitution by the Parliament to overcome the judgement in **RC Cooper**,

wherein this Court struck down the nationalisation of the private rights of shareholders and banks as violative of Article 14;

b. Article 31C is part of a scheme, along with Articles 31A and 31B which were inserted by the first amendment. That both Article 31-A and 31-B apply to private property is uncontested.;

c. If 'ownership and control' of 'material resources of the community' excluded private ownership, there would be no challenge under Article 19 to require protection under Article 31C;

d. Article 39(c) seeks to prevent the "concentration of wealth and means of production" which could be to the common detriment. Such phrases cannot be construed to refer to public wealth and public means of production. A similar interpretation must be adopted for Article 39(b); and

e. The concept of 'common good' alluded to in Article 39(b) is critical to determine whether the provision includes privately owned resources. The COVID-19 pandemic has shown us the need to pool resources, which may often be privately owned, to protect the health of the community.

ii. Judicial Discipline: Observations in Sanjeev Coke and Mafatlal

83. Several arguments have been made with regard to the judicial discipline followed by and the precedential value of the judgements which lie at the heart of this reference. We will first address these arguments before analysing the correctness of the interpretation of Article 39(b) in these judgements.

a. The resurrection of the minority view in **Ranganatha Reddy** by **Sanjeev Coke**

84. As discussed in Part A of this judgement, the five-judge bench order referred the correctness of the decision in **Sanjeev Coke** to a larger bench of seven judges. One of the apprehensions of this Court in this reference order was that this Court in **Sanjeev Coke**, followed the observations of the minority judgement in **Ranganatha Reddy**, despite the majority expressly distancing itself from such observations. The appellants have also advanced similar contentions. They argue that the decision in **Sanjeev Coke** is not good in law as the judgement follows a minority view which was 'disagreed' with by the majority, and the same error was repeated by subsequent decisions that have followed **Sanjeev Coke**. Therefore, we first explore whether the decision in **Sanjeev Coke** can be faulted on the ground of judicial discipline.

85. The judgement at the heart of this controversy before us is **Ranganatha Reddy** rendered by a bench of seven judges of this Court. The issue before this Court related to the constitutional validity of the Karnataka Contract Carriages (Acquisition) Ordinance, 1976, followed by the Karnataka Contract Carriages (Acquisition) Act, 1976. The legislation provided for the nationalisation of contract carriages in the state. One opinion was authored by Justice NL Untwalia for the majority, speaking for himself, Chief Justice MH Beg, Justice YV Chandrachud and Justice PS Kailasam. Justice Krishna Iyer, speaking for himself, Justice Jaswant Singh and Justice PN Bhagwati, authored a separate but concurring opinion on behalf of a minority of the judges.

86. In **Ranganatha Reddy**, the issue arose before this Court in an appeal from the judgement of the Karnataka High Court which struck down the legislation and declared it to be unconstitutional. Justice Untwalia, speaking for the majority, briefly delineated the findings of the High Court in the following terms:

> "**4.** We now proceed to state the findings of the High Court on the various points argued before it not in the order as finally recorded in para 98 of its judgment at p. 1530 but in the order the points were urged before us by Mr Lal Narayan Sinha, learned Counsel for the appellants. They are as follows:
> "(1) The acquisition is not for a public purpose.
> (2) The compensation or the amount provided for or the principles laid down in the Act for payment in lieu of the various vehicles, permits and other assets is wholly illusory and arbitrary."
> For the two reasons aforesaid, the Act is violative of Article 31(2) of the Constitution and is a fraud on it. It is, therefore, null and void.
> (3) The acquisition of contract carriages with inter-State permits and other assets pertaining to such operators is ultra vires the legislative power and the competence of the State Legislature.
> **(4) Article 31-C does not bar the challenge to the Act as being violative of Article 31(2) of the Constitution as there is no reasonable and substantial nexus between the purpose of the acquisitions and securing the principles specified in clauses (b) and (c) of Article 39."**
> **(emphasis supplied)**

87. From the above, it is clear that the High Court declared the Act unconstitutional on several grounds, including a violation of Article 31(2)[93] and on the ground of legislative competence. Significantly, as stated in point (4) of the above extract,

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[93] Article 31(2) was part of the Constitution at the time. It has been subsequently omitted by Section 6 of the Constitution (Forty-fourth Amendment) Act, 1978, w.e.f. 20.06.1979. [It read: "(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."]

the High Court also decided on the question of whether the legislation had a nexus with Articles 39(b) and (c) and was consequently protected by Article 31-C. In this regard, the High Court took the view that there was no substantial nexus between the purpose of the acquisition by the legislation and the principles laid down in Articles 39(b) and (c).

88. It was in the context of the above findings of the High Court that the appeal was heard by this Court. The majority judgement, authored by Justice Untwalia, upheld the constitutionality of the Act on the ground that the legislation met the muster of Article 31(2). It was held that the provisions were for 'public purpose' and provided adequate compensation, as required by the provision. While arguments were made by the counsel on all the issues raised by the judgement of the High Court, the majority judgement eventually upheld the constitutionality of the Act only on the ground of Article 31(2). In fact, it appears that Justice Untwalia consciously refrained from making observations about whether the legislation had a nexus with Article 39(b) and the consequent protection under Article 31C. This is evidenced by the following observations of Justice Untwalia:

> **"15.** … For the purpose of deciding the point which falls for consideration in these appeals, it will suffice to say that still the overwhelming view of the majority of Judges in Kesavananda Bharati case is that the amount payable for the acquired property either fixed by the legislature or determined on the basis of the principles engrafted in the law of acquisition cannot be wholly arbitrary and illusory. **When we say so we are not taking into account the effect of Article 31-C inserted in the Constitution by the 25th Amendment (leaving out the invalid part as declared by the majority).**
>
> …

> **17.** As already stated the High Court took the view that the amount payable under the Act for the property acquired would be such that it will be wholly arbitrary and illusory and leave the many operators in huge debts. Many of them were plying their contract carriages having taken loans of considerable sums of money from the various financiers on hire-purchase system, for whom also Mr A.K. Sen appeared and argued before us. They would not only be paupers but huge liability will remain on their shoulders if the interpretation put by the High Court were to be correct. Mr Lal Narayan Sinha, learned Counsel for the appellants, took a very just and proper attitude in advancing an argument before us which would take away the basis of the High Court judgment in this regard. With respect to each and every relevant section on the question of payment of the amount in lieu of the property acquired he suggested such a reasonable, harmonious and just construction by the rules of interpretation that we found no difficulty in accepting his argument — rather, were glad to do so. The other side on the interpretation so put, which we are going to mention hereinafter, felt satisfied to a large extent. **Mr Sinha also advanced some argument with reference to the valid part of Article 31-C read with clauses (b) and (c) of Article 39 but very wisely did not choose to heavily rely upon it. On the interpretation of the statute as canvassed by him, there hardly remained any necessity of it.**
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> **27. On the interpretations aforesaid which we have put to the relevant provisions of the Act, it was difficult — rather impossible — to argue that the amount so fixed will be arbitrary or illusory. In some respects it may be inadequate but that cannot be a ground for challenge of the constitutionality of the law under Article 31(2). The respondents felt quite satisfied by the interpretations aforesaid and could not pursue their attack on the vires of the Act on that ground."**
>
> (emphasis supplied)

89. Justice Untwalia also expressly clarified that the majority opinion does not express any opinion on whether the Act has a reasonable nexus with Articles

39(b) and (c) and Article 31-C is applicable. Further, the learned judge observed that while Justice Krishna Iyer has rendered a separate opinion specifically dealing with the Article 39(b) and (c) question, the majority must not be understood to be in agreement with those findings. Justice Untwalia observed:

> "**37.** At the end we may also indicate that under sub-section (6) of Section 19 all sums deducted by the State Government under sub-section (3) of Section 10 which include the sums payable to the secured creditors stand transferred to the Corporation which is obliged to credit the sums transferred to the appropriate funds. The said provision would take within its ambit the liability of the Corporation to pay forthwith the sum found due to the secured creditors. **Since we have upheld the constitutional validity of the Act on merits by repelling the attack on it by a reasonable and harmonious construction of the Act, we do not consider it necessary to express any opinion with reference to Article 31-C read with clauses (b) and (c) of Article 39 of the Constitution. Our learned Brother Krishna Iyer, J. has prepared a separate judgment specially dealing with this point. We must not be understood to agree with all that he has said in his judgment in this regard**."

90. Justice Krishna Iyer began his separate opinion, on behalf of himself and two other judges, with the following question: *"We go wholly with our learned brother Untwalia, J. Then why a separate afterword?"*[94] The opinion then goes on to frame the questions that arose from the judgement of the High Court in the following terms:

> "**50.** Back to the challenging problems thrown up by the High Court's decision. The facts are there in the leading judgment and the formulation of the controverted propositions also needs no reiteration. Broadly speaking, we strike no note of dissensus but seek to bring out some social nuances even in

[94] Ranganatha Reddy [40].

> consensus. Let us project the pegs on which our discussion may hang. Incidentally, conceptual differences about the dimensions of the change visualised by Article 31-C read with Article 39(b) and (c) are bound to exist among Judges who, after all, professionally objectify the social philosophy of the Constitution through the subjective prism of their own mentalism.
> 1. What is a "public purpose", set as a constitutional limitation in Article 31(2), compliance with which conditions the immunity from attack based on Article 19(1)(f) or inadequacy of recompense when any person is deprived of his property?
> 1(a). What is the degree of nexus between the public purpose and the acquisition desiderated by Article 31(2)?
> 1(b). Can Cooper be judicially resurrected, draped differently but with the same "compensation" soul, even after the amendment of Article 31(2)?
> **2. What are the pervasive ambience and progressive amplitude of the "directive principle" in Article 39(b) and (c) in the context of nationalisation of public utilities?**
> **2(a). Can State monopoly by taking over private property be a modus operandi of distribution of ownership and control of the material resources of the community to subserve tile common good, within the framework of Article 39 (b)?**
> **2(b). Are distribution and nationalisation antithetical or overlapping?**
> **2(c). What is the connotation of the expression "material resources"? Can private buses be regarded as material resources of the community**?"

91. The above formulation by Justice Krishna Iyer of the issues raised by the High Court is distinguishable from the formulation of the issues by the majority in paragraph 4 of the judgement, extracted above. Issues 2, 2(a), 2(b) and 2(c) identified by Justice Krishna Iyer on the interpretation of Article 39(b), and particularly the purport of the terms 'distribution' and 'material resources' were not even framed as issues by the majority, let alone answered. We will discuss in detail, the answers given by Justice Krishna Iyer to these questions at a later

stage. For now, it is sufficient to note that Justice Krishna Iyer *inter alia* observed that all resources that satisfy material needs, including privately owned resources, fall within the ambit of the phrase 'material resources of the community' used in Article 39(b).[95]

92. There was a resurrection of these observations by Justice Krishna Iyer in the decision of five judges of this Court in **Sanjeev Coke**. As briefly noted above, in this case, the petitioners challenged the nationalisation of their coke oven plants on the ground that nationalising certain coke oven plants, while leaving others out violated Article 14 of the Constitution. The Court proceeded on the assumption that Article 31C remains in force and protects a legislation from challenge under Articles 14 and 19 when the Act bears a nexus with the principles in Article 39(b) or (c). This Court held that the Coking Coal Mines (Nationalisation) Act 1972 is a legislation that gives effect to the policy specified in Article 39(b) and therefore, is immune from a challenge to its constitutionality under Article 14. To establish the nexus between the Act and the principles laid down in Article 39(b), the bench of five judges of this Court (speaking through Chinappa Reddy, J) analysed the scope of Article 39(b) and the meaning of both 'material resources of the community' and the concept of 'distribution to subserve the common good'.

93. The counsel for the petitioner in **Sanjeev Coke** mirrored the arguments made by some of the appellants in the case before us. It was urged that a coal mine

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[95] Ranganatha Reddy [80-84].

or coke oven plant owned by private parties cannot constitute a "material resource of the community" until it is acquired by the state. It was argued that to qualify as a material resource of the community, the ownership of the resource must vest with the state. A legislation such as the Coking Coal Mines (Nationalisation) Act, it was urged, may be a legislation for the acquisition of coking coal mines and coke oven plants belonging to private parties but cannot be considered to be a legislation in furtherance of Article 39(b). In essence, the petitioners' case was that acquisition is a pre-requisite for 'distribution' and cannot be considered synonymous with distribution.

94. This Court rejected this argument and quoted with approval paragraphs 82 to 83 of the judgment authored by Justice Krishna Iyer in **Ranganatha Reddy** for a minority of judges**.** Relying on the observations of Justice Krishna Iyer, this Court concluded that material resources of the community are not confined to public-owned resources but include "all resources, natural and man-made, public and private-owned". In this way, the observations in the minority opinion authored by Justice Krishna Iyer in **Ranganatha Reddy** were resurrected by a five-Judge Bench of this Court in **Sanjeev Coke**.

b. **Sanjeev Coke** erred in relying on the observations of the minority in **Ranganatha Reddy**

95. The first issue which arises is the precedential value of the observations made by Justice Krishna Iyer in his opinion in **Ranganatha Reddy** and whether a

subsequent bench of lesser strength in **Sanjeev Coke** was in violation of judicial discipline by following these observations.

96. The law laid down by this Court is binding on subsequent benches of lesser or coequal strength. A bench of lesser strength cannot disagree or dissent from the view taken by a bench of a larger quorum. In case of any doubt, such a bench may only invite the attention of the Chief Justice and request for the matter to be placed for hearing before a bench of a larger strength than the quorum of the bench whose decision was being considered. A bench of coequal strength may go one step ahead, and express an opinion doubting the correctness of the view taken by the earlier bench of coequal strength. Subsequently, the matter may be placed before a larger bench to lay down the law on the correctness of the decision which is doubted.[96]

97. Judges of this Court have the liberty to pronounce separate dissenting judgment(s). However, it is the decision of the majority of judges which constitutes the binding judgment. [97] The binding nature of the judgement depends on the bench strength and not the numerical strength of the majority taking a particular view. For instance, if a judgment is pronounced by a bench of seven judges, with four judges constituting the majority, and the remaining three judges dissenting from the view of the majority, the majority judgement

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[96] Central Board of Dawoodi Bohra vs. State of Maharashtra, (2005) 2 SCC 673 [12]; 2004 INSC 720
[97] Article 145(5), Constitution of India. [It reads: "No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion."] A similar provision was contained in Section 214(4) of the Government of India Act, 1935.

will constitute a binding judgment by a bench of seven judges and not a bench of four judges. This position of law has been clarified and settled by a Constitution Bench of this Court in **Trimurthi Fragrances (P) Ltd.** v. **State (NCT of Delhi)**.[98]

98. A dissenting judgment, however, must be distinguished from a concurring judgment.[99] A dissenting judgment is a judgment signed by a minority of judges, with or without an accompanying opinion, which expresses non-concurrence with the decision of the majority of judges of the court.[100] However, judges of this Court who agree with the decision of the majority may also author separate opinions. In such 'concurring opinions', the judge (or judges) agree with the conclusion of the majority, though they separately state their views on the case or their reasons for concurrence. Such opinions may be based on different grounds and the judges may give separate reasons, even about observations on which they concur with the majority. The majority judgement too is not always contained in a single opinion. It is common practice for a plurality of judges of this Court to render separate opinions, and it is from the conclusions and concurring observations of each of their judgements that a majority opinion is identified.

99. In order to determine whether the observations in the concurring opinion of a numerical minority of judges constitute a binding precedent, we must ask two

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[98] 2022 SCC OnLine SC 1247; 2022 INSC 975.
[99] DD Basu, 'Constitution of India', Vol 9, p 9917.
[100] ADVANCED LAW LEXICON BY RAMANATHAIER, 3rd Edn., Vol. III, p. 2509.

questions. **Firstly,** when only the concurring opinion expounds the law on a particular point, does the majority opinion indicate a difference of opinion from that view or distance itself from such reasoning? **Secondly**, are the observations in the concurring opinion essential to the *ratio decidendi* and can they be regarded as an expression of opinion on behalf of this Court as a whole?[101] These requirements are cumulative. For observations in a concurring opinion to be binding on a smaller or coequal bench, the observations in the concurring opinion should be both free from disagreement or difference by the majority of judges and also be a part of the *ratio decidendi* of the judgment.

100. The disagreement with the concurring view in the majority opinion may be express or implied. The majority may expressly state that it disagrees with or distances itself from the view taken in a concurring opinion on a particular issue. Alternatively, the discussion in the majority judgment on that issue may be at odds with the observations in the concurring opinion. It is the latter situation that becomes more tricky, particularly, when a single opinion has not been authored on behalf of the majority. A Constitution Bench of this Court in **Jaishri Laxmanrao Patil v. State of Maharashtra**[102] has provided some assistance about how to cull out the binding majority opinion in such a situation, where various judges, discuss the same question of law albeit differently. The Constitution Bench (speaking through Justice Ravindra Bhat) relied on the observations in **Rajnarain Singh v. Patna Administration Committee**[103] and

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[101] DD Basu, 'Constitution of India', Vol 9, p 9849.
[102] (2021) 8 SCC 1; 2021 INSC 284.
[103] (1954) 2 SCC 82; 1954 INSC 69.

held that to cull out the majority in such cases, the Court must attempt to ascertain the 'greatest common measure' of agreement. The Court held:

> "**355.** Before we proceed to notice the relevant paragraphs of the judgment of **Indra Sawhney**, we need to first notice method of culling out the majority opinion expressed in a judgment where more than one judgments have been delivered. The Constitution Bench of this Court in **Rajnarain Singh v. Patna Admn. Committee**, had occasion to find out the majority opinion of a seven-Judge Bench judgment delivered by this Court in **Delhi Laws Act, 1912, In re**. the Constitution Bench laid down **that opinion which embodies the greatest common measures of the agreement among the Bench is to be accepted as the decision of the Court. Thus, for culling out the decision of the Court in a case where there are several opinions, on which there is greatest common measure of agreement is the decision of the Court**."
>
> (emphasis supplied)

101. Therefore, in situations where several opinions are authored, dealing with the same questions of law, to identify the propositions of law that are binding on subsequent benches, the greatest common measure of agreement by a majority of judges would be **binding** on future benches.

102. It must be noted, however, that there is a difference between whether an observation is a binding precedent and whether it is a position of law that may have persuasive value on subsequent benches. In the absence of disagreement by a majority of judges (either express or implied), nothing precludes subsequent benches of this Court from relying on observations made in a concurring opinion (on behalf of the minority of judges) which are not discussed by the other judges at all. It is assumed in such cases, that all judges on the bench have read the opinions of one another, and did not deem it

necessary to either state their express disagreement with the opinion or lay down a different understanding of the proposition of law (implied disagreement).[104]

103. For instance, in **Navtej Singh Johar** v **Union of India**,[105] one of us (DY Chandrachud, J) authored a concurring opinion, recognising the concept of 'indirect discrimination'. While technically this was an opinion on behalf of only one judge, the other judgements in the case did not discuss this issue at all. Neither did the other judges expressly disagree with the view, nor did they present a view on the subject that could be seen as being at odds with the view taken in the concurring opinion. In the absence of such disagreement, express or implied, subsequent benches of this Court were not precluded from relying on the observations as having persuasive value. In **Lt. Col. Nitisha & Ors. vs. Union of India & Ors**,[106] a two-Judge Bench of this Court relied on the conception of 'indirect discrimination' while analysing an evaluation criteria set by the army, which was facially neutral but disproportionately impacted women officers. The bench was not violating judicial discipline merely because a majority of judges did not expressly agree with the view or discuss the concept at all. The fact that the observations of the concurring opinion were not disagreed with or even discussed is sufficient for a subsequent bench to rely on the same if they choose to do so. In such cases, the court is not bound by the view but may choose to rely on it.

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[104] Kaikhosrou (Chick) Kavasji Framji v. Union of India, (2019) 20 SCC 705 [40-46]; 2019 INSC 378.
[105] (2018) 10 SCC 1 [442-446]; 2018 INSC 790.
[106] (2021) 15 SCC 125 [50]; 2021 INSC 210.

104. However, the above example is distinguishable from the situation in **Ranganatha Reddy**. The majority judgment in **Ranganatha Reddy** not only refrained from making observations about the interpretation of Article 39(b) but also indicated an express disagreement with the observations in the judgment of Justice Krishna Iyer on the point. It was to prevent future benches from relying on the observations of that judgment, by presuming concurrence, that the majority opinion clarified that it must not be understood to agree with the observations in the judgement of Justice Krishna Iyer. Thus, it is clear that a majority of judges of this Court did not adopt the view advanced by Justice Krishna Iyer on the interpretation of Article 39(b). In such a situation, the bench of five judges in **Sanjeev Coke** was bound by the view of the majority in **Ranganatha Reddy**, which was a decision rendered by a bench of seven judges. The view taken by a minority of three judges and specifically disagreed with by the majority of four judges could not be relied on by a smaller bench of five judges in **Sanjeev Coke**. Not only was the opinion in the judgment of a minority of judges not binding, but it also could not be relied on as having persuasive value, since there was a majority opinion of a larger bench disagreeing with the view.

105. The majority in **Ranganatha Reddy** did not discuss its interpretation of Article 39(b) and merely expressed their disagreement *simpliciter* with the view of the concurring minority. Therefore, it is undoubtedly possible that the bench of a lower quorum in **Sanjeev Coke** was perplexed about the interpretation of Article 39(b) that it was bound to follow. In such a situation it was open to the bench to have brought this to the attention of the Chief Justice and requested

for the matter to be placed before a larger bench. A part of the beauty of minority opinions undoubtedly lies in the hope of the author that, in some cases, they may become the law when adopted by a majority in a future case.[107] However, this cannot be done by compromising on judicial discipline. To this effect, this Court in **Sanjeev Coke** erred in relying on the observations in the opinion of Justice Krishna Iyer in **Ranganatha Reddy,** when the binding opinion of the majority of judges expressly stated their inability to agree with those observations.

c. <u>The error has been carried forward in subsequent decisions</u>

106. Mr Tushar Mehta, the learned Solicitor General of India, has argued that this Court has consistently upheld the observations of Justice Krishna Iyer in **Ranganatha Reddy** and this is not a case of jurisprudential inconsistency or conflicting decisions. The observations in **Sanjeev Coke** on Article 39(b), adopting the minority view in **Ranganatha Reddy**, have been followed in subsequent decisions of this Court. These decisions include *inter alia* **SAbu Kavur Bai, Basantibal Khetan**, and **Mafatlal.** Thus, it was urged, that this Court should refrain from unsettling a position of law that has been consistent for several years and has "acquired the status of *stare decisis*".

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[107] The famous words of Chief Justice Hughes: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed..... Nor is this always in vain. In a number of cases dissenting opinions have in time become law." [HUGHES, THE SUPREME COURT OF THE UNITED STATES, (1930) American Bar Asson. Journal.]

107. We are not inclined to accept this submission. In **Sita Soren v Union of India**,[108] a Constitution Bench of this Court, speaking through one of us (DY Chandrachud, J) had occasion to clarify that the doctrine of *stare decisis* is not an inflexible rule of law. This Court may review its earlier decisions if it believes that there is an error, or the effect of the decision would harm the interests of the public or if "it is inconsistent with the legal philosophy of the Constitution". In cases involving the interpretation of the Constitution, this Court would do so more readily than in other branches of law because not rectifying a manifest error would be harmful to the public interest and the polity. The period of time over which the case has held the field is not of primary consequence.

108. As noted above, the decision of the five-judge bench in **Sanjeev Coke** was based on an erroneous reliance on the minority opinion in **Ranganatha Reddy**. The same error committed in **Sanjeev Coke** has been carried forward in subsequent decisions of this Court ever since. The view of a minority of three judges, expressly disagreed with by a majority of four judges, has been relied on for several years, without its validity ever being tested by a larger bench. Similarly, the disagreement with the minority opinion expressed by the majority in **Ranganatha Reddy** has also remained untested, with the smaller bench in **Sanjeev Coke** adopting the minority view without any explanation. Therefore, this bench of nine judges must test the correctness of the decision in **Ranganatha Reddy** and the subsequent decisions relying on the minority opinion in the case. This exercise has eluded this Court for a long period of

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[108] (2024) 5 SCC 629 [33]; 2024 INSC 161.

time. As noted above, it is only a bench of a larger quorum (nine judges) that can test the correctness of an opinion rendered by a smaller bench (seven judges) and thus, this Constitution Bench must reconsider the interpretation of Article 39(b) adopted in these judgements.

d. The single-line observation in Mafatlal is *obiter dicta*

109. Another point of contention between the parties has been the precedential value of the single-line observation of a nine-judge bench of this Court in **Mafatlal** that the phrase 'material resources of the community' under Article 39(b) includes privately owned property. As noted above, the underlying seven-judge referral order notes that the attention of this Court was drawn to this observation in **Mafatlal**. It was in this context that the seven-judge bench order expressed doubts about the view and referred the question to this bench of nine judges.

110. The counsel for the appellants contend that the observations in **Mafatlal** on this point constitute *obiter dicta* and do not bind this bench of coequal strength. On the other hand, the counsel for the respondents have advanced the view that the issue arose directly in the case and the observations are binding on this bench.

111. Not every observation in a judgement of this Court is binding as precedent. Only the *ratio decidendi* or the propositions of law that were **necessary** to

decide on the issues between the parties are binding.[109] Observations by the judge, even determinative statements of law, which are not part of her reasoning on a question or issue before the court, are termed *obiter dicta*. Such observations do not bind the Court. More simply, a case is only an authority for what it *actually* decides.[110]

112. A Constitution Bench of this Court (speaking through Chief Justice Khare) in **Islamic Academy of Education v. State of Karnataka**[111] pithily observed:

> "**2.** […] The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. **By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment.** […]"

113. In **Secunderabad Club v. CIT,**[112] this Court, speaking through one of us (Justice BV Nagarathna), had occasion to delineate how to cull out the *ratio decidendi* of a judgement and identify the principles which have precedential value. This Court observed:

> "**14.** […] According to the well-settled theory of precedents, every decision contains three basic ingredients :
> (i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the judge draws from the direct or perceptible facts ;
> **(ii) statements of the principles of law applicable to the legal problems disclosed by the facts ; and**

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[109] HALSBURY, 2nd Edn, Vol 19, para 556.
[110] Secundrabad Club v. CIT, 2023 SCC OnLine SC 1004 [13]; 2023 INSC 736.
[111] (2003) 6 SCC 697 [2]; 2003 INSC 391.
[112] 2023 SCC OnLine SC 1004; 2023 INSC 736.

> (iii) judgment based on the combined effect of (i) and (ii) above.
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> For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision, for, it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. **However, for the purpose of the doctrine of precedent, ingredient (ii) is the vital element in the decision. This is the ratio decidendi. It is not everything said by a judge when giving a judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi**."
>
> (emphasis supplied)

114. Further, a simple test that has been invoked by this Court to determine whether a particular proposition of law is to be treated as the *ratio decidendi* of a case is the "inversion test" formulated by Professor Eugene Wambaugh.[113] The test mandates that to determine whether a particular proposition of law is part of the *ratio decidendi* of the case, the proposition is to be inversed. This means that either that proposition is hypothetically removed from the judgement or it is assumed that the proposition was decided in reverse. After such removal or reversal, if the decision of the Court on that issue before it would remain the same then the observations cannot be regarded as the *ratio decidendi* of the case.[114]

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[113] State of Gujarat v. Utility Users' Welfare Assn., (2018) 6 SCC 21 [113-114]; 2018 INSC 329.
[114] Eugene Wambaugh, The Study of Cases (Boston: Little, Brown & Co., 1892)

115. In **Mafatlal**, a Bench of nine Judges of this Court adjudicated on the rights and remedies available to a citizen against the State in relation to the refund of unlawfully recovered taxes and imposts. The court dealt with whether a manufacturer or assessee who has passed on the burden of an illegally recovered tax is entitled to a refund or whether a refund in such cases will amount to unjust enrichment. One of the several arguments made by the counsel appearing for the Union of India was that this question must be decided in light of the constitutional values of social and economic justice, including those laid down in the Preamble and Articles 39(b) and (c). More specifically, it was urged that Article 265[115] must be interpreted in the context of these constitutional values.

116. Faced with the above argument, the majority opinion authored by Justice Jeevan Reddy, on behalf of himself and four other judges, made certain observations which referred to Article 39(b). These observations are found in paragraphs 84 to 86 of the judgement. We must take a closer look at these observations, in the context of the issues before the Court, to determine whether they are part of the *ratio decidendi* and central to the decision of this Court.

117. Justice Jeevan Reddy attempted to locate the question of refund of unlawfully recovered duty within the framework of the "philosophy and core values" which guide our Constitution. In this context, it was observed that these

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[115] Article 265, Constitution of India. [It reads: "*265. Taxes not to be imposed save by authority of law – No tax shall be levied or collected except by authority of law*".]

values can be located *inter alia* in the Directive Principles contained in Part IV, including Article 39(b) and the Preamble of the Constitution. Justice Jeevan Reddy observed:

> "**84.** […] Unlike the economically neutral — if not pro-capitalist — Constitutions governing those countries**,** the Indian Constitution has set before itself the goal of "Justice, Social, Economic and Political" — a total restructuring of our society — the goal being what is set out in Part IV of the Constitution and, in particular, in Articles 38 and 39**. Indeed, the aforesaid words in the Preamble constitute the motto of our Constitution, if we can call it one. Article 38 enjoins upon the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life". Article 39 lays down the principles of policy to be followed by the State. It says that 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; and (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment".** Refunding the duty paid by a manufacturer/assessee in situations where he himself has not suffered any loss or prejudice (i.e., where he has passed on the burden to others) is no economic justice; it is the very negation of economic justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the manufacturing community thereby contributing to concentration of wealth in a small class of persons which may not be consistent with the common good. **The Preamble and the aforesaid articles do demand that where a duty cannot be refunded to the real persons who have borne the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good** […]
>
> (emphasis supplied)

118. In the next paragraph, Justice Jeevan Reddy made further observations about 'philosophy and values' which must be kept in mind while interpreting the Constitution. Significantly, Justice Jeevan Reddy borrowed from the observations by Justice Krishna Iyer in **Ranganatha Reddy** and noted:

> "**85. […]** As observed by Thomas Jefferson, as far back as in 1816, "laws and institutions must go hand-in-hand with the progress of the human mind … as new discoveries are made, new truths are discovered and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the time…". The very same thought was expressed by Krishna Iyer, J. in **State of Karnataka v. Ranganatha Reddy** with particular reference to our constitutional philosophy and values:
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> > "Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process of the new equity-loaded legality…. It is right that the rule of law enshrined in our Constitution must and does reckon with the roaring current of change which shifts our social values and shrivels our feudal roots, invades our lives and fashions our destiny."
>
> The learned Judge quoted Granville Austin, saying:
> "The Judiciary was to be the arm of the social revolution, upholding the quality that Indians had longed for in colonial days…. The courts were also idealised because, as guardians of the Constitution, they would be the expression of a new law created by Indians for Indians."

119. Having made these observations, this Court went on to accept the submission of the counsel for the Union of India and held that the 'philosophy and core values' of our Constitution must be kept in mind while understanding the provisions of the Constitution, including Article 265. Before reaching this

conclusion, the judgement stated in a single sentence that "the 'material resources of the community' are not confined to public resources" but include all resources, including privately owned resources. The observations were as follows:

> "86. **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" is repeatedly affirmed by this Court.** (See *Ranganatha Reddy*, *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coa*l and *State of T.N. v. L. Abu Kavur Bai*), We are of the considered opinion that Shri Parasaran is right in saying that the philosophy and the core values of our Constitution must be kept in mind while understanding and applying the provisions of Article 265 of the Constitution of India and Section 72 of the Contract Act (containing as it does an equitable principle) — for that matter, in construing any other provision of the Constitution and the laws. **Accordingly, we hold that even looked at from the constitutional angle, the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position even if Article 265 can be invoked — we have held, it cannot be — for claiming refund of taxes collected by misinterpretation or misapplication of a provision of law, rules, notifications or regulation."**

120. The above observations indicate that the relevance of Article 39(b) to the judgement was limited to the larger socio-economic values which it espouses. The *ratio decidendi* of the majority judgement was that the constitutional values contained in the Preamble and Part IV of the Constitution, including Article 39(b) must be considered while interpreting Article 265 and determining whether a refund of taxes is permissible to a person who has passed on the burden. The single-line observation on Article 39(b) encompassing privately owned property

was not relevant to this holding. To hold that this observation constitutes the *ratio decidendi* of the judgment would be to disregard the warning of Chief Justice Khare in **Islamic Academy of Education** that "by reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment."[116]

121. This Court in **Mafatlal** did not independently conclude that Article 39(b) encompasses private property or justify the relevance of this proposition to the issues before the court. It was merely stated that this has been "repeatedly affirmed" by this Court. Even if this proposition of law is inverted and it is presumed that this Court observed that private resources do not fall within the ambit of 'material resources of the community', it would not impact the decision or the issue in question. The underlying values of economic justice which run through Chapter IV of the Constitution and the Preamble would remain intact and this Court would have reached the same conclusion. The tax collected was already within the "ownership and control" of the government, and in the context of a refund, there is no question of distributing any privately owned resources. We are therefore inclined to accept the submission of the appellants that the issue of whether Article 39(b) includes privately owned property was not a matter in dispute in **Mafatlal.** The single-line observation of Justice Jeevan Reddy in the majority opinion constitutes *obiter dicta* and is not binding on this Court.

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[116] Islamic Academy of Education [2].

122. Mr Tushar Mehta, the learned Solicitor General of India contended that certain observations on Article 39(b) have been made not only in the majority opinion but also in two other opinions – a concurring opinion authored by Justice Paripoornan and a dissenting opinion authored by Justice SC Sen. It was urged that this indicates that the issue of Article 39(b) was central to the dispute and the observations of the majority on the inclusion of private property are part of the ratio of the judgement.

123. Justice Paripoornan concurred with the majority view and accepted the submission of the counsel for the Union of India that Article 265 of the Constitution must be construed in light of the values in the Preamble and Articles 39(b) and (c). The observations were in the following terms:

> **"304.** […] The plea urged was that, if the assessee, is denied the refund, the State Government could retain the amount illegally collected, and it would amount to violation of the constitutional mandate enshrined in Article 265 of the Constitution. An equitable principle will not hold good against a constitutional mandate. On the other hand the counsel for the Union of India, **Shri K. Parasaran, brought to our notice the following portion of the Preamble and Articles 39(b) and (c) of the Constitution to contend that Article 265 of the Constitution cannot be construed in a vacuo or isolation, but should be construed in the light of the basic principles contained in other parts of the Constitution — viz. — the Preamble and the Directive Principles of State Policy:**
>
> **"Preamble**
> **WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political:**
> *****"**
> **Articles 39(b) and (c):**

> **"39. (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;**
> **(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;"**
>
> **305**. Mr Parasaran also urged that it should be borne in mind that excise duty is an indirect levy or tax which could be passed on. Innumerable persons bear the brunt. And it is passed on, ordinarily by prudent businessmen. […] **The scope of Article 39(b) of the Constitution, as laid down by this Court in *State of Karnataka v. Ranganatha Reddy, Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., State of T.N. v. L. Abu Kavur Bai,* was highlighted**. […]
>
> **306. On an evaluation of the rival pleas urged in the matter, I am of the view that the plea of the counsel for Union of India should prevail."**
> **(emphasis supplied)**

124. On the other hand, Justice Sen disagreed with the view taken in the opinions authored by Justice Jeevan Reddy and Justice Paripoornan. He held that the provisions of Article 39 cannot curtail the interpretation of Article 265, and the Directive Principles do not permit the state to use unlawfully collected properties. He observed:

> "**161.** Article 39 of the Constitution has directed the State to formulate its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. **These provisions do not in any way curtail the scope and effect of Article 265. Article 39 does not enjoin that unlawfully collected properties should be used by the State for the common good. Nor does it say that the operation of the economic system should be so moulded as to prevent concentration of wealth,**

> **by unlawful means. Article 39 cannot be a basis for retaining whatever has been gathered unlawfully by the Government for common good. Simply stated the Directive Principles of State Policy do not license the Government to rob Peter to pay Paul**."

125. The above observations in the opinions of Justice Paripoornan and Justice SC Sen only further indicate that the argument of the counsel was limited to whether Article 265 of the Constitution must be interpreted in light of the constitutional values found *inter alia* in the Preamble and Part IV, including Article 39(b). The observations in these two opinions in no way assist the respondents in establishing that the single sentence in the majority judgement about the inclusion of private property constituted the *ratio decidendi* of the judgment.

126. In any event, the mere presence of an observation in multiple opinions of the court, be it concurring or dissenting opinions, does not automatically indicate that they form part of the *ratio decidendi*. In order to determine whether the observations form part of the *ratio decidendi*, one must go back to the drawing board and determine whether the observations pertained to an issue which *actually* arose between the parties and were *necessary* to the determination by the court. In other words, even if a numerical majority of judges or opinions of the Court affirm an observation, it would not automatically constitute the *ratio decidendi* of the case. It must be independently established that the observation relates to an issue which was in dispute before the court.

127. Therefore, the single-line observation in **Mafatlal** that the phrase 'material resources of the community' used in Article 39(b) includes privately owned resources was *obiter dicta* and is not binding on this Court.

iii. Interpreting Article 39(b)

128. Having addressed the contentions regarding judicial discipline and the precedential value of the judgments which gave rise to this reference, we turn to the substantive question before us: the interpretation of Article 39(b).

129. The counsel for the respondents contended that this Court should refrain from laying down a water-tight interpretation of Article 39(b) and it should be left to Parliament to determine the ambit of the provision based on the economic priorities of the day. We are not inclined to accept such an argument in its entirety. The interpretation of Article 39(b) has far-reaching consequences, involving judicial inquiry, which makes it incumbent on this Court to interpret the provision. These consequences, detailed below, underscore the necessity of a constitutional interpretation by this Court, while also highlighting the ramifications of adopting a wide and unmanageable construction of the provision.

a. <u>Article 39(b) as a pre-requisite to protection under Article 31C</u>

130. As discussed in Part C of this judgement, Article 31C as upheld by the majority in **Kesavananda Bharati** remains in force under the Constitution. Under this provision (as it stands), no law giving effect to the policy of the State towards securing the principles specified in clauses (b) or (c) of Article 39(b) can be challenged on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Articles 14 and 19 of the Constitution. Therefore, the first and perhaps most significant consequence of this Court holding that a certain statute gives effect to the principles in Article 39(b) is that it falls within the immunity provided by Article 31C. The constitutionality of such a legislation cannot be challenged under Articles 14 or 19 of the Constitution.

131. Prior to the decision in **Kesavananda Bharati**, if a law merely contained a declaration that it gives effect to the policy laid down in Article 39(b), it could not be questioned in any court on the ground that it does not *actually* give effect to such a policy. In **Kesavananda Bharati**, this part of the provision was struck down. All laws which purport to give effect to the principles in Articles 39(b) or (c) of the Constitution are subject to judicial inquiry and review on the question of whether they *actually* bear a nexus with the provision. In other words, the question of whether they do in fact give effect to the principles in Articles 39(b) and (c) is justiciable.

132. In **Kesavananda Bharati**, while striking down the second part of the erstwhile Article 31-C, Justice HR Khanna explained the importance of the court exercising judicial review on whether the legislation gives effect to the principles under Article 39(b) and (c). He was particularly apprehensive of giving the

legislature the final authority to determine whether a law falls within the ambit of Article 39(b). The exclusion of judicial review was held to be violative of the basic structure of the Constitution. Justice Khanna observed:

> "(xiv) The second part of Article 31-C contains the seed of national disintegration and is invalid on the following two grounds:
>
> (3) **It gives a carte blanche to the legislature to make any law violative of Articles 14, 19 and 31 and make it immune from attack by inserting the requisite declaration.** Article 31-C taken along with its second part gives in effect the power to the legislature including a State Legislature, to amend the Constitution in important respects.
> (4) The legislature has been made the final authority to decide as to whether the law made by it is for the objects mentioned in Article 31-C. **The vice of the second part of Article 31-C lies in the fact that even if the law enacted is not for the object mentioned in Article 31-C, the declaration made by the legislature precludes a party from showing that the law is not for the object and prevents a court from going into the question as to whether the law enacted is really for that object. The exclusion by the legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution**. The second part of Article 31-C goes beyond the permissible limit of what constitutes amendment under Article 368."

133. The sequitur to this Court striking down the second part of Article 31-C in **Kesavananda Bharti** is that the court may conduct a judicial inquiry into whether the legislation which is sought to be saved by Article 31-C, actually bears a direct and reasonable nexus with the principles laid down in Article 39(b) or (c), as the case may be. In this regard, the observations of Justice Mathew in **Kesavananda Bharati** are instructive:

> **"1779.** […] a Court will have to examine the pith and substance, the true nature and character of the law as also its design and the subject-matter dealt with by it together with its object and scope. If the Court comes to the conclusion that the declaration was merely a pretence and that the real purpose of the law is the accomplishment of some object other than to give effect to the policy of the State towards securing the Directive Principles in Article *39*(*b*) and (*c*), the declaration would not be a bar to the Court from striking down any provision therein which violates Articles 14, 19 or 31**. In other words, if a law passed ostensibly to give effect to the policy of the State is, in truth and substance, one for accomplishing an unauthorised object, the Court would be entitled to tear the veil created by the declaration and decide according to the real nature of the law.**"
>
> (emphasis supplied)

134. In view of the decision in **Kesavananda Bharati**, it has been consistently affirmed by this Court that the declaration in a statute that the Act has a nexus with or seeks to give effect to the principles laid down in Article 39(b) or (c) is subject to judicial review. To determine whether a statute is within the folds of Article 31-C, the court may examine the nature and character of legislation to determine whether there is any direct and reasonable nexus between the law and the principles in Articles 39(b) and (c). On such an examination, if it appears that there is no such nexus, the legislation will not enjoy the protection of Article 31-C. It has been held by this Court that "to see the real nature of the statute, the court may also tear the veil". If the court concludes that the object of the legislation was merely a pretence and the real object does not correspond with the principles laid down in Articles 39(b) and (c), Article 31-C would not be attracted and the validity of the statute would have to be tested independent of Article 31-C.

135. It cannot be gainsaid that the impact of a legislation being saved by Article 31C is significant. The impact of this 'safe harbour' was eloquently described by Chief Justice YV Chandrachud, speaking for a majority of judges in **Minerva Mills.** While detailing the consequence of legislation being protected from a challenge under Article 14 and 19, this Court observed:

> "61. Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of a democracy. They are universally so regarded, as is evident from the Universal Declaration of Human Rights. Many countries in the civilised world have parted with their sovereignty in the hope and belief that their citizens will enjoy human Freedoms. And they preferred to be bound by the decisions and decrees of foreign tribunals on matters concerning human freedoms. **If Articles 14 and 19 are put out of operation in regard to the bulk of laws which the legislatures are empowered to pass, Article 32 will be drained of its life-blood.**
>
> 74. Three Articles of our Constitution and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. **Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual**"
>
> (emphasis supplied)

136. In view of the above, the first consequence of the interpretation of Article 39(b) by this Court is linked to its reviewing role as a pre-condition to the protection of Article 31-C. Given that this Court may judicially review the question of whether a legislation bears a direct and reasonable nexus with the

principles of Article 39(b), the interpretation of the provision cannot be left solely to the legislature. This Court must lay down a construction of the provision, which does not grant the legislature absolute authority to include any legislation within the fold of Article 39(b) without a governing principle.

b. Article 39(b) as a Directive Principle

137. The unique consequence flowing from Article 39(b) as a pre-condition to receiving the protection of Article 31-C has been detailed above. However, the provision also has a special place in the Constitution, as a part of the Chapter on 'Directive Principles of State Policy'.

138. Chapter IV of the Constitution is titled ' Directive Principles of State Policy' and contains Articles 36 to 51. The preambular text of Chapter IV may be located in Article 37, which reads as follows:

> "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."

139. From the text of Article 37, three major principles about the provisions contained in Chapter IV can be identified. Firstly, unlike fundamental rights and other provisions in the Constitution, they shall not be 'enforceable' by any court. In other words, a breach of a Directive Principle cannot ground a legal claim.

Secondly, the principles laid down in the provisions are **fundamental** to the governance of the country. Thirdly, it is the 'duty of the State' to apply these principles in making laws. These principles raise questions about the purport of the term 'fundamental' in the context of Chapter IV and whether the duty of the state to apply these principles is a legal or merely a moral duty. It is undoubtedly true that Article 37 renders Directive Principles immune from judicial enforcement. However, such non-enforceability is predicated on the understanding that many of these principles require fiscal resources for implementation, and thus immediate accountability for their non-fulfilment would have burdened a nascent country. The non-justiciability of these principles does not diminish their significance and they remain significant despite their direct non-enforceability through judicial channels.[117]

140. The rest of the chapter, containing Articles 38 to 51 lays down the principles which constitute the Directive Principles. These principles range from equal pay for equal work to the organisation of village panchayats to humane conditions of work and maternity relief. Initially, between the 1950s and 1960s, the jurisprudence of this Court reflected the view that Directive Principles have no role to play in the decision-making of the courts – they are not directly enforceable, do not play a role in the interpretation of statutes, and cannot be used to abridge or interpret fundamental rights in any way. They were viewed as mere instructions to the legislature and executive, which lay outside the ambit of judicial inquiry. For instance, an early decision of this Court in **State of**

[117] Ashok Kumar Thakur v Union of India, (2008) 6 SCC 1 [173]; 2008 INSC 473.

Madras v Champakan Dorairjan [118] declined to accord any weight to arguments that sought to invoke Directive Principles as a justification for allegedly abridging fundamental rights. In this case, the erstwhile State of Madras sought to justify caste-based affirmative action policies by invoking Article 46 of the Constitution.[119] A seven-judge bench of this Court (speaking through Justice SR Das) rejected these arguments and opined:

> "**15. […]** The Directive Principles of the State policy, which by Article 37 are expressly made unenforceable by a court, cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under Article 32. The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive Act or order, except to the extent provided in the appropriate article in Part III. **The Directive Principles of State policy have to conform to and run as subsidiary to the chapter of Fundamental Rights**. **In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood. […]**"
>
> (emphasis supplied)

141. A similar view is advanced by the distinguished constitutional scholar, HM Seervai in his treatise, 'Constitutional Law of India'.[120] Seervai adopts the view that Directive Principles have no role to play in constitutional adjudication by the court and are mere exhortations to the legislature and executive. In his opinion, the only body that can hold the government accountable in relation to Directive Principles is the electorate and the courts must steer clear of this domain. If this position of law was true, there would be some merit in the argument of the

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[118] AIR 1951 SC 226 [15]; 1951 INSC 26.
[119] Article 46, Constitution of India: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."
[120] HM Seervai, Constitutional Law of India, Vol 2 (4th ed, Universal Law Publishing 2002) 1934–40.

respondents that this Court should refrain from laying down an interpretation of Article 39(b) and leave it to the legislature (and the electorate) to evolve an interpretation for themselves. However, the jurisprudence of this Court with regard to the role of Directive Principles has evolved significantly, and the construction of Directive Principles plays a vital role in various forms of judicial inquiry.

142. Early signs of a shift in the approach of this Court were visible in **Mohd Hanif Qureshi v State of Bihar**.[121] This Court held that attempts must be made to harmoniously interpret Directive Principles and fundamental rights. However, this Court stopped short of granting Directive Principles any further role vis-à-vis interpreting fundamental rights. The role of Directive Principles was placed subordinate to fundamental rights. This Court adopted the view that the government should undoubtedly frame legislation advancing Directive Principles, but the fundamental rights in Part III, interpreted autonomously, would continue to serve as constraints on these endeavours. Similar observations were echoed by this Court in **Golak Nath v. State of Punjab**,[122] marking an entry into the era of harmonious construction of Directive Principles and fundamental rights.

143. Subsequently, in the landmark decisions in **Kesavananda Bharati** and **Minerva Mills**, the insistence of this Court on a harmonious reading and interplay between fundamental rights and Directive Principles became even

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[121] 1957 SCC OnLine SC 17 [12].
[122] 1967 SCC OnLine SC 14 [16, 19]; 1967 INSC 45.

stronger. In **Minerva Mills**, this Court (speaking through Chief Justice YV Chandrachud) quoted Granville Austin and observed that Part III and Part IV of the Constitution are "two wheels of a chariot, one no less important than the other". This Court made the following observations:

> "56. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. **To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.**
>
> 57. **[…]** It is in this sense that Parts III and IV together constitute the core of our Constitution and, combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution."
>
> (emphasis supplied)

144. In the background of these decisions, which mandated that fundamental rights and Directive Principles must be construed harmoniously, an important principle began to emerge in the jurisprudence of this Court. Courts began to rely on Directive Principles while adjudicating on the 'reasonableness' of the

restriction imposed on fundamental rights. This has been affirmed in a line of precedent of this Court.[123] We may reiterate the observations in one such case to understand this position of law.

145. In **State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,**[124] a bench of seven judges reconsidered several questions which were decided in **Mohd Hanif Qureshi**. Significantly, this Court had occasion to lay down the correct position on the role played by Directive Principles in our constitutional scheme, particularly, with regard to their role vis-à-vis fundamental rights. The Court moved away from the view in **Mohd Hanif Qureshi** that the implementation of a Directive Principle cannot be considered a valid ground for establishing the reasonability of the restriction imposed on the fundamental right guaranteed by Article 19(1)(g). After reviewing several cases on this point, this Court (speaking through Chief Justice Lahoti) laid down the law in the following terms:

> "41. [….] For judging the reasonability of restrictions imposed on fundamental rights the relevant considerations are not only those as stated in Article 19 itself or in Part III of the Constitution: the directive principles stated in Part IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. **A restriction placed on any fundamental right, aimed at securing directive principles will be held as reasonable and hence *intra vires* subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting**

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[123] *See* Indian Handicrafts Emporium v. Union of India, (2003) 7 SCC 589, 2003 INSC 427; M.R.F. Ltd. v. Inspector, Kerala Govt, (1998) 8 SCC 227 [13], 1998 INSC 423; Workmen v. Meenakshi Mills Ltd., (1992) 3 SCC 336 [27], 1992 INSC 164; Pathumma v. State of Kerala, (1978) 2 SCC 1, 1978 INSC 7.
[124] (2005) 8 SCC 534; 2005 INSC 525.

> **legislature under Part XI Chapter I of the Constitution.**
>
> …
>
> 47 **[…]** The series of decisions which we have referred to hereinabove and the series of decisions which formulate the three stages of development of the relationship between directive principles and fundamental rights undoubtedly hold that, **while interpreting the interplay of rights and restrictions, Part III (Fundamental rights) and Part IV (Directive principles) have to be read together. The restriction which can be placed on the rights listed in Article 19(1) are not subject only to Articles 19(2) to 19(6); the provisions contained in the chapter on directive principles of State policy can also be pressed into service and relied on for the purpose of adjudging the reasonability of restrictions placed on the fundamental rights."**

146. Similarly, in view of the above jurisprudence which mandates that Directive Principles and fundamental rights be viewed as 'complementary and supplementary', Directive Principles have also acquired a role in interpreting fundamental Rights. Reference may be made to the decision in **State of Kerala v. N.M. Thomas**[125] and **Ashok Kumar Thakur v Union of India**[126], where this Court interpreted the right to equality under Article 14 in light of the Directive Principles. Similarly, in cases such as **Bandhua Mukti Morcha v. Union of India**[127] and **Olga Tellis v. Bombay Municipal Corpn.,**[128] this Court expanded the interpretation of Article 21 in light of various Directive Principles and held

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[125] (1976) 2 SCC 310; 1975 INSC 224.
[126] (2008) 6 SCC 1; 2008 INSC 473.
[127] (1984) 3 SCC 161 [10]; 1983 INSC 203.
[128] (1985) 3 SCC 545 [33]; 1985 INSC 151.

that these principles are fundamental to "understanding the meaning and content of fundamental rights".

147. In sum, the Directive Principles play an integral role in constitutional interpretation by this Court. **Firstly**, fundamental rights are to be interpreted harmoniously and in light of these Directive Principles. **Secondly***,* they act as markers of reasonable restrictions on fundamental rights. Therefore, given the role of Directive Principles in constitutional adjudication by this Court, it cannot abdicate the task of interpreting Article 39(b).

iv. Historical Context: Constituent Assembly Debates

148. Most counsel before us have sought to rely on the debates before the constituent assembly to buttress their understanding of Article 39(b). Both sides have drawn different inferences from the discussions of the members of the Constituent Assembly. To address these arguments and understand the intention behind the introduction of Article 39(b) in the Constitution, we will review the debates and discussions in the assembly that are relevant to the issue at hand.

a. <u>Debates about the purpose of Directive Principles</u>

149. On 4 November 1948, Dr B R Ambedkar moved a motion to introduce the draft constitution and delivered a landmark speech, explaining the intentions and ideas behind various provisions of the draft constitution. Dr Ambedkar elucidated the purpose behind including Directive Principles in the Constitution.

He stated that they are a novel feature of our Constitution and the only other Constitution which embodies such principles is that of Ireland. He dismissed the criticism that such principles are merely 'pious declarations' which do not have any binding force. Dr Ambedkar observed:

> "If it is said that the Directive Principles have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law."

150. According to Dr B R Ambedkar, the Directive Principles are akin to the 'Instrument of Instructions' issued to the Governor-General and the Governors of the colonies by the British Government under the Government of India Act 1935. The only difference was that the Directive Principles are in the form of instructions to the Legislature and the Executive. He stated that while future governments may not be answerable for a breach of such principles in a court of law, they would respect these principles, knowing that they are answerable for them before the electorate. Dr Ambedkar noted the importance of such instructions in the following terms:

> "The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the government of the country**. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them**. **He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them**

> **before the electorate at election time.** What great value these directive principles possess will be realized better when the forces of right contrive to capture power."
>
> (emphasis supplied)

151. On 19 November 1948, the Constituent Assembly discussed some of the provisions in Part IV of the draft Constitution. An amendment was moved by Mr Damodar Swarup Seth to draft article 30, which corresponds to Article 38 of the present constitution, in the following terms:

> "Sir, I move that for article 30, the following be substituted:
>
> "30. The State shall endeavour to promote the welfare, prosperity and progress of the people **by establishing and maintaining democratic socialist order** and for the purpose the State shall direct its policy towards securing :—
>
> (a) the transfer to public ownership of important means of communication, credit and exchange, mineral resources and the resources, of natural power and such other large economic enterprise as are matured for socialisation;*
>
> (b) the municipalisation of public utilities;
>
> (c) the encouragement of the organisation of agriculture, credit and industries on co-operative basis."

152. Mr Seth advanced the view that the principles laid down in draft article 30 must be made more specific and convey a clear indication about the 'economic nature of the social order to be established'. He was of the view that the provision must expressly state an endeavour to establish and maintain a 'democratic socialist order', which in his view, was necessary to mitigate the 'capitalistic order' He opined:

> "Sir, my reason for submitting this amendment is that I feel that as it is worded, the article is somewhat indefinite and vague, and does not convey any clear indication as to the economic nature of the social order to be established. We all know that the society in which we now live is of a capitalistic order or character and in this society we see the exploiter and exploited classes both existing side by side; and the exploiting class is naturally the top-dog and the exploited class the under-dog. In such a society we clearly see that the real welfare of the masses, of the toiling millions can neither be secured nor protected, unless the society is made clear of the exploiter class, and **that can only be possible when we establish a socialist democratic order, and transfer to public ownership the "important means of production, communication, credit and exchange, mineral resources and the resources of natural power and such other large economic enterprise as are matured for socialisation;" bring about the "municipalisation of public utilities"; and "the encouragement of the organisation of agriculture, credit and industries on co-operative basis".**

153. The response of Dr BR Ambedkar to this proposal is particularly instructive. He opposed the amendment and stated that there was a misunderstanding among members who proposed such amendments. He was of the view that along with a 'parliamentary democracy', the Constitution sought to establish as an ideal, the concept of an 'economic democracy'. However, he noted there are various ways in which this ideal of 'economic democracy' can be achieved – ranging from individualism to socialism to communism. Dr Ambedkar observed as follows:

> "…. As I stated, our Constitution as a piece of mechanism lays down what is called parliamentary democracy. By parliamentary democracy we mean 'one man, one vote'. We also mean that every Government shall be on the anvil, both in its daily affairs and also at the end of a certain period when the voters and the electorate will be given an

> opportunity to assess the work done by the Government. The reason why we have established in this Constitution a political democracy is because we do not want to install by any means whatsoever a perpetual dictatorship of any particular body of people. While we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy. We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the Government. That idea is economic democracy, whereby, so far as I am concerned, I understand to mean, 'one man, one vote'. **The question is : Have we got any fixed idea as to how we should bring about economic democracy ? There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialistic state as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy.**"

154. According to Dr Ambedkar, the idea was to leave enough room for different schools of economic thought and for the electorate to decide which ideals are the best way to achieve 'economic democracy'. With this intent in mind, the language used in the Directive Principles was 'not fixed or rigid'. He stated:

> "Now, having regard to the fact that there are various ways by which economic democracy may be brought about**, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy,** the fullest opportunity to act in the way in which they want to act.

> Sir, that is the reason why the language of the articles in Part IV is left in the manner in which this Drafting Committee thought it best to leave it**. It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value, for they lay down that our ideal is economic democracy**. [..]
>
> I think, if the friends who are agitated over this question bear in mind what I have said just now that **our object in framing this Constitution is really twofold : (i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every Government whatever, it is in power, shall strive to bring about economic democracy, much of the misunderstanding under which most members are labouring will disappear.**"

155. An insight may also be gleaned from Dr Ambedkar's response to a proposal by Professor KT Shah to include the phrase "India shall be a Secular, Federal, Socialist Union of States" in draft Article 1 of the Constitution.[129] Dr Ambedkar opposed the proposal with a two-fold response. First, he reiterated his position that the Constitution is not a mechanism to install a particular political party, structure of social organisation or economic policy. To lay down such a policy about how social and economic life is to be organised, in his view, would "destroy democracy" and take away citizens' liberty to choose the method of social organisation that suits their needs. He stated that while at that point in time, a socialist organisation may be deemed to be beneficial, future

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[129] Constituent Assembly Debates, Vol VII (15th November 1948)

generations may devise a different form of social organisation. Second, he conceded that the several Directive Principles, including Article 31(ii), which corresponds with the present Article 39(b) are already "socialistic" in their direction and thus, the amendment was 'superfluous'. The observations of Dr Ambedkar are extracted below:

> "Mr. Vice-President Sir, I regret that I cannot accept the amendment of Prof. K. T. Shah. My objections, stated briefly are two. In the first place **the Constitution, as I stated in my opening speech in support of the motion I made before the House, is merely a mechanism for the purpose of regulating the work of the various organs of the State. It is not a mechanism whereby particular members or particular parties are installed in office. What should be the policy of the State, how the Society should be organised in its social and economic side are matters which must be decided by the people themselves according to time and circumstances. It cannot be laid down in the Constitution itself, because that is destroying democracy altogether. If you state in the Constitution that the social organisation of the State shall take a particular form, you are, in my judgment, taking away the liberty of the people to decide what should be the social organisation in which they wish to live. It is perfectly possible today, for the majority people to hold that the socialist organisation of society is better than the capitalist organisation of society. But it would be perfectly possible for thinking people to devise some other form of social organisation which might be better than the socialist organisation of today or of tomorrow. I do not see therefore why the Constitution should tie down the people to live in a particular form and not leave it to the people themselves to decide it for themselves.** This is one reason why the amendment should be opposed.
>
> The second reason is that the amendment is purely superfluous. My Honourable friend, Prof. Shah, does not seem to have taken into account the fact that

> apart from the Fundamental Rights, which we have embodied in the Constitution, **we have also introduced other sections which deal with directive principles of state policy. If my honourable friend were to read the Articles contained in Part IV, he will find that both the Legislature as well as the Executive have been placed by this Constitution under certain definite obligations as to the form of their policy.**
> **[…]**
>
> **What I would like to ask Professor Shah is this: If these directive principles to which I have drawn attention are not socialistic in their direction and in their content, I fail to understand what more socialism can be.**"
>
> (emphasis supplied)

b. Debates about the text of Article 39(b)

156. On 22 November 1948, the Constituent Assembly debated a proposed amendment to Article 31 of the draft Constitution, which corresponds to Article 39 of the present Constitution. Professor KT Shah proposed that clause (ii) of Article 31 of the draft constitution, which corresponds to Article 39(b) of the present Constitution, be substituted as follows:

> "Mr. Vice-President, Sir, I beg to move:
> "That for clause (ii) of article 31, the following be substituted:
>
> '(ii) that the ownership, control and management of the **natural resources of the country in the shape of mines and mineral wealth, forests, rivers and flowing waters as well as in the shape of the seas along the coast of the country shall be vested in and belong to the country collectively and shall be exploited and developed on behalf of the community by the State** as represented by the Central or Provincial Governments or local governing authority or statutory corporation as may be provided for in each case by Act of Parliament';"

(emphasis supplied)

157. Professor Shah contended that the clause in its then existing form could lend itself to “any interpretation” and expressed an apprehension that if the clause is left vaguely worded it would fail to serve its purpose and “make the proper development of the country or the just redistribution of its wealth, or bringing in a fair measure of social justice, only an empty dream.” Therefore, he suggested that the existing clause should be substituted with the draft provision extracted above.

158. Professor Shah was of the view that there could be no dispute about the proposition that as regards the natural resources described in the substituted clause, no human being lent any value in their creation by their own labour. Therefore, it was urged, that they are ‘gifts of nature’ and should belong to all people collectively. He stated that if they are to be developed, they must be for and on behalf of the community. He vehemently opposed the utilisation of such resources by ‘private monopolists’, who in his opinion, only sought ‘profit for themselves’. He noted as follows:

> “The creation or even the presence of vested interests, of private monopolists, of those who seek only a profit for themselves, however useful, important, or necessary the production of such natural resources may be for the welfare of the community, is an offence in my opinion against the community, against the long-range interests of the country as a whole, against the unborn generations, that those of us who are steeped to the hilt, as it were, in ideals of private property and the profit motive, do not seem to realise to the fullest.

> In the resources that are mentioned in my amendment not only is there no creation of any value or utility by anybody's proprietary right being there, but what is more, the real value comes always by the common effort of society, by the social circumstances that go to make any particular interests or resources of this kind valuable."

159. In essence, Professor Shah was of the view that the ultimate ownership, direct management, conduct and development of the natural resources such as mines, mineral wealth and the other natural resources detailed in his proposed amendment, must only be in the hands of the state. He opined as follows:

> "Take mines and mineral wealth. Mines and mineral wealth, as everybody knows, are an exhaustible, – a wasting asset. Unfortunately, these, instead of having been guarded and properly protected and kept for the community to be utilised in a very economical and thrifty manner, have been made over to individual profit-seeking concession-holders and private monopolists, so that we have no control over their exploitation, really speaking, for they are used in a manner almost criminal, so that they can obtain the utmost profit on them for themselves, regardless of what would happen if and when the mines should come to an end or the stored up wealth of ages past is exhausted.
>
> I suggest, therefore, that we allow no long range interests of private profit–seekers involved in the utilisation of these mines and the mineral wealth, that on the proper utilisation of these mines and mineral wealth depends not only our industrial position, depend not only all our ambitions, hopes and dreams of industrialising this country, but what is much more, depends also the defence and security of the nation. It would, therefore, I repeat, be a crime against the community and its unborn generations if you do not realise, even at this hour, that the mineral wealth of the country cannot be left untouched in private hands, to be used, manipulated, exploited, exhausted as they like for their own profit.

> It is high time, therefore, that in this Constitution we lay down very categorically that the ultimate ownership, the direct management, conduct and development of these resources can only be in the hands of the State or the agents of the State, the representatives of the State, or the creatures of the State, like Provinces, municipalities, or statutory corporations.
>
> Another argument may also be advanced here in support of my view. By their very nature, these resources cannot be exploited economically or efficiently unless they become monopolies. In one form or another, they have to be developed in a monopolistic manner. Now monopolies are always distrusted so long as they remain in private hands and are operated for private profit. If they are to be monopolized, as I believe inevitably they will have to be, then it is just as well that they should be owned, managed and worked by the State."

160. Professor Shah stated that the draft provision only provided for vague State control, in the form of a mandate to "sub-serve the common good". He opined that in order to have a positive guarantee of the 'proper, social, and wholly beneficial utilisation' of resources, it was essential to ensure that their ownership, control and management were **vested** in the public hands. He noted:

> "It is not enough to provide only for a sort of vague State control over them as the original clause does**; it is not enough merely to say that they could be so utilised as to "sub serve the common good," every word of which is vague, undefined and undefinable, and capable of being twisted to such a sense in any court of law,** before any tribunal by clever, competent lawyers, as to be wholly divorced from the intention of the draftsman, assuming that the draftsman had some such intention as I am trying to present before the House**. We must have more positive guarantee of their proper, social and wholly beneficial utilisation; and that can only be achieved if their ownership, control and management are vested in public hands.**

> Considerations, therefore, of immediate wealth, of the necessity of industrialisation, of national defence, and of social justice have moved me to invite this House to consider my amendment favourably, namely, that without a proper full-fledged ownership, absolute control and direct management by the State or its representatives of these resources, we will not be able to realise all our dreams in a fair, efficient, economical manner which I wish to attain by this means."
>
> (emphasis supplied)

161. Finally, before concluding, Professor KT Shah clarified that his proposed amendment deliberately did not include 'land' in the list of resources, because "the various measures that have been in recent years adopted to exclude landed proprietors – zamindars to oust them and take over the land, would automatically involve the proposition that the agricultural or culturable land of this country belongs to the country collectively, and must be used and developed for its benefit."

162. Mr Shibban Lal Saxena supported the amendments moved by Professor KT Shah to draft Article 31(ii). He opined that the proposed amendments, in essence, suggested that the system of our State shall be 'socialist'. He urged Dr Ambedkar "at least to incorporate the spirit of those amendments somewhere in the Constitution". In the specific context of the amendment proposed to Article 31(ii), he opined that the enunciation is "very wide", such that any system of economy could be based on it. The clause in its existing form, according to Mr Saxena, left it open to future Parliaments to evolve an economic plan of their choice. However, he was of the view, that there must at

least be a Directive Principle that states that key industries of the country shall be owned by the State. He noted:

> "Now, this enunciation "ownership and control of the material resources of the community to be distributed so as to sub serve the common good" is a very wide enunciation of a most important principle. The enunciation is so general that any system of economy can be based upon it. Upon it can be based a system of socialist economy where all the resources of the country belong to the State and are to be used for the well being of the community as a whole. But a majority in the next Parliament can also come forward and say that the New Deal evolved by Roosevelt is the best system, and it should be adopted. This clause leaves it open to any future parliament to evolve the best plan of their choice. But I feel personally that we should today at least lay down that the key industries of the country shall be owned by the State.
>
> **[…]**
>
> Unless we lay down in the Constitution itself that the key industries shall be nationalized and shall be primarily used to serve the needs of the nation, we shall be guilty of a great betrayal. Even if the principle is not to be enforced today, we must lay down in this clause (ii) about directive principles that the key industries shall be owned by the State. That is, according to the Congress, the best method of distributing the material resources of the country. I therefore think that Professor Shah's amendment has merely drawn attention to this fundamental principle."

163. Mr Jadubans Sahay disagreed with the text of Professor KT Shah's proposed amendments as he was of the view that it was 'loosely worded'. However, he stated that he was in support of the principles and the spirit underlying the amendment. In his opinion, the Constituent Assembly should not have refrained from incorporating in the Constitution, at least in the form of a Directive Principle, that the 'means of production' and the natural or material

resources shall belong to the community and through it to the State. The ultimate goal, he urged, must be that all means of production and the 'gifts of nature' which belong to the country should belong to the State or the community. He opined:

> "…But I may state for the information of the House that, so far as the principles which underlie his amendment are concerned, I support them. The spirit of it also I support. I fail to see why this august Assembly which meets only once in every country, is not keen to the extent of clearly and boldly incorporating in this article that the means of production and the natural or material resources of the country shall belong to the community and through it to the State. I cannot understand this, though the large majority of the amendments, if you scrutinise them, will be found to favour the principles underlying the amendment of Professor Shah. I cannot understand how it is that the Congress, the predominantly majority party here, is not pressing this thing."

> "… **After all this is a directive principle. I am not asking you to incorporate it so that the capitalists and the big purses of the country may not have the opportunity to work the mines and the minerals. This is only a directive principle. Are we not going to keep it as our goal that all means of productions and the gifts of Nature which belong to this vast country should belong to the State or to the community?** I am sorry, Sir, that the bogey has been raised by the capitalists that if you talk like this they will cease to produce. I know the large majority of friends here will not be deterred by this bogey raised by the capitalists, because production is not for the welfare of the community. It is for the welfare of the capitalists. They produce for profits. Honourable Members of this House know it better than myself that they produce for profit and they will continue to produce as long as they make profit and, if not, they will not. So we should not be deterred by this slogan. …
>
> Sir, in this Chapter and particularly in this **article are we not going to suggest that ultimately we have**

> **to nationalise them, are we not going to suggest that is the aim of the nation, is the target of the nation? […]**"
>
> (emphasis supplied)

164. Mr S Nagappa supported the existing text of clauses (ii) and (iii) of Article 31 and believed that they were intended for the benefit of the "poor man". He opined that, while it would have been better if the clause had been drafted in more unequivocal language, they represented a "ray of hope for the future". In his opinion, as long as these clauses stood, there was "no possibility of capitalism thriving in India". He too was in vehement support of the goal to "nationalize industries and means of production".

165. Dr BR Ambedkar opposed the amendments proposed by Mr KT Shah. In his opinion, the language of the draft provision used "extensive language", which could potentially include the propositions moved by Professor KT Shah. He noted as follows:

> "With regard to his other amendments, viz., substitution of his own clauses for sub-clauses (ii) and (iii) of Article 31, all I want to say is this that I would have been quite prepared to consider the amendment of Professor Shah if he had shown that what he intended to do by the substitution of his own clauses was not possible to be done under the language as it stands. **So far as I am able to see, I think the language that has been used in the Draft it a much more extensive language which also includes the particular propositions which have been moved by Professor Shah, and I therefore do not see the necessity for substituting these limited particular clauses for the clauses which have been drafted in general language deliberately for a set purpose.** I therefore oppose his second and third amendments."

166. Eventually, the motion to amend the provision was put to vote. The proposal to substitute the provision was negatived and it was thus introduced in its present form.

c. Inferences from the discussions in the Constituent Assembly

167. Before laying down the principles which emerge from the above discussions, two caveats must be kept in mind.

168. Firstly, debates and discussions in the Constituent Assembly serve a limited purpose in constitutional interpretation. A review of the debates and discussions in the Constituent Assembly may aid in gleaning the principles and intent behind introducing various provisions of the Constitution. However, these principles do not control the meaning of the provision.[130] This Court must interpret provisions of the Constitution in consonance with changing times, values and in the present case, even changing economic priorities. The Constitution is a living document. The ideas and the thinking of the framers of the Constitution cannot remain frozen for time immemorial. As a Constitution Bench of this Court noted in **K.S. Puttaswamy v. Union of India,**[131] the Constitution governs the lives of over 125 crore citizens of this country and must be interpreted to respond to the changing needs of society at different points in time. This Court, speaking through one of us (Justice DY Chandrachud), observed:

> "**130.** Now, would this Court in interpreting the Constitution freeze the content of constitutional

[130] S.R. Chaudhuri v. State of Punjab, (2001) 7 SCC 126; 2001 INSC 373.
[131] (2017) 10 SCC 1 [476]; 2017 INSC 1235.

> guarantees and provisions to what the Founding Fathers perceived? The Constitution was drafted and adopted in a historical context. **The vision of the Founding Fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere. Yet, it would be difficult to dispute that many of the problems which contemporary societies face would not have been present to the minds of the most perspicacious draftsmen. No generation, including the present, can have a monopoly over solutions or the confidence in its ability to foresee the future. As society evolves, so must constitutional doctrine.** … ”
>
> (emphasis supplied)

169. Secondly, when the framers of the Constitution debated on the scope of Article 39(b) and other Directive Principles, the safe harbour provision under Article 31C did not exist. As discussed earlier in this judgement, Article 31-C was only introduced over twenty years later in 1971, by the twenty-fifth amendment to the Constitution. Therefore, the discussion in the Constituent Assembly on the scope of Article 39(b) was limited to viewing the provision as akin to any other Directive Principle – as an aspirational principle for future governments. Dr Ambedkar noted in his speech on 4 November 1948 that Directive Principles including Article 39(b) were instructions to the executive and legislature on “how they should exercise their powers”. At the time of these discussions, the framers of our Constitution could not have contemplated that legislation which bears a nexus with the principles of Article 39(b) would be protected from a challenge under Part III rights contained in Articles 14, 19 and the erstwhile Article 31 of the Constitution. Therefore, while interpreting Article 39(b) in the context of the present-day Constitution which contains Article 31C,

we must be cautious in drawing overbroad conclusions from the discussions in the Constituent Assembly.

170. With these two caveats in mind, the following inferences may be made from the discussions in the Constituent Assembly about the nature of the Directive Principles:

a. Dr Ambedkar's landmark speech on 4 November 1948 evinces that Directive Principles, including the present-day Article 39(b) were understood to be guiding principles or 'instructions' to the executive and legislature. While they would not be enforceable under law, it was believed that the values enshrined in them would assume importance at the time of elections and the electorate would hold future governments accountable. This purpose attributed to Article 39(b) in the Constituent Assembly is substantially different from the current roles that it serves in our constitutional structure – both as a pre-condition to Article 31C and often as a tool to interpret rights contained in Part III of the Constitution;

b. The discussions in the Constituent Assembly indicate the objection of Dr Ambedkar to any proposals to expressly lay down a particular form of social structure or economic policy for future governments in the Constitution. He noted that the Constitution, including in the Directive Principles, did not intend to prioritise one form of government or economic structure over the other but instead only laid down the ideal of 'economic democracy';

c. Dr Ambedkar did not intend to locate the idea of ‘economic democracy’ within a single economic or political school of thought. Instead, it was believed that future governments and electorates would identify the socio-economic structure which best suits the needs of society. It was to be left to future generations to persuade the electorate and determine the “best way” of achieving the ideal of an ‘economic democracy;’ and

d. When members such as KT Shah and Damodar Seth sought greater inclusion of what they termed as ‘socialistic’ thought, Dr Ambedkar’s response was always that such principles can be accommodated within the ambit of the widely worded provisions, as they exist. Not only were such proposals to specify an economic structure opposed by Dr Ambedkar but in all the examples discussed above, they were also negatived by a majority when the draft amendments were put to a vote.

171. We now turn to an analysis of the amendment proposed by Professor KT Shah to Article 31(ii), which corresponds with the present-day Article 39(b). As discussed above, Professor Shah sought to substitute the article with the following provision:

> “(ii) that the ownership, control and management of the **natural resources of the country in the shape of mines and mineral wealth, forests, rivers and flowing waters as well as in the shape of the seas along the coast** of the country shall be **vested in and belong to the country collectively and shall be exploited and developed on behalf of the community by the State** as represented by the Central or Provincial Governments or local governing authority or statutory corporation as may be provided for in each case by Act of Parliament’;”

172. The proposed amendment to Article 31(ii) sought to make the language of the provision more specific and lay down a ‘socialist’ economic order. It specified a list of natural resources to be covered by the provision, and also expressly stated that these resources would be vested in the state which would exploit them on behalf of the community. The opposition to the existing provision was that it allowed future Parliaments to evolve an economic plan of their choice instead of laying down that key industries would be owned by the state.

173. Once again, following his view in earlier debates, Dr Ambedkar opposed the amendment, which sought to lay down the specificities of a ‘socialist’ economic order. His exact response, however, was significant – he stated that the proposed amendment was already covered by the “extensive language” of the existing provision. This response has been central to the submissions of the counsel for the appellants and respondents before us.

174. Ms. Uttara Babbar, senior counsel, submitted that the keyword in the amendment was ‘vested’. She argued that the proposed amendment differs from the current provision, as it sought to include the **vesting** of certain natural resources, which may otherwise be privately owned, in the state. According to her, the rejection of the amendment by the Constituent Assembly indicates that the existing provision does not include the ‘vesting’ of resources in the state, but only pertains to the distribution of resources already owned and controlled by the state. Regarding Dr Ambedkar’s statement that the proposed amendment is already included within the provision, she contended that this

was limited to the fact that the natural resources listed in the proposed amendment were covered by the existing clause. In the absence of any discussion on the "vesting" of such resources in the state, she argued that Ambedkar's response cannot be interpreted to incorporate such an understanding.

175. On the other hand, Mr Tushar Mehta learned Solicitor General for India and Mr Rakesh Dwivedi, senior counsel appearing for the State of West Bengal contend that Dr Ambedkar's response to the proposed amendment indicates that the clause includes within its fold the vesting or acquisition of privately owned resources as well. The provision, according to them, was deliberately framed in expansive terms, to include all types of resources, including privately owned resources. The idea was to keep the provision widely worded so that future governments could mould it according to the economic priorities and dynamics of the day.

176. In our view, Dr Ambedkar's objection to the proposed amendment must be interpreted in view of his earlier observations on the nature of the Directive Principles and his vehement objection to any attempts to lay down a rigid 'economic structure' in the Constitution. Dr Ambedkar was clear that he was opposed to laying down any particular school of economic thought in the Directive Principles, notwithstanding a passing remark about the socialistic direction of Part IV, discussed above. This passing remark too may be understood in light of the Directive Principles being used as a tool by the framers to accommodate ideological dissenters who would otherwise lose out in

constitutional negotiations. As Directive Principles were understood as non-justiciable exhortations, the framers often made strategic concessions in their text to accommodate diverse views and ensure the deliberations did not break down.

177. However, in view of the fact that Article 39(b) has evolved beyond a non-justiciable directive, we must pay heed to Dr Ambedkar's prescient warning that the Constitution must not be interpreted in a way that imposes a rigid economic structure. With this principle in mind, Dr Ambedkar's response to the proposed amendment to Article 39(b) cannot be interpreted to indicate that the provision encompasses *all* private property, and any legislation to convert private ownership to public ownership would fall within its ambit. At best, the response suggests that natural resources including rivers and seas *may* be **vested** in the state for the "common good" in certain specific cases.

178. With this historical context in mind, we now turn to examine how this Court has interpreted the provision over time, including in the judgments that have been called into question in the present reference.

v. Interpretation of Article 39(b) that has been doubted

179. The genesis of this reference lies in the judgement of this Court in **Ranganatha Reddy**. A seven-judge bench of this Court adjudicated on the constitutionality of the Karnataka Contract Carriages (Acquisition) Act, 1976, which dealt with the acquisition of private contract carriages by the State. The legislature was of the view that nationalisation was necessary because private

contract carriages were being operated in a manner "detrimental to the public interest" and the nationalisation of the carriages would prevent misuse and provide better facilities. The legislation contained a declaration stating that it is in furtherance of the principles contained in Articles 39(b) and (c) and thus protected by Article 31-C. The Karnataka High Court struck down the legislation as unconstitutional on various grounds, including *inter alia* that it was not protected by Article 31-C.

180. As noted earlier in this judgement, the majority decision, authored by Justice Untwalia, upheld the constitutional validity of the legislation but did not discuss the question of whether the legislation was in furtherance of Article 39(b) and thus, protected by Article 31-C. However, the contours of Article 39(b) were discussed in the concurring opinion authored by Justice Krishna Iyer (on behalf of himself and two other judges), and it was held that legislation was saved by Article 31-C. Justice Krishna Iyer framed the questions with regard to Article 39(b) in the following terms:

> **"50.** […]
> 2. What are the pervasive ambience and progressive amplitude of the "directive principle" in Article 39(b) and (c) in the context of nationalisation of public utilities?
> 2 (a). Can State monopoly by taking over private property be a modus operandi of distribution of ownership and control of the material resources of the community to subserve the common good, within the framework of Article 39 (b)?
> 2(b). Are distribution and nationalisation antithetical or overlapping?
> 2 (c). What is the connotation of the expression "material resources"? Can private buses be regarded as material resources of the community?"

181. Justice Krishna Iyer held that the purpose behind the provision is to allow for the "restructuring of the social order" and each word in the provision contributes to this "social mission". He warned against a "ritualistic construction" of the provision which would weaken this purpose. He observed:

> **"80. […] The key word is "distribute" and the genius of the Article, if we may say so, cannot but be given full play as it fulfils the basic purpose of restructuring the economic order.** Each word in the article has a strategic role and the whole article a social mission. It embraces the entire 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 the ownership and control.
>
> **83.** Two conclusions strike us as quintessential. Part IV, especially Article 39(b) and (c), **is a futuristic mandate to the State with a message of transformation of the economic and social order**. Firstly, such change calls for collaborative effort from all the legal institutions of the system: the legislature, the judiciary and the administrative machinery. Secondly and consequentially, loyalty to the high purpose of the Constitution viz. social and economic justice in the context of material want and utter inequalities on a massive scale, compels the Court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision. To be Pharisaic towards the Constitution through ritualistic construction is to weaken the social-spiritual thrust of the founding fathers' dynamic faith."
>
> (emphasis supplied)

182. While holding that Article 39(b) includes the nationalization of motor vehicles, Justice Krishna Iyer had occasion to interpret the phrase "material resources of the community". In essence, Justice Krishna Iyer interpreted the term "material resources" to cover "all national wealth" including all resources –

natural and manmade, private and public. The only qualifier according to Justice Iyer is that the resource must "meet material needs". He adopted the view that an individual is a member of the community, and thus, all resources of the individual are part of the "community". According to Justice Iyer, if privately owned resources are excluded from the ambit of Article 39(b) it would defeat the underlying purpose of the provision, which is redistribution of wealth. Further, he clarified that not only private 'means of production', but also 'private resources' are included within the fold of Article 39(b). These observations lie at the heart of the controversy before this Court, and the correctness of this interpretation of 'material resources of the community' has been challenged by the appellants before us. The observations are reproduced below.

> "**81.** "Resources" is a sweeping expression and covers not only cash resources but even ability to borrow (credit resources). Its meaning given in Black's Legal Dictionary is:
>
> *"Money or any property that can be converted into supplies; means of raising money or supplies; capabilities of raising wealth or to supply necessary wants; available means or capability of any kind."*
> **And 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. To exclude ownership of private resources from the coils of Article 39(b) is to cipherise its very purpose of redistribution the socialist way.** A directive to the State with a deliberate design to dismantle feudal and capitalist citadels of property must be interpreted in that spirit and hostility to such a purpose alone can be hospitable to the meaning which excludes private means of production or

> goods produced from the instruments of production. **Sri A.K. Sen agrees that private means of production are included in "material resources of the community" but by some baffling logic excludes things produced. If a car factory is a material resource, why not cars manufactured?** "Material" may cover everything worldly and "resources", according to Random House Dictionary, takes in "the collective wealth of a country or its means of producing wealth: money or any property that can be converted into money assets". **No further argument is needed to conclude that Article 39(b) is ample enough to rope in buses. The motor vehicles are part of the material resources of the operators.**"
>
> **(emphasis supplied)**

183. The next part of Article 39(b) that Justice Krishna Iyer discussed, in his concurring opinion, is the term "distribution". More specifically, the opinion explores whether "nationalisation" can be understood to be a form of "distribution" which subserves the "common good". Justice Krishna Iyer held that a narrow interpretation cannot be given to the term. After referring to the dictionary definition of the term 'distribution', it was observed that the nationalisation of resources, which essentially entails classifying and allocating industries/services/utilities between the private and public sectors, is a form of 'distribution'. Moreover, nationalisation has been held to be a distributive process which is for the "good of the community". The observations are reproduced below.

> "**82.** The next question is whether nationalisation can have nexus with distribution. Should we assign a narrow or spacious sense to this concept? Doubtless, the latter, for reasons so apparent and eloquent. 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". (See Random House Dictionary). **To classify and allocate certain industries or services or utilities or articles between the private and public sectors of the national economy is to distribute those resources. Socially conscious economists will find little difficulty in treating nationalisation of transport as a distributive process for the good of the community. You cannot condemn the concept of nationalisation in our Plan on the score that Article 39(b) does not envelop it. It is a matter of public policy left to legislative wisdom whether a particular scheme of take-over should be undertaken**."

184. The next decision with a bearing on the interpretation of Article 39(b) is **Bhim Singhji.** As briefly discussed earlier, a five-judge Constitution bench of this Court adjudicated on the constitutionality of the Urban Land (Ceiling and Regulation) Act 1976. The legislation *inter alia* provided for the imposition of a ceiling on vacant land in urban agglomerations and for the acquisition of land in excess of the ceiling limit, to prevent the concentration of urban land in the hands of a few. Chief Justice YV Chandrachud, Justice Bhagwati, Justice Krishna Iyer and Justice Sen, constituting a majority of four judges held that the Act gave effect to the principles laid down in Articles 39(b) and (c), and, thus was protected by Article 31-C. Initially, when the judgement was pronounced, Chief Justice YV Chandrachud (for himself and Justice Bhagwati) authored a short judgment stating that detailed reasons would follow. Eventually, Chief Justice YV Chandrachud (for himself and Justice Bhagwati) issued an order stating that the learned judges agreed with the reasons stated in the opinion of

Justice Krishna Iyer.[132] Justice Sen concurred with the majority on the question of whether the Act was in furtherance of Articles 39(b) and (c) but disagreed on some other aspects. Justice Tulzapurkar authored a dissenting opinion, striking down the legislation as unconstitutional and held that the Act did not give effect to the principles in Articles 39(b) and (c) so as to be saved by Article 31C.

185. The opinion of the majority authored by Justice Krishna Iyer held that a law that inhibits the concentration of urban land in the hands of a few and ensures equitable distribution falls within the ambit of Article 39(b) and (c). He observed:

> "10. **[…] Article 39(b) and (c) of the Constitution are directly attracted and there is no doubt that the fullest exploitation of the material resources of the community undoubtedly requires distribution of urban land geared to the common good. It is also a notorious fact that concentration of urban land in private hands is an effective forbiddance of the maximum use of such land for industrial purposes at a critical juncture when the nation is fighting for survival through industrialisation.** It needs no argument to conclude that the objective of the legislation as set out in the long title and in the statutory scheme is implementation of Part IV of the Constitution. The directive principles of State Policy being paramount in character and fundamental in the country's governance, distributive justice envisaged in Article 39(b) and (c) has a key role in the developmental process of the socialist republic that India has adopted. **[…]**
>
> 11. **The taking over of large conglomerations of vacant land is a national necessity if Article 39 is a constitutional reality. "Law can never be higher than the economic order and the cultural development of society brought to pass by that economic order." (Marx).** Therefore, if Article 38 of the Constitution which speaks of a social order

[132] Maharao Sahib Shri Bhim Singhji v. Union of India, (1986) 4 SCC 615.

> informed by economic justice, is to materialise, law must respond effectively and rise to the needs of the transformation envisioned by the founding fathers. **[…]**"

186. Although Justice Krishna Iyer did not cite his concurring judgement in **Ranganatha Reddy**, he made certain observations which may help contextualise his observations on Article 39(b) in **Ranganatha Reddy**. He observed that the acquisition of private resources by the state to favour another private owner is not within the scheme of Article 39(b). In some circumstances, according to Justice Krishna Iyer, even a private industry may serve the common good and certain professions and industries may remain in private hands, "in the transitional stage of our pluralist economy undergoing a fabian transformation".

> "**16-A. […]** It is not and never can be compulsory taking from some private owners to favour by transfer other private owners. The prevalent pathology of corrupt use of public power cannot be assumed by the court lest the same charge be levelled against its echelons. The wide definition of "industry" or the use of general words like 'any person" and "any purpose" cannot free the whole clause from the inarticulate major premise that only a public purpose to subserve the common good and filling the bill of Article 39(b) and (c) will be permissible. Even a private industry may be for a national need and may serve common good. Even a medical clinic, legal aid bureau, engineering consultant's office, private ambulance garage, pharmacist's shop or even a funeral home may be a public utility. Professions for the people, trade at the service of the community and industry in the strategic sector of the nation's development may well be in private hands in the transitional stage of our pluralist economy undergoing a fabian transformation. Why should lands allotted to such private industries or professionals be condemned? The touchstone is public purpose, community good and like criteria. If the power is used for favouring a

> private industrialist or for nepotistic reasons the oblique act will meet with its judicial waterloo. To presume as probable graft, nepotism, patronage, political clout, friendly pressure or corrupt purpose is impermissible. **[…]**."

187. The next decision that is relevant to the interpretation of Article 39(b) is **Sanjeev Coke** – a decision of a Constitution Bench of five judges of this Court. As noted earlier in this judgement, the observations of this Court in this case have been specifically doubted in the reference orders before us. This Court was adjudicating on the constitutionality of the Coking Coal Mines (Nationalisation) Act, 1972, which provided for the acquisition of coking coal mines, along with their coking oven plants. In addition to these coking oven plants, twelve coking oven plants which were owned by independent persons, such as the petitioners, were also nationalised under the legislation. The petitioners contended that the legislation violated Article 14 as other coking oven plants were not being nationalised, although they were similarly placed. The Union of India defended the legislation on its merits and also argued that the legislation was protected by Article 31-C as it gives effect to the principles in Article 39(b). According to the legislature, the Act providing for the nationalisation of the coking coal mines and coke oven plants was "with a view to reorganising and reconstructing such mines and plants for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal needed to meet the growing requirements of the iron and steel industry and for matters connected therewith or incidental thereto".

188. The counsel for petitioners in the case argued that a law which violates the "broader egalitarian principle" embodied in Article 14 cannot be considered to be giving effect to the principles laid down in Article 39(b). To further this argument, the counsel relied on the observations made by Justice Bhagwati in his dissenting opinion in **Minerva Mills**, wherein the learned judge upheld the constitutionality of an amendment to Article 39(b) by the forty-second Amendment. Justice Bhagwati, in essence, had observed that when a law gives effect to a Directive Principle, such a law would always conform to the principle of "real and substantive" equality, even if it may conflict with the formalistic doctrinaire view of equality. This argument was rejected by the Court and it was held that if the law to further the Directive Principle must necessarily be non-discriminatory or based on a reasonable classification then there is no purpose left in Article 31-C. It would be valid on its own. Hence it was held that a law designed to promote a Directive Principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would advance the broader egalitarian principle and the constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles, Article 31-C was held to protect the law from a challenge under Article 14.[133]

189. On the question of whether the Act gives effect to Article 39(b), the counsel for the petitioners argued that a coal mine or coke oven plant owned by private parties could not constitute "material resources of the community". It was urged

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[133] Sanjeev Coke [16, 17].

that to qualify as a "material resources of the community", the ownership of the resource must vest in the state. The legislation may be considered as a legislation for the acquisition by the State of coking coal mines and coke oven plants belonging to private parties but it is not a legislation towards securing the principles in Article 39(b). It was argued that the keyword in Article 39(b) is "distribute" and material resources had first to be acquired by the State before they could be distributed. A law providing for acquisition could not, it was urged, be considered a law for distribution.

190. This argument was rejected by this Court (speaking through Justice Chinappa Reddy). The Court observed that the expression "material resources of the community" means all things capable of producing wealth for the community and cannot be limited to only public-owned resources. Further, the words must – the learned Judge held - be understood in the context of the constitutional goal of setting up a "socialist" republic, which has always been the goal of the Chapter on Directive Principles. Further, it was held that the term "distribution" cannot be given a narrow construction, and includes the "transformation of wealth from private ownership into public ownership". This Court relied on the observations in the concurring opinion authored by Justice Krishna Iyer in **Ranganatha Reddy** to buttress these observations. These findings on the meaning of the phrases "material resources of the community" and "distribution" are at the heart of the reference before us and have been reproduced in full below.

> "**19. […]**
> **The expression "material resources of the community" means all things which are capable**

of producing wealth for the community. There is no warrant for interpreting the expression in so narrow a fashion as suggested by Shri Sen and confine it to public-owned material resources and exclude private-owned material resources. The expression involves no dichotomy. The words must be understood in the context of the constitutional goal of establishing a sovereign, socialist, secular, democratic republic. Though the word "socialist" was introduced into the Preamble by a late amendment of the Constitution, that socialism has always been the goal is evident from the Directive Principles of State Policy. The amendment was only to emphasise the urgency. 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.

[…]

We may also look at it this way. When we say that the State of Himachal Pradesh possesses immense forest wealth or that the State of Bihar possesses immense mineral wealth, we do not mean that the Governments of the States of Himachal Pradesh and Bihar own the forest and mineral wealth; what we mean is that there is immense forest and mineral wealth in the territories of the two States, whether such wealth is owned by the people as a whole or by individuals. Again, when we talk of, say, a certain area in Delhi being a Bengali, Punjabi or South Indian area, we do not mean that the area is owned by Bengalis, Punjabis or South Indians but only that large numbers of Bengalis, Punjabis or South Indians live in that area. 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 it refers also to resources owned by individual members of the community. Resources of the community do not mean public resources only but include private resources as well. Nor do we understand the word "distribute" to be used in Article 39(b) in the limited sense in which Shri Sen wants us to say it is used, that is, in the sense only of retail distribution to individuals. It 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*. The submissions of Shri Sen are well-answered by the observations of Krishna Iyer, J. in **State of Karnataka v. Ranganatha Reddy […]"**

191. Additionally, this Court also held that the fact that only a part of the industry, and not the industry as a whole was being nationalised was irrelevant to the question of whether Article 39(b) would be attracted. It was held that the distribution between public, private and joint sectors and the extent and range of any scheme of nationalisation are essentially matters of state policy which are inherently inappropriate subjects for judicial review.

192. The next decision of this Court which discussed the meaning and content of Article 39(b) and has been referred to in the underlying reference orders is **Abu Kavur Bai.** Akin to **Ranganatha Reddy,** this is another case which dealt with the nationalisation of transport services. In that case, the constitutionality of the Tamil Nadu State Carriages and Contract Carriages (Acquisition) Act 1973, which sought to nationalise the transport industry in stages, was under challenge. The transport service and part of the assets of the operators were acquired by the State under the legislation. The Madras High Court declared the Act as being violative of Article 31(2) and outside the protective umbrella contained in Article 31C.

193. The Constitution Bench of this Court (speaking through Justice Fazal Ali) upheld the constitutionality of the legislation. This Court held that the legislation gave effect to the principles in Articles 39(b) and (c) and was thus saved from a challenge under Article 31(2), due to the application of Article 31-C. The judgment relied on the decisions in **Ranganatha Reddy** and **Sanjeev Coke** to arrive at this conclusion. This Court held that the reason for the inclusion of Article 31-C was based on the theoretical aspiration that means of production, key industries, mines, minerals, public utilities, and services may be taken gradually under public ownership, management and control. Nationalisation, it was held, was necessary to achieve the goal of building an egalitarian society.[134]

194. It was argued before this Court that the nationalisation of the entire transport services along with the vehicles and workshops does not serve "any public good" and does not prevent the concentration of wealth in the hands of a few. Moreover, it was argued that the taking over of vehicles, tools, implements and workshops was not contemplated by Article 39(b) as they constituted movable properties and not "material resources". This Court rejected these arguments. Relying on the decision in **Ranganatha Reddy,** where a similar legislation in the State of Karnataka was upheld by this Court, it was held that the state has nationalised the carriages to provide expeditious transport at reasonable rates to the members of the public and prevent misuse by private operators, which

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[134] Abu Kavur Bai [29-31].

constitutes an important public purpose. [135] This Court relied on the definition in various dictionaries and the observations of this Court in **Sanjeev Coke** and held that the term "material resources" used by Article 39(b) is wide enough to cover both movable and immovable properties.[136]

195. Finally, this Court addressed the argument that the nationalisation policy codified in the legislation does not envisage 'distribution', because the property that is taken over is not distributed to various members of the community for their benefit. This Court, in line with its earlier observations, rejected this argument. Referring to definitions of the term 'distribution', it was held that 'distribution' must not be given a narrow construction which will defeat the purpose of Article 39(b). This Court held that the nationalisation of transport services fell within the ambit of 'distribution' and observed:

> "**92.** It is obvious, therefore, that in view of the vast range of transactions contemplated by the word 'distribution' as mentioned in the dictionaries referred to above, it will not be correct to construe the word 'distribution' in a purely literal sense so as to mean only division of a particular kind or to particular persons. The words, apportionment, allotment, allocation, classification, clearly fall within the broad sweep of the word 'distribution'. **So construed, the word 'distribution' as used in Article 39(b) will include various facets, aspects, methods and terminology of a broad-based concept of distribution. In other words, the word 'distribution' does not merely mean that property of one should be taken over and distributed to others like land reforms where the lands from the big landlords are taken away and given to landless labourers or for that matter the various urban and rural ceiling Acts. That is only one of the modes of distribution but not the only mode.**

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[135] Abu Kavur Bai [74, 75].
[136] Abu Kavur Bai [78-83].

> In the instant case, as we have already pointed out, distribution is undoubtedly there though in a different shape. So far as the operators were concerned they were mainly motivated by making huge profits and were most reluctant to go to villages or places where the passenger traffic is low or the track is difficult. This naturally caused serious inconvenience to the poor members of the community who were denied the facility of visiting the towns or other areas in a transport. **By nationalising the transport as also the units the vehicles would be able to go to the farthest corner of the State and penetrate as deep as possible and provide better and quicker and more efficacious facilities. This would undoubtedly be a distribution for the common good of the people and would be clearly covered by clause (b) of Article 39.**"

196. The above principles laid down in **Ranganatha Reddy**, **Sanjeev Coke** and **Abu Kavur Bai** have been followed in decisions which dealt with the nationalisation or acquisition of certain resources by the state. These resources include electrical energy [**Tinsukhia Electric Supply Co. Ltd. v. State of Assam**[137] and **Maharashtra State Electricity Board v. Thana Electric Supply Co.**[138]], refractory plants [**Assam Sillimanite Ltd. v. Union of India**[139]] and land [**Basantibai Khetan**]. In the interests of brevity, we will not reiterate the findings in each of these decisions. However, it may be noted that these decisions followed the view in **Ranganatha Reddy**, **Sanjeev Coke** and **Abu Kavur Bai** on two broad aspects. *Firstly*, the phrase 'material resources of the community' includes privately owned resources and cannot be restricted to resources owned by the state. *Secondly*, nationalization or the vesting of these

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[137] (1989) 3 SCC 709; 1989 INSC 128
[138] (1989) 3 SCC 616; 1989 INSC 127
[139] 1992 Supp (1) SCC 692; 1990 INSC 89

private resources in the State falls within the expression "distribution" and subserves the common good.

197. Another significant decision where a Constitution Bench of this Court explored the meaning of Article 39(b) is **Natural Resources Allocation, In re, Special Reference No. 1 of 2012**[140]. Unlike the decisions discussed above, this was not a case where the protection of Article 31-C was sought to protect a legislation, instead, Article 39(b) was relied on by this Court to determine whether there is a constitutional mandate for the distribution of natural resources in a particular way. In view of the observations of a two-judge bench of this Court on the allocation of spectrum, the President made a reference to this Court. One of the main questions before this Court was whether auctions are the only constitutionally permissible means for the state to dispose of natural resources.

198. The Constitution Bench held that declaring auctions as a constitutional mandate would be impermissible as it would distort the constitutional principles in Article 39(b). This Court held that Article 39(b) lays down a 'restriction' on the object of distribution of natural resources, i.e. that such distribution must be to achieve the "common good". Further, the term "distribution" was held to have a wide connotation, not restricted to only one mode of allocation such as auctions. This Court held:

> **"113. […]** The overarching and underlying principle governing "distribution" is furtherance of common good. But for the achievement of that objective, the

[140] (2012) 10 SCC 1; 2012 INSC 428.

> Constitution uses the generic word "distribution". Distribution has broad contours and cannot be limited to meaning only one method i.e. auction. It envisages all such methods available for distribution/allocation of natural resources which ultimately subserve the "common good".

199. Further, this Court held that although auctions may be the best way to maximise revenue, revenue maximisation is not always the best way to subserve the 'common good'. In some cases, according to this Court, revenue considerations may assume a secondary position vis-à-vis developmental considerations. This Court held:

> **"119.** The norm of "common good" has to be understood and appreciated in a holistic manner. It is obvious 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. Revenue maximisation is not the only way in which the common good can be subserved. Where revenue maximisation is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue maximisation is not the object of a policy of distribution, the question of auction would not arise. **Revenue considerations may assume secondary consideration to developmental considerations.**
>
> **120.** […] **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.** Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate."

200. Notably, this Court relied on the decisions in **L Abu Kavur Bai** and the decision of **Ranganatha Reddy** to arrive at the above propositions. In essence the decision in **Special Reference No. 1** does two things. Firstly, it restates the wide interpretation of 'distribution' and holds that no single mode of distribution is mandated by Article 39(b). Secondly, it interprets the phrase 'common good' to have a wide import and clarifies that revenue maximisation by the government is not always the only way to subserve the common good. Importantly, this was not a decision where Article 39(b) was invoked to prevent a challenge under Article 14 but to interpret the constitutional mandate about the distribution of natural resources, in light of the 'negative' right to equality in Article 14 and the 'positive' mandate in Article 39(b). In a sense, this is an example of harmoniously construing fundamental rights (Article 14) and the Directive Principles (Article 39(b)) to understand underlying constitutional principles and mandates.

201. The broad precepts which emerge from these decisions may be summarised thus:

a. The purpose behind Article 39(b) is to allow the state to carry out a 'restructuring of the economy'. The goal of the article is to prevent the concentration of wealth in a few hands;

b. The term "material resources of the community" refers to things capable of producing wealth for the community and includes all resources – natural and manmade, private and public. The resources of the individual are the

resources of the community and thus, privately owned property is covered by the phrase;

c. The nationalisation of privately owned resources may give effect to Articles 39(b) and (c). The expression 'distribution' must be given a wide construction so as to include the acquisition of private resources by the state; and

d. The decisions which advance the above precepts ground their interpretation of Article 39(b) in the observations of Justice Krishna Iyer in **Ranganatha Reddy** and the subsequent affirmation in **Sanjeev Coke** and **Abu Kavur Bai**.

202. In view of the above, the following questions fall for the consideration of this Court:

a. Do all privately owned resources fall within the ambit of 'material resources of the community'?

b. Is the acquisition of private resources by the state a form of distribution recognised by Article 39(b)?

vi. Correctness of the above interpretation of Article 39(b)

203. Article 39(b) is **not** a source of legislative power. The inclusion or exclusion of 'privately-owned resources' from the ambit of the provision does not impact the power of the legislature to enact laws to acquire such resources. The power to acquire private resources, in certain situations, continues to be traceable to other provisions in the Constitution, including the sovereign power of eminent domain. Acquisition of property, for instance, is a Concurrent list subject in Entry

42 of List III of the Seventh Schedule. Further, where a legislation falls within the ambit of Article 39(b), the law is only protected against a challenge under Articles 14 and 19 of the Constitution. Even if a law is in furtherance of Article 39(b) and protected by Article 31C, it is susceptible to a challenge to its constitutionality under other provisions of the Constitution, including Article 300-A. Similarly, a law which falls outside the ambit of Article 39(b), may still be valid. All other benefits and protections granted by the Constitution under *inter alia* Articles 31A and 31B continue to be applicable to such a law. With this in mind, we turn to determining the correctness of the above interpretation of Article 39(b), i.e. that <u>all</u> private property is covered within the ambit of Article 39(b).

a. <u>The interpretation is inconsistent with the text of Article 39(b)</u>

204. Five significant elements emerge from the text of Article 39(b), which has been reproduced in paragraph 2 of this Judgement. These are:

a. The provision relates to “ownership and control”;
b. The ownership and control of “material resources” is dealt with by the provision;
c. The material resources which the provision covers are those which are “of the community”;
d. The policy of the state must be directed to secure the “distribution” of the ownership and control of such resources;

e. The purpose of the distribution must be to "best subserve the common good".

205. The question before this Court is whether privately owned resources fall within the ambit of the phrase 'material resources of the community'. To define the phrase 'material resources of the community', the law lexicons and legal dictionaries draw our attention to the definitions by this Court in **Ranganatha Reddy**, **Sanjeev Coke** and **Abu Kavur Bai.** These judgements have been doubted in the reference before us. Thus, we need to consider the terms afresh to understand the correct interpretation of the phrase. We may begin by looking at the terms 'material', 'resources' and 'community', independently.

206. Black's Law Dictionary defines the expression 'resources' in the following terms:

> "a factor of production or economy needed for an activity. Basic resources are labour, land, and capital. Others can include information, energy, entrepreneurship, expertise, time and management." [141]

207. The term 'material' is defined as:

> "1. Of or relating to matter; physical (material goods).
> 2. Having some logical connection with the consequential facts (material evidence).
> 3. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential (material alteration of a document)."[142]

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[141] Black's Law Dictionary, 8th Edition, South Asian Edition, 2015.
[142] *Ibid.*

208. Similarly, the term ‘community’ has been defined in the following terms:

> “anything constitutes a community; a common interest, a common language, a common government, is the basis of that community which is formed by any number of individuals; the coming together of many and keeping together under given law and for given purposes constitutes a society.”[143]

209. None of these definitions indicate that the terms exclude ‘private property’ from the provision. However, there is a distinction between holding that private property *may* form part of the phrase ‘material resources of the community’ and holding that *all* private property falls within the net of the phrase. It is here that the judgment by Justice Krishna Iyer in **Ranganatha Reddy**, and the consequent observations in **Sanjeev Coke** fall into error. Justice Krishna Iyer cast the net wide, holding that *all* resources which meet “material needs” are covered by the phrase and any attempts by the government to nationalise these resources would be within the scope of Article 39(b). He clarified that not only the “means of production” but also the goods so produced fall within the net of the provision. The illustration which he provides in **Ranganatha Reddy** indicates the unworkable nature of such an interpretation. Justice Krishna Iyer observed, by way of an illustration, that not only do factories which produce cars fall within the net of Article 39(b), but even privately owned cars are covered by the provision.[144] Similarly, even in **Sanjeev Coke**, the net is cast wide and this Court observed that “all things capable of producing wealth of the community”

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[143] Ramanathaier, Advanced Law Lexicon, 3rd Edition., Vol. III.
[144] Ranganatha Reddy [81].

fall within the ambit of the phrase. In both decisions, it was observed that all resources of the individual are consequentially the resources of the community.

210. It is a settled rule of interpretation that no word in a statute may be construed as surplusage and be rendered ineffective. While construing a provision, full effect is to be given to the language used in the provision.[145] This principle is equally applicable to constitutional interpretation. The provisions of the draft Constitution placed before the Constituent Assembly by Dr B R Ambedkar were debated at length. Often, members of the assembly would propose amendments which involved alternate phrasing of various provisions. These were debated thread-bare in the assembly before the members voted on the final text. As noted earlier in this judgement, the text of the present Article 39(b) was also the subject of debate and discussion. An amendment was proposed by Professor KT Shah, which sought an alternative phrasing of the provision. After detailed discussions, the assembly ultimately voted in favour of the current phrasing of the provision. Therefore, while interpreting the article, we cannot ignore the specific words used in the provision or render them ineffective.

211. An interpretation of Article 39(b) which places *all* private property within the net of the phrase “material resources of the community” only satisfies one of the three requirements of the phrase, i.e. that the goods in question must be a ‘resource’. However, it ignores the qualifiers that they must be “material” and “of the community”. The use of the words “material” and “community” are not

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[145] Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 [43-44], 2014 INSC 21; Rohitash Kumar v Om Prakash Sharma, (2013) 11 SCC 451 [27-29], 2012 INSC 509.

meaningless superfluities. We cannot adopt a construction of the provision which renders these terms *otiose*. The words "of the community" must be understood as distinct from the "individual". If Article 39(b) was meant to include **all** resources owned by an individual, it would state the "ownership and control of **resources** is so distributed as best to subserve the common good". Similarly, if the provision were to exclude privately owned resources, it would state "ownership and control of **resources of the state** …" instead of its current phrasing. The use of the word "of the community" rather than "of the state" indicates a specific intention to include *some* privately owned resources.

212. In essence, the text of the provision indicates that not **all** privately owned resources fall within the ambit of the phrase. However, privately owned resources are not excluded as a class and some private resources may be covered. The resource in question must meet the two qualifiers, i.e. it must be a "material" resource and it must be "of the community". Thus, the judgements doubted in the reference before us are incorrect to the extent that they hold that "all resources" of an individual are part of the community and thus, all private property is covered by the phrase "material resources of the community".

b. <u>The interpretation amounts to endorsing a particular economic ideology</u>

213. To declare that Article 39(b) includes the distribution of *all* private resources amounts to endorsing a particular economic ideology and structure for our economy. Justice Krishna Iyer's judgment in **Ranganatha Reddy**, which was followed *inter alia* in **Sanjeev Coke** and **Bhim Singhji**, was influenced by a

particular school of economic thought. This is evident from various observations made in these judgements. For instance, in **Ranganatha Reddy**, Justice Krishna Iyer observed that Article 39(b) constitutes "a directive to the State with a deliberate design to dismantle feudal and capitalist citadels of property".[146] In **Bhim Singhji**, Justice Krishna Iyer cited Karl Marx in his judgment to observe that taking over large conglomerations of land is necessary to make Article 39 a "constitutional reality".[147] Interestingly, in the same decision, Justice Krishna Iyer also expressed his view about the nature of the economy and observed that our economy was "in the transitional stage … undergoing a fabian transformation".[148] Similarly, in **Sanjeev Coke**, Justice Chinappa Reddy states that "the words and thought of Article 39(b) but echo the familiar language and philosophy of socials as expounded by all socialist writers".[149] In essence, the interpretation of Article 39(b) adopted in these judgements is rooted in a particular economic ideology and the belief that an economic structure which prioritises the acquisition of private property by the state is beneficial for the nation.

214. Significantly, both Justice Krishna Iyer (in **Ranganatha Reddy** and **Bhimsinghji**) and Justice Chinappa Reddy (in **Sanjeev Coke**) consistently referred to the vision of the framers as the basis to advance this economic ideology as the guiding principle of the provision. However, as noted earlier in

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[146] Ranganatha Reddy [81].
[147] Bhim Singhji [11].
[148] *Ibid* [16A]; Fabianism refers to a British socialist theory which believes in the gradual transition to a socialist society and rejects the revolutionary doctrines of Marxism. [Lamb, P. (2023, November 28). *Fabianism*. *Encyclopedia Britannica*. https://www.britannica.com/money/Fabianism]
[149] Sanjeev Coke [19].

this judgement, the vision of the framers while drafting the Constitution was not to lay down a particular form of social structure or economic policy for future governments. The debates in the Constituent Assembly reflect the foresight of Dr B R Ambedkar. He was categoric in his constitutional vision. The Constitution and the Directive Principles, as he expounded their fundamental principles, rejected the prevalence of one dogma. The Constitution was framed in broad terms to allow succeeding governments to experiment with and adopt a structure for economic governance which would subserve the policies for which it owes accountability to the electorate. According to Dr Ambedkar, if the Constitution laid down a particular form of economic and social organisation, it would amount to taking away the liberty of people to decide the social organisation in which they wish to live. He opined on several occasions that economic democracy is not tied to one economic structure, such as socialism or capitalism, but to the aspiration for a 'welfare state'. Thus, the role of this Court is not to lay down economic policy, but to facilitate this intent of the framers to lay down the foundation for an 'economic democracy'.

215. Indeed, it is this spirit and its all-encompassing nature of the Constitution which has allowed elected governments since independence to pursue economic reforms and policies based on domestic conditions, international requirements and political exigencies of the time. At the time of independence in the 1950s and 1960s, given the early challenges of our republic, the focus of the government was on planning, a mixed economy, heavy industries, and import substitution policies. Subsequently, in the late 1960s and 1970s, there was a shift towards purportedly 'socialist' reforms and policies. Since the

decade of the 1990s, or the liberalisation years, there has been a shift towards pursuing a policy of market-based reforms.[150] Today, the Indian economy has transitioned from the dominance of public investment to the co-existence of public and private investment.[151] The doctrinal error in the Krishna Iyer approach was, postulating a rigid economic theory, which advocates for greater state control over private resources, as the exclusive basis for constitutional governance.

216. India's economic trajectory indicates that the Constitution and the custodians of the Constitution – the electorate – have routinely rejected one economic dogma as being the exclusive repository of truth. As participants in a vibrant multi-party 'economic democracy', the 'People of India' have voted to power governments which have adopted varied economic and social policies, based on the country's evolving development priorities and challenges. The foresighted vision of our framers to establish an 'economic democracy' and trust the wisdom of the elected government, has been the backbone of the high-growth rate of India's economy, making it one of the fastest-growing economies in the world.[152] To scuttle this constitutional vision by imposing a single economic theory, which views the acquisition of private property by the state as

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[150] Rahul De, A History of Economic Policy in India: Crisis, Coalitions, and Contingency, 2023 (Oxford University Press).

[151] Ministry of Finance (Department of Economic Affairs), Government of India, The Indian Economy: A Review, January 2024.

[152] Ministry of Finance (Department of Economic Affairs), Government of India, Economic Survey 2023-24, July 2024.

the ultimate goal, would undermine the very fabric and principles of our constitutional framework.

c. The interpretation is incompatible with the right to property

217. The right to property was included in the Constitution as a fundamental right under Articles 19(1)(f) and Article 31. Subsequently, the right to property was deleted from Part III of the Constitution by the Constitution (Forty-fourth Amendment) Act, 1978. However, a modified version was inserted and the right to property continues to be constitutionally protected under Article 300A.[153] Although no longer in the nature of a fundamental right, the provision has been characterised as a constitutional and human right.[154]

218. A two-Judge Bench of this Court in **Kolkata Municipal Corporation & Anr v. Bimal Kumar Shah & Ors**[155], speaking through Justice PS Narasimha, had occasion to discuss the scope and content of Article 300-A and the constitutional vision in relation to private property. This Court held that merely providing compensation does not justify compulsory acquisition by the state unless procedural safeguards are followed. It was observed that a "post-colonial reading" of the constitutional right to property cannot be limited to the twin conditions of (a) the acquisition being for a public purpose; and (b) payment of

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[153] Article 300A of the Constitution: "Persons not to be deprived of property save by authority of law. – No person shall be deprived of his property save by authority of law."

[154] Chandigarh Housing Board v. Major General Devinder Singh, 2007 (9) SCC 6, 2007 INSC 291; Lachhman Dass v. Jagat Ram, (2007) 10 SCC 448; Vidya Devi v. State of Himachal Pradesh, (2020) 2 SCC 569, 2020 INSC 23.

[155] 2024 INSC 435.

compensation, and must give way to more meaningful renditions. This Court observed:

> "25. While it is true that after the 44th Constitutional Amendment, the right to property drifted from Part III to Part XII of the Constitution, there continues to be a potent safety net against arbitrary acquisitions, hasty decision-making and unfair redressal mechanisms. **[…] To assume that constitutional protection gets constricted to the mandate of a fair compensation would be a disingenuous reading of the text and, shall we say, offensive to the egalitarian spirit of the Constitution.**
>
> 26. The constitutional discourse on compulsory acquisitions, has hitherto, rooted itself within the 'power of eminent domain'. Even within that articulation, the twin conditions of the acquisition being for a public purpose and subjecting the divestiture to the payment of compensation in lieu of acquisition were mandated. **[…]**
> **A post-colonial reading of the Constitution cannot limit itself to these components alone. The binary reading of the constitutional right to property must give way to more meaningful renditions, where the larger right to property is seen as comprising intersecting sub-rights, each with a distinct character but interconnected to constitute the whole. These sub-rights weave themselves into each other, and as a consequence, State action or the legislation that results in the deprivation of private property must be measured against this constitutional net as a whole, and not just one or many of its strands."**

219. The right to property under Article 300-A, this Court observed, may be seen as comprising of the following sub-rights which ensure that the procedure followed is just, fair and reasonable:

> "**27. […]** i) duty of the State to inform the person that it intends to acquire his property – the right to notice, ii) the duty of the State to hear objections to the acquisition – the right to be heard, iii) the duty of the State to inform the person of its decision to acquire

> – the right to a reasoned decision, iv) the duty of the State to demonstrate that the acquisition is for public purpose – the duty to acquire only for public purpose, v) the duty of the State to restitute and rehabilitate – the right of restitution or fair compensation, vi) the duty of the State to conduct the process of acquisition efficiently and within prescribed timelines of the proceedings – the right to an efficient and expeditious process, and vii) final conclusion of the proceedings leading to vesting – the right of conclusion."

220. The interpretation of Article 39(b), both as a pre-cursor to the protection of Article 31C and as an aspirational Directive Principle, cannot run counter to the constitutional recognition of private property. To hold that <u>all</u> private property is covered by the phrase "material resources of the community" and that the ultimate aim is state control of private resources would be incompatible with the constitutional protection detailed above.

d. <u>Determining the 'materiality' and 'community element' of the resource</u>

221. We have established above that a construction of Article 39(b) which provides that *all* private property is included within the ambit of Article 39(b) is incorrect. However, there is no bar on the inclusion of private property as a class and if a privately owned resource meets the qualifiers of being a 'material resource' and 'of the community', it may fall within the net of the provision. We agree with the formulation of Mr Zal Andhyarujina, learned senior counsel that "material resources of the community" refers to either natural resources (which are those of the nation) or those resources which in a large sense can be said to be of community, even though they may be in private hands.

222. The materiality of a privately owned resource and whether it has a community element cannot be determined in a vacuum and must be identified on a case-by-case basis. The underlying reference orders, limit our mandate to examining the correctness of the interpretation in **Ranganatha Reddy** and **Sanjeev Coke**, without assessing the applicability of Article 39(b) to any specific resources or legislation. We may, therefore, only outline guiding principles to determine whether a particular privately owned resource falls within the fold of the provision. The following factors may be borne in mind while determining whether the resource constitutes a 'material resource of the community':

a. The nature of the resource and its inherent characteristics;
b. The impact of the resource on the well-being of the community;
c. The scarcity of the resource; and
d. The consequences of such a resource being concentrated in the hands of private owners.

223. There are various forms of resources, which may be privately owned, and inherently have a bearing on ecology and/or the well-being of the community. Such resources fall within the net of Article 39(b). To illustrate, non-exhaustively, there may exist private ownership of forests, ponds, fragile areas, wetlands and resource-bearing lands. Similarly, resources like spectrum, airwaves, natural gas, mines and minerals, which are scarce and finite, may sometimes be within private control. However, as the community has a vital

interest in the retention of the character of these resources, they fall within the ambit of the expression “material resources of the community”.

224. We may refer to the Public Trust Doctrine that has been evolved by this Court in a consistent line of precedent, to better understand the ‘community’ element of such resources. [156] This doctrine provides that the State holds all natural resources as a trustee of the public and must deal with them in a manner consistent with the nature of the trust. The doctrine was introduced to Indian jurisprudence by a two-judge bench decision of this Court in **M.C. Mehta v. Kamal Nath**[157] This Court, speaking through Justice Kuldip Singh, held that the doctrine is rooted in the principle that certain resources like “air, sea, waters and forests” hold such importance to the people, as a whole, that it would be unjustified to make them a subject of private ownership. This Court held that the doctrine mandates the Government to protect the resources for the enjoyment of the general public, rather than to permit their use for commercial gains. Significantly, this does not mean that the state cannot distribute such resources, sometimes even to private entities, rather while distributing such resources, the state is bound to act in consonance with the principles of public trust so as to ensure that no action is taken which is detrimental to public interest.[158]

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[156] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388, 1996 INSC 1482; M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464, 1996 INSC 1482; Fomento Resorts and Hotels Ltd. v. Minguel Martins, (2009) 3 SCC 571, 2009 INSC 39; Intellectuals Forum v. State of A.P., (2006) 3 SCC 549, 2006 INSC 101; Vedanta Limited v State of Tamil Nadu, 2024 INSC 175.
[157] (1997) 1 SCC 388 [22-25]; 1996 INSC 1482.
[158] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 [74-78]; 2012 INSC 68.

225. The Constitution Bench of this Court in **Special Reference No. 1**, adverted to above, had occasion to observe that the Public Trust Doctrine has expanded beyond resources like air, sea, water and forests, to include other resources such as spectrum which also have a community or public element. The Constitution Bench of this Court, relying on Article 39(b), held that no part of such resources can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation. The considerations may be in the nature of the state earning revenue or to "best sub-serve the common good". The idea, this Court held, is that one set of private citizens cannot prosper at the cost of another set of private citizens, because such resources are owned by the community as a whole.

e. <u>The provision may include the ‘vesting’ of private resources in the state</u>

226. Mr Zal Andhyarujina and Mr Sameer Parekh, learned counsel for the appellants contend that the wide-net cast by Justice Krishna Iyer in **Ranganatha Reddy** and followed in **Sanjeev Coke** is not the correct position of the law. However, they both conceded, as we have held above, that in certain cases, privately owned resources may be covered by Article 39(b). On the other hand, other counsel such as Ms Uttara Babbar, learned senior counsel contend that a privately owned resource can <u>never</u> fall within the ambit of Article 39(b). They ground this understanding in the requirement of the provision that the state must secure the “distribution” of the concerned resources, rather than the phrase “material resources of the community”. They argue that the mere vesting of a private resource in the state does not constitute “distribution” and thus, it

cannot fall within the net of Article 39(b). In other words, they urged that the acquisition of privately owned resources by the state is a prerequisite to the applicability of Article 39(b) and only the process of distribution which follows the acquisition is covered by the provision.

227. We cannot subscribe to such a narrow interpretation of the word 'distribution' On the limited question of whether the acquisition of private resources falls within the ambit of the term 'distribution', we agree with the principles enunciated in previous decisions of this Court. The term has a wide connotation. The distribution may be piecemeal or the resource may be kept in the control of a governmental agency or a regulated private agency, so long as the benefits percolate through to the people as a common good. As noted by this Court in **In Re Natural Resources,** Article 39(b) only lays down a restriction on the object of the distribution, i.e. that it must be to subserve the 'common good'. However, there is no bar on the mode of distribution.

228. In some cases, the mere vesting of the resource in the hands of the government serves the 'common good', while in other cases, a resource may be distributed amongst private players to achieve this purpose. To illustrate, a large privately owned pond may be acquired and put in control of a governmental agency or a cooperative society so that the pond is preserved. Similarly, the material resource of spectrum may be auctioned to the highest bidder who may be a private company, who would then utilize the spectrum along with their technology to best subserve the common good. These are questions of economic and social policy which fall outside the ambit of judicial

inquiry. As noted above, this Court must not tread into the domain of economic policy, or endorse a particular economic ideology while undertaking constitutional interpretation. To hold that the term "distribution" cannot encompass the vesting of a private resource would amount to falling into the same error as the Justice Krishna Iyer doctrine, i.e. to lay down a preference of economic and social policy.

E. Conclusion

229. In a nutshell, the answers arrived at by this Court to the reference before us may be summarised in the following terms:

a. Article 31C to the extent that it was upheld in **Kesavananda Bharati v Union of India** remains in force;

b. The majority judgment in **Ranganatha Reddy** expressly distanced itself from the observations made by Justice Krishna Iyer (speaking on behalf of the minority of judges) on the interpretation of Article 39(b). Thus, a coequal bench of this Court in **Sanjeev Coke** erred by relying on the minority opinion;

c. The single-sentence observation in **Mafatlal** to the effect that 'material resources of the community' include privately owned resources is not part of the *ratio decidendi* of the judgement. Thus, it is not binding on this Court;

d. The direct question referred to this bench is whether the phrase ‘material resources of the community’ used in Article 39(b) includes privately owned resources. Theoretically, the answer is yes, the phrase ***may*** include privately owned resources. However, this Court is unable to subscribe to the expansive view adopted in the minority judgement authored by Justice Krishna Iyer in **Ranganatha Reddy** and subsequently relied on by this Court in **Sanjeev Coke**. Not every resource owned by an individual can be considered a ‘material resource of the community’ merely because it meets the qualifier of ‘material needs’;

e. The inquiry about whether the resource in question falls within the ambit of Article 39(b) must be context-specific and subject to a non-exhaustive list of factors such as the nature of the resource and its characteristics; the impact of the resource on the well-being of the community; the scarcity of the resource; and the consequences of such a resource being concentrated in the hands of private players. The Public Trust Doctrine evolved by this Court may also help identify resources which fall within the ambit of the phrase “material resource of the community”; and

f. The term ‘distribution’ has a wide connotation. The various forms of distribution which can be adopted by the state cannot be exhaustively detailed. However, it may include the vesting of the concerned resources in the state or nationalisation. In the specific case, the Court must determine whether the distribution ‘subserves the common good’.

230. The reference is answered in the above terms. The Registry is directed to obtain administrative instructions from the Chief Justice for placing the matters before an appropriate bench.

……CJI
[Dr Dhananjaya Y Chandrachud]

……J
[Hrishikesh Roy]

……J
[J B Pardiwala]

……J
[Manoj Misra]

……J
[Rajesh Bindal]

……J
[Satish Chandra Sharma]

……J
[Augustine George Masih]

New Delhi;
November 05, 2024