"Doctrine of Public Trust" and its Application by Judiciary in Environmental Governance of India: A Critique

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I. Introduction

There has been a relentless effort at the national and international level to protect the mother earth and its natural resources from pollution, ecological imbalance, un-sustainable method of development, rapid exhaustion of finite natural resources, to ensure conservation and its augmentation including its fair and sustainable use. While some initiatives have been successful, some have failed and some are in a process of making. The reason sometimes is flaw with policy or there is its non-implementation. Sometimes there are lapses with the laws or there is laxity in its implementation. What is the cause of grave concern is that of institutional failure, where the people by indulging corrupt practices manipulate the whole system and take the law to their advantage. As a ray of hope judiciary has taken a pro-active role to check environmental corruption, by enforcing strict observance of law and policy-as a sine-qua-non for good environmental governance. While doing that it needed the application of some principles of environmental jurisprudence. "Doctrine of Public Trust" is one of such principles. In this paper there will be a critical analysis of the nature and content of "Doctrine of Public Trust" and its application by the judiciary in India, in the backdrop of environmental governance.

II. Newspaper Report Leading to the Filing of Writ Petition

There was a news item[2] in the "Indian Express" under the caption: "Kamal Nath Dares the Mighty Beas to Keep His Dreams Afloat". The relevant part of the news item was as under:

> Kamal Nath's family has direct links with a private company, Span Motels Private Limited, which owns a resort-Span Resorts, for tourists in the Kullu-Manali valley. The problem is with another ambitious venture floated by the same company- Span Club. The club represents Kamal Nath's dream of having a house on the bank of the Beas in the shadow of the snow-capped Zanskar ranges. The club

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[2] Kamal Nath Dares the Mighty Beas to Keep His Dreams Afloat, Indian Express, February, 25, 1996, page 1.

was built after encroaching upon 27.12 bighas of land, including substantial forest land, in 1990. The land was later regularised and leased out to the company on April 11, 1994. The regularisation was done when Mr. Kamal Nath was Minister of Environment and Forests. The swollen Beas changed its course and engulfed the Span club and the adjoining lawns, washing it away. For almost five months now, the Span Resorts management has been moving bulldozers and earth-movers to turn the course of the Beas for a second time. The heavy earth mover has been used to block the flow of the river just 500 meters upstream. The bulldozers are creating a new channel to divert the river to at least one kilometer downstream. The tractor trolleys move earth and boulders to shore up the embankment surrounding Span Resort for flaying a lawn. According to the Span Resorts management, the entire reclaiming operation should be over by March 31 and is likely to cost over a crore of rupees. Three private companies-one each from Chandigarh, Mandi and Kullu-have moved in one heavy earth mover, four earth movers and four bulldozers and 35 tractor trolleys. A security ring has been thrown all around. Another worrying thought is that of the river eating into the mountains, leading to landslides which are an occasional occurrence in this area. Last September, these caused floods in the Beas and property estimated to be worth Rs 105 crores was destroyed. "Mr. Kamal Nath was here for a short while two-three months ago. He came, saw what was going on and left. I suppose he knows what he is doing", says another executive. The district administration pleads helplessness. Rivers and forest land, officials point out, are not under their jurisdiction. Only the Kullu conservator of forests or the district forest officer can intervene in this case. But who is going to bell the country's former Environment and Forests Minister?

III. M.C. Mehta v. Kamal Nath: Invocation of Public Trust Doctrine

The above-mentioned news led to the filling of a writ petition which results in M.C.Mehta v. Kamal Nath[3] judgment. The judgment is a milestone in ensuring environmental governance in India. Here the Supreme Court borrowed the common law concept of "Doctrine of Public Trust" from a

[3] M.C.Mehta v. Kamal Nath, (1997) 1 SCC 388.

U.S.A[4] which envisioned of co-ownership of people over natural resources, trusteeship of the government over those and some sacred obligations to perform or refrain from doing. While restating that "the aesthetic use and the pristine glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public goods and in public interest to encroach upon the said resources," on its historical origin and basic content, the Kuldip Singh J[5] observed:

> The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the ideas that certain common properties such as rivers, sea-shore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary conceded about 'the environment' bear a very close conceptual relationship to this legal doctrine. Under the Roman Law, these resources were either owned by no one or by everyone in common. Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public Joseph L. Sax, Professor of Law, University of Michigan proponent of the Modern Public Trust Doctrine-in an erudite article "Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention[6]" has given the historical background of Public Trust Doctrine as under: "The source of modern public trust law is found in a concept that received much attention in Roman and English law-the nature of property rights in rivers, the sea, and the seashore. Two points should be emphasized, First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties-such as the seashore, highways, and running water- "perpetual use was dedicated to the public," It has never been clear whether the public had an

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4 Illinois Central R.R.Company v. Illinois, 146 US 687 (1982).
5 M.C.Mehta v. Kamal Nath, at para 27.
6 Michigan Law Review, Vol. 68, Part-1, 1969, page 4.

> enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.

There are three restrictions on the government's power to deal with the property as trustee of the people under this doctrine[7]

> The "Public Trust Doctrine" primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Prof. Sax the Public Trust Doctrine imposes the following restrictions on governmental authority. Three types of restrictions on governmental authority are often though, to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public, second, the property may not be sold, even for a fair cash equivalent; and, third property must be maintained in particular types of uses.

The "Doctrine of Public Trust" as common law principle has a place in the common law system of India[8]:

> Our legal system-based on English common law- includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

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7 M.C.Mehta v. Kamal Nath, at para 28.
8 Id, at para 34.

IV. The Dynamic Nature of "Doctrine of Public Trust": M.C. Mehta vs Kamal Nath

The "Doctrine of Public Trust" is not static; it does not confine itself only within a few subjects as originated in U.K; it can respond positively to the changing needs of time. Therefore, Supreme Court referred to Prof. Joseph L. Sax[9]:

> Judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.

Relying on the judicial trend of U.S.A, the apex Court highlighted this afore-said aspect of the doctrine[10]:

> Public trust doctrine under the English Common Law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in Mono Lake case clearly show the judicial concern in protecting all ecologically important lands for example fresh water, wetlands or riparian forests. The observation of the Court in Mono Lake case to the effect that the protection of ecological values is among the purpose of public trust, may give rise to an argument that the ecology and the environment-protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In Phillips

[9] Id, at para 35.
[10] Id, at para 41.

> Petroleum Co. vs. Mississippi: 108 S. Ct. 791 (1988), the U.S Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying no-navigable tidal areas. The majority judgment adopted ecological concepts to determine which lands can be considered tide lands. Phillips Petroleum case assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all eco-systems operating in our natural resources.

V. Application of Doctrine of Public Trust in Some Other Cases

In Intellectuals Forum, Tirupathi v. State of A.P[11], while reiterating that State is the trustee of all natural resources of the country which are by nature meant for public use and enjoyment, the Supreme Court summarised the very concept:

> Public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust. This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a nugatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resource.

Fomento Resorts v. Minguel Martins[12] is an example where the doctrine was applied to give access to the public of a beach in Goa:

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[11] (2006) 3 SCC 549.
[12] (2009) 3 SCC 571, (para 53 & 54).

> This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof. The heart of public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved.

Reliance Natural Resources Limited v. Reliance Industries Limited[13] is a case where Supreme Court harped on the broader application of this doctrine beyond the realm of conventional subjects:

> It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the public trust doctrine. Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application.

VI. Centre for Public Interest Litigation v. Union of India

Though commercial allocation of environmental resources was not the issue in this case[14], it is significant because the 'Doctrine of Public Trust' has been invoked to regulate the commercial distribution of spectrum i.e. scientific and technological knowledge or material resources of the country-a scarce, finite and renewable natural resource. Though it was all about spectrum but a clear directive regarding the government's policy towards the distribution of natural resources for commercial purposes is found here. The observations of Supreme Court[15] regarding the utility of natural resources, ownership regime over it, attached obligation of the government, and constitutional directives vis-a-vis Doctrine of Public Trust are very pertinent:

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[13] (2010) 7 SCC 1, see also Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, (2004) 3 SCC 214.

[14] Centre for Public Interest Litigation v. Union of India, AIR 2012 SC 522.

[15] Id, at para 75 &76.

Natural resources are generally understood as elements having intrinsic utility to mankind. They may be renewable or non renewable. They are thought of as the individual elements of the natural environment that provide economic and social services to human society and are considered valuable in their relatively unmodified, natural, form. A natural resource's value rests in the amount of the material available and the demand for it. The latter is determined by its usefulness to production. Natural resources belong to the people but the State legally owns them on behalf of its people and from that point of view natural resources are considered as national assets, more so because the State benefits immensely from their value. The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources[16].

The ownership regime relating to natural resources can also be ascertained from international conventions and customary international law, common law and national constitutions. In international law, it rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the U.N General Assembly and then affirmed as a customary international norm by the ICJ. Common Law recognizes States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same. Constitutions across the world focus on establishing natural resources as owned by, and for the benefit of, the country. In most instances where constitutions specifically address ownership of natural resources, the Sovereign State, or, as it is more commonly expressed, 'the people', is designated as the owner of the natural resource[17].

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16 Id, at para 63.

17 Id, at para 64.

The court then referred to an article of Prof. Joseph L. Sax, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention[18]".

> The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources."

The apex Court adverted to the doctrine in this new field of resources. Accordingly the doctrine is depicted as the best practical, philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust[19].

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

The Court concluded[20] by stating that "the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the

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[18] Id, at para 66.
[19] Id, at para 85.
[20] Id, at para 89.

constitutional principles including the doctrine of equality and larger public good", which resulted in cancellation of 2G Spectrum Allocation as first-come-first-served policy adopted for its commercial allocation, goes against the letter and spirit of "Doctrine of Public Trust".

VII. Presidential Reference Case: An Overview

Amidst the issue of constitutionally prescribed methods for commercial allocation of natural resources, the union government sought Supreme Court's advice under Article 143[21], on matters of whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions; or whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court.

A. Scope of Application of Public Trust Doctrine in Natural Resources Allocation

On "Doctrine of Public Trust", vis-a-vis commercialisation of natural resources, the Supreme Court[22] is of the opinion that the application of the doctrine is not apt. If the following observations of the apex Court are analysed it would be evident that firstly, the Supreme Court maintained a studied silence over the applicability of the "Doctrine of Public Trust" in this matter and did not find any place for the doctrine in commercialisation of all natural resources; secondly, the apex Court did not categorically state the relevance of "Doctrine of Public Trust" as a guiding principle. Altogether it clearly shows the disapproval of the doctrine's applicability in commercial allocation of environmental resources:

> It is a specific doctrine with a particular domain and has to be applied carefully. It has been seriously debated before us as to whether the doctrine can be applied beyond the realm of environmental protection. Richard J. Lazarus in his article, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine", while expressing scepticism over the 'liberation' of the doctrine, makes the following observations: The

[21] Re: Special Reference No.1 of 2012. Article 143 (1): If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may after such hearing as it thinks fit, report to the President its opinion thereon.

[22] Id, at para 90.

> strength of the public trust doctrine necessarily lies in its origins; navigable waters and submerged lands are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing are the object of its guarantee of public access. Commentators and judges alike have made efforts to "liberate", "expand", and "modify" the doctrine's scope yet its basic focus remains relatively unchanged. Courts still repeatedly return to the doctrine's historical function to determine its present role. When the doctrine is expanded, more often than not the expansions require tortured constructions of the present rather than repudiations of the doctrine's past.
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> However, we feel that for the purpose of the present opinion, it is not necessary to delve deep into the issue as in *Intellectuals Forum case*, the main departure from the principle explained by Joseph. L. Sax in his Article "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" is that public trust mandates a high degree of judicial scrutiny, an issue that we will anyway elaborately discuss while enunciating the mandate of Article 14 of the Constitution.

B. Auction Method for Commercial Allocation of Natural Resources vis-a-vis Article 14

Regarding auction, Supreme Court opines that as a method of disposal of natural resources, it is not a constitutional mandate. Despite being a more preferable method of alienation of natural resources, it cannot be a constitutional requirement or limitation for alienation of natural resources and any method other than auction cannot be struck down as ultra-vires Constitution, It is pertinent to mention that there is no discussion on the applicability of "Doctrine of Public Trust" as promised in the preceding paragraph:

> From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity. A State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational,

> informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14[23].
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> Such being the constitutional intent and effect of Article 14, the question arises-can auction as a method of disposal of natural resources be declared a constitutional mandate under Article 14? Answer it in the negative since any other answer would be completely contrary to the scheme of Article 14. Firstly, Article 14, with respect to the State, is only couched in negative terms; like an admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory. It, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the Article apparent from its plain language[24].

C. Auction Method of Commercial Allocation of Natural Resources vis-a-vis Directive Principle

Generating fund through "auction method" is not always a welcome step and sometimes might go against the fundamental rules of governance; over here also but there is no discussion on the relevancy of "Doctrine of Public Trust" as promised in the preceding paragraph:

> Auction as a constitutional mandate may distort another constitutional principle embodied in Article 39(b), which enumerates certain principles of policy, to be followed by the State, reads as follows: "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; Article 39(b) mandates that the ownership and control of natural resources should be so distributed so as to best subserve the common good[25].
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> Article 39(b) is a restriction on 'distribution' built into the Constitution. But the restriction is imposed on the object and not the means. The overarching and underlying principle governing 'distribution' is furtherance of common good. But

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[23] Id, at para 105.
[24] Id, at para 106.
[25] Id, at para 111.

> for the achievement of that objective, the 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"[26].
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> Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. "Common Good" is the sole guiding factor under Article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy sub-serves the "common good" and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in Article 39(b)[27]. The norm of "common good" has to be understood and appreciated in a holistic manner[28].

D. Method of Commercial Allocation of Natural Resources vis-a-vis Judicial Review

The apex Court has power to review the constitutionality of the method of allocation of natural resources but cannot advise as to which is the better or best method of allocation; and following observation shows that non-application of "Doctrine of Public Trust" is not a ground for judicial review:

> This Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode. The methodology pertaining to disposal of natural resources is clearly an economic policy. Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are *ultra vires* and *intra vires* the provisions of the Constitution. If a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down[29].

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[26] Id, at para 112.
[27] Id, at para 116.
[28] Id, at para 119.
[29] Id, at para 146.

> However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution. A judicial scrutiny of methods of disposal of natural resources should be in consonance with the constitutional principles. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution[30].

VIII. A Concluding Comment

The crux of the issue is fair method of commercial allocation of natural resources, for which the advice of the apex Court was sought under Article 143 of Constitution of India. As the Supreme Court's judgment in Presidential Reference case outlines the national policy of the government, for commercial allocation of natural resources, therefore it needs some close scrutiny in the backdrop of application of "Doctrine of Public Trust".

(A). given that government as the trustee of the people to protect the common properties, without forgetting the restrictions on its power, a new dimension to the doctrine is found. The commercial allocation of natural resources to people or business bodies *per se* does not go against the very concept of this doctrine. This new aspect of "Doctrine of Public Trust" has got recognition from Supreme Court in 2G Spectrum case. The doctrine does not necessarily mean that the government cannot commercially allocate natural resources resulting in direct financial benefits to a limited number of people. But the rider is that the government can transfer (by any fair method) natural resources with an objective to generate fund if it wants to utilise the fund for development purposes ultimately benefitting (financial or non-financial) the general public. In another words, it can be inferred that there is no wrong in commercial allocation of natural resources for the benefit of the society, though in that process a small group of people might benefit (economically) themselves but what is to be seen is that whether in that process ultimately general people are benefitting (common good) or not. Maximum common good is the ultimate aim and non-arbitrary method of allocation is the mechanism for the accomplishment of the obligation imposed by "Public Trust Doctrine". Similarly, needless to say that

[30] Id, at para 149.

government as trustee is duty bound to augment (depends on the nature of resources) the natural resources especially environmental resources.

(B). As far as National Environmental Policy of India[31]is concerned, some of its key objectives are pertinent to the "Doctrine of Public Trust": (i). Conservation of Critical Environmental Resources: to protect and conserve critical ecological systems and resources; (ii). Intra-generational Equity: to ensure equitable access to environmental resources and quality for all sections of society; (iii). Environmental Governance: to apply the principles of good governance i.e. transparency, rationality, accountability and regulatory independence, to the management and regulation of use of environmental resources. These objectives are to be realized through various strategic interventions, which are premised on a set of principles including "Public Trust Doctrine": "the State is not an absolute owner, but a trustee of all natural resources, which are by nature meant for public use and enjoyment, subject to reasonable conditions, necessary to protect the legitimate interest of a large number of people, or for matters of strategic national interest". Therefore, there should not be any policy confusion that observance of "Public Trust Doctrine" is not a mandatory in commercial allocation of natural resources. There is no justification in limiting the scope of the doctrine but Supreme Court did the same in Presidential Reference case.

(C). Advice of Supreme Court is not binding on the President[32]. Nonetheless, if it is accepted, it becomes the law of the land and gets the status of the policy of the country. But, a question of law which has already been decided by it cannot be referred to it again under Article 143. The Court cannot sit in appeal over its earlier decision under advisory jurisdiction. But in Presidential Reference case the observation of Supreme Court regarding the non-applicability of "Doctrine of Public Trust" in commercial allocation of natural resources shows that though the reference was to have a constitutional guideline for commercial allocation of natural resources, (not confined in 2G SPECTRUM's allocation or only environmental resources) it exceeded its jurisdiction as it frowned upon its earlier decision of 2G SPECTRUM ALLOCATION case, by actually overruling "Doctrine of Public Trust" in above-said areas, which is constitutionally untenable. Hence, it fails to give a proper direction for the future commercial allocation of natural resources. The err stems from the fact that, Supreme Court disapproves the application of "Public Trust Doctrine" in commercial allocation of natural resources (no matter whether it is purely an environmental resource or material and intellectual resource) and gave all emphasis on Article 14 and 39(b) of Constitution as guiding

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31 National Environmental Policy, 2006.

32 In Re, Presidential Reference, AIR 1999 SC 1.

principles; a complete negation of the application of "Doctrine of Public Trust" even in commercial allocation of environmental resources, a denial of dynamic nature of DOCTRINE OF PUBLIC TRUST.

(D). On "Common Good" and "Non-Arbitrary Method of Distribution", as determinant factors to ascertain the method of commercial allocation of natural resources, Presidential Reference case gives an impression that the "Doctrine of Public Trust", Article 14 and 39 (b), Constitution of India are not mutually inclusive. It is unacceptable that "Common Good" and "Non-Arbitrary Method Distribution" are determinants to the exclusion of "Doctrine of Public Trust". The truth is that there is no such inherent conflict between the three, if delved deeper. It is undenying that whole gamut of Article 14 comes into play in commercial allocation of natural resources with these few words: "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly[33]". It implies that the government should have discretionary power but it must not be exercised arbitrarily:[34]

> From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute Monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.

It also tells that a democratic Government in a social welfare country cannot lay down arbitrary procedure for commercial allocation of natural resources. Applicability of Article 14 does not deny the obligation of government under "Doctrine of Public Trust" as the doctrine is a principle, strict observance of which makes the discretionary exercise of power non-arbitrary and at par with Article 14. This is equally true also to the effectiveness of directive of Article 39 (b) in this matter. "Public Trust

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[33] Lord Denning in Breen v. Amalgamated Engineering Union (1971) 2 QB 175. See also Ramaswami, J. in S.G. Jaisinghani v. Union of India AIR 1967 SC 1427 and Bhagwati, J. in Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCR 1014.

[34] P.N.Bhagwati J. in Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

Doctrine" is not an isolated island, but together with non-arbitrary distribution of natural resources under Article 14 and consideration of "Common Good" of Article 39(b), it forms a whole continent. All are mutually inclusive; there is no inherent conflict between these three; all principles are directed towards the achievement of same goal in different ways. While allocating natural resources for commercial purposes, all have to be complied with-as complimentary and supplementary to each other. The policy of allocation should be judged against each of the principles, and must satisfy each of the tests which do not exclude the strict compliance of 'Doctrine of Public Trust". The above-said construction is built upon the view of V.R.Krishna Iyer. J[35] regarding the inter-relationship of fundamental rights:

> "No Article in Part III is an island but part of a continent, and the conspectus of the whole part gives the directions and correction needed for interpretation of these basic provisions. Man is not dissectible into separate limbs and, likewise, cardinal rights in an organic constitution, which make man human, have a synthesis.

The quintessence of "Doctrine of Public Trust" is that State is the trustee of all natural resources, which goes far beyond the conventional subject matters. The people have equal and equitable rights over the natural resources as co-owners. It envisages an obligation of government to provide complete protection to all natural resources for public use or enjoyment including its augmentation (depends on the nature of the resource), commercial utilisation for all round development, economic growth and to ensure comfort in lives of people. Government cannot act in a manner which would benefit a private party at the cost of general interest of the people. Keeping in mind "Doctrine of Public Trust" and Articles 14 and 39(b), it cannot, allocate property arbitrarily for a consideration less than the highest that could be obtained for it, to be utilised for public purpose, unless, of course, there are justified reasons. Apart from conventional applications of "Doctrine of Public Trust", its inter-relationship with other constitutional principles like Articles 14 and 39 (b), augmentation of environmental resources and their fair commercialisation for economic growth or greater common public good or public interest, directly fall under the broader perspective of the doctrine and basic structure of good environmental governance and sound environmental jurisprudence, not only of India but also of any country of the world.

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[35] Maneka Gandhi v Union of India, AIR 1978 SC 597.