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1 INTRODUCTION

Mineral rights in India are governed by customary law, common law principles, and statutory provisions. Like most countries with a colonial past, India too has a complex history of rights over natural resources - a mosaic that seeks to enmesh traditional customary rights of the region with common (or civil) law principles, pre-colonial legal history, and colonial laws – even as they coexist with modern-day decolonisation efforts that seek to undo historical wrongs. This complex legal history operates within an ever-increasing global demand for mineral resources that require regulatory certainty and legal clarity to expand and grow. Paradoxically there also exists a growing acknowledgment of an eco-centric indigenous cosmology that challenges and threatens the very basis of the homogenised global legal order. Locating the emerging jurisprudence within this broader discourse with its opposing trajectories is critical to our understanding of rights over resources.

In the first section, I locate the mineral rights discourse within ongoing law and natural resources debates and then provide a quick overview of the governance framework over mineral resources in the country, with a focus on the tribal-dominated areas which are also mineral-rich areas. In the third section, I critically examine in detail the judgments of the Supreme Court which have a bearing on the substantive rights of people and communities over mineral resources. I begin by framing the questions around which some of the critical debates revolve.

2 FRAMING THE ANALYSIS

The analysis of the judicial rulings arises from and is grounded within existing debates and discourses around natural resources, both national and international. First, the question of ownership of mineral resources and the ensuing rights is an evolving debate with a long history. The concept of eminent domain, vigorously adopted during colonial times, determined for a long how natural resources remained subjugated to boarder state mandates of 'public interest' and the 'greater good'. It sidelined traditional and customary rights in favour of development in the national interest. However, this excessive and overbearing control of the state over natural resources has been steadily whittled away. The idea of ownership has been nuanced by decolonisation discourses, which brought to fore subaltern histories and ownership rights to undo historical wrongs of usurpation of resources and overriding of customary claims that predated colonisation.[1] Thus, a historical unpacking is now leading to a reexamination of ownership claims to restore lost claims and unjust dispossession.[2]

Second, the expansion of the environmental rights framework impacts how the mineral rights discourse is articulated. Two concepts, that of public trust doctrine and inter-generational equity, bring in new models of ownership and sharing of profits from mining to enable intra and inter-generational equity. The public trust doctrine redefines the role of the state viz-a-vis natural resources. It establishes the rights of the public to the resources, imposes duties of the state, and demands direct accountability to citizens.[3] Similarly, intergenerational equity grants rights to future generations which can be operationalised by states through either sovereign wealth funds or long-term planning and conservation of the resource.[4]

Third, the expansion of environment rights witnessed a parallel development of the broader good governance

1 See generally, Srestha Banerjee, 'Let People-centric Natural Resource Governance be the New Regime's Agenda' (Down to Earth, 24 May 2019) <https://www.downtoearth.org.in/blog/forests/let-people-centric-natural-resource-governance-be-the-new-regime-s-agenda-64740>.

2 The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

3 See generally, Shibani Ghosh, Public Trust Doctrine in Indian Environmental Law in Indian Environmental Law: Key Concepts and Principles (Orient Black Swan 2019).

4 Rahul Basu, 'Implementing Intergenerational Equity in Goa' (2014) XLIX (51) Economic & Political Weekly 33-37.

framework of TAP (transparency, accountability, and participation) being adopted to counter the ill effects of resource curse and corruption.[5] Rights over mineral resources now include these related democratic rights, making citizens and people critical stakeholders in resource development and management. This expansion is now finding resonance in judicial pronouncements, and in the past few decades, emphasis is laid on building greater democracy around resource management through the process of consultation, prior informed consent, social license to operate, and by introducing auctions as a process of enhancing transparency and accountability in resource allocation.

Fourth, the global standard-setting mechanism creates benchmarks for national efforts and improvement within the mining industry. The discourse around sustainable development and sustainable mining is now a part of the mining industry. Although they originated within the environmental discourse, it has expanded to take on a broader set of ideas/concepts that are now implemented as scientific mining. Global supply chains are being monitored for compliance with labour standards and human rights norms, through mechanisms such as certifications, voluntary codes, and the US Dodd Frank Act.[6] The European Commission is currently developing a mandatory Human Rights Due Diligence framework for its member states, thus inching towards transforming 'soft' law into 'hard' law that has implications for the liability regime.[7]

Finally, the growing recognition that nature has rights, capable of legal personhood, and is not merely property from an anthropocentric viewpoint is steadily being adopted by various courts. The evolution towards recognition of the inherent rights of nature, to exist and thrive and acknowledging the need for a holistic approach to natural systems such as lakes, rivers, forests, and the eco-system of the entire planet. This rich and growing jurisprudence, adopted now in more than twenty countries, is changing how the law views nature as a legal entity with distinct rights.[8] In December 2021, the Constitutional Court of Ecuador, applied the constitutional principle of 'rights to nature' to cancel the mining concessions granted within the Los Cedros protected forest thus protecting several endangered species within this rich biodiverse ecosystem.[9]

These developments have a bearing on how mineral rights are being reconceptualised within the Indian jurisprudence. In the next few sections, I take a more careful look at some recent judicial pronouncements to map the changing discourse, the tensions with ongoing reforms in the mineral sector, and the complexities of protecting rights over mineral resources.

3 MINERAL RESOURCES AND THE GOVERNANCE FRAMEWORK

Mining is one of the oldest professions and this history has a bearing on the governance framework. India's ancient history of mining and metallurgy is widely acknowledged. The history of gold mining[10] and iron ore smelting, with its unique Indian features,

5 Brookings Institute, 'The TAP Plus Approach to Anti-Corruption in the Natural Resource Value Chain' (June 2020) <https://FLTRC_Corruption_vfinal_x2screen-reader4.pdf&usg=AOvVaw3Kym8sOzN0oC1-NIu_8hkK>.

6 Holly Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond' (2016) 48(4) George Washington International Law Review 743-780.

7 ibid.

8 For a detailed listing of countries, court ruling, statutory incorporations, and constitutional provisions, see 'Rights of Nature Law, Policy and Education' <http://www.harmonywithnatureun.org/rightsOfNature/>.

9 See generally, 'Ecuador's Highest Court Enforces Constitutional 'Rights of Nature' to Safeguard Los Cedros Protected Forest' (Press note, Centre for Biological Diversity, 2 Dec 2021) <https://biologicaldiversity.org/w/news/press-releases/ecuadors-highest-court-enforces-constitutional-rights-of-nature-to-safeguard-los-cedros-protected-forest-2021-12-02/>.

10 See generally, R.K Dube, 'India's Contribution to the Mining, Extraction and Refining of Gold: Some Observations Related to the Pre-Christian Era' in P Ramachandra Rao & N G Goswami (eds), Metallurgy in India - A Retrospective 163-181 (NML, Jamshedpur 2000).

is well documented. The oft-quoted example for the superiority of Indian metallurgy is the iron pillar (in the Qutab Minar Complex) in New Delhi. Archaeological evidence points to the antiquity of mining practices, dating as far back as the 4th century B.C. R.K Dube notes that there is evidence of 'small scale and local extraction of gold (was) taking place in the Neolithic period in the Wandalli and Hutti zones of South India'.[11] The evidence of mining as a thriving cottage industry, with significant innovations in metallurgy, demonstrate the livelihood potential of mining but the governance framework does not necessarily acknowledge this potential.

Colonial rule brought with it a different approach and a shift in the legal paradigm. With colonialism came the industrialisation of the mining sector, particularly of coal extraction in India.[12] The introduction of steam engines created an unprecedented demand for coal, followed by the demand generated by the First World War. The increased demand was met with a shift to large-scale mining operations. The colonial rule established the framework for the regulation of mineral extraction, mine safety, and the rights of mineworkers.

The post-independence legal framework is modeled on the colonial emphasis on state ownership and production for revenue generation. The added vision on nation-building placed emphasis on infrastructures such as dams, roads, railways, energy generation, and cities, requiring both major and minor minerals. In the constitutional schema, major mineral resources are currently governed by the Central legislations, minor minerals, and land by the state, while also acknowledging customary rights over minor minerals at the local body level. A more nuanced reading of the Constitution, confirmed by judicial interpretation,[13] accords several protections over traditional and customary rights over land and mineral resources to local communities and traditional rights holders. The existence of these rights, because they fall largely within the individual and local community realm, remains somewhat under-explored in literature. It has become imperative that we examine these in the post-liberalisation phase as private actors increasingly lay claim over resources that under the planned economy model were primarily used in the best interest of the people.

The Indian Constitution provides for a three-tier governance structure to enable effective governance even at the local level. It outlines the powers for each unit of governance i.e., the Centre, the State, and the local bodies in the Seventh, the Eleventh, and the Twelfth Schedule.[14] The Constitution also acknowledges the need for a separate governance framework for the adivasis in the plain's region and the tribes in the North-Eastern part of India. This institutional framing is important to locate the mineral rights in India, as the complexity of the governance structure both aids and hinders the rights claims over mineral resources.

Importantly, the Central Government has the prerogative to promulgate laws concerning the regulation of mines and mineral development and also labour safety in mines and oilfields. Important controls over major minerals such as terms for royalty rates, terms of auctions, etc. are exercised by the Central Government. State governments have been given powers under entry 23 of List II to regulate mines and the development of minerals, subject to the powers of the central government under List I. The state governments have been granted the power to impose taxes on mineral rights under entry 50 of List II.[15] While major minerals are controlled by the Central Government, significant powers are vested in the local government when it comes to minor minerals.

The lines between the powers of the Centre and the State are not clearly demarcated concerning mineral

11 ibid 178.

12 The first experiments of coal extraction by the British date back to Raniganj in 1774. The first systematic geological survey of the area was carried out in 1845-46. For more, see E R Gee, 'History of Coal Mining in India' (1940) 6 (3) Indian National Science Academy 313–18.

13 See the Supreme Court ruling in Samata v. State of AP, AIR 1997 SC 3297 and Theresiamma Jacob & Ors v. Geologist, Dept of Mining, AIR 2013 SC 3251.

14 See generally, Ligia Noronha and others, 'Resource Federalism in India: The Case of Minerals' (2009) 44 (8) Economic and Political Weekly 51–59.

15 M P Ram Mohan and Shashikant Yadav, 'Constitution, Supreme Court and Regulation of Coal Sector in India' (2018) 11 NUJS L.Rev. 1.

resources leading to conflict and litigation. This has been compounded by the Central Government, over the years, taking on the role of an active regulator.[16] Judicial review has thus sought to clarify the jurisdictional domain over the two tiers of governance. I discuss some of these tensions in the latter section of the paper but suffice it to say here that the areas of conflict have largely revolved around land and profit-sharing (royalty, taxes, and cess) over mineral resources.

However, it is not the Centre and State arrangement that is critical in understanding the constitutional aspects of rights over mineral resources. The several exceptions providing autonomy over land and natural resources contained in the Indian Constitution provide the key to a more comprehensive understanding. Local communities have rights over the resources as provided for under the Fifth and the Sixth Schedule areas. Article 13 of the Indian Constitution also acknowledges customary law as an important source of law, which has major implications for our understanding of the rights over mineral resources.

There are seven key mining states, of which five states are designated as states with Scheduled Areas. Powers vest with communities with regard to mineral resources. For instance, in the fifth schedule areas (predominantly adivasi areas in peninsular India) the prior consent of the gram sabhas is required and the gram sabhas have the power to either reject applications or if need be, grant conditional permissions.[17] Mining in areas falling within the Sixth Schedule i.e. largely the semi-autonomous tribal areas in the Northeast, a share of royalties are to be paid over to the District Councils, after an agreement between the state government and the district council, thus giving significant powers to the local district councils.

Having stated the broad governance framework, I now focus on the changing nature of rights over mineral resources. The exploration here is not a comprehensive review but brings focus to two significant judicial rulings in recent years that interrogate and transform the mineral rights framework.

4 RIGHTS OVER MINERAL RESOURCES

A range of rights – right to access, use, participation, accountability – flow from the wide range of property rights[18] over a particular resource. Apart from the property rights or ownership rights, rights flowing from permits, licenses, and contracts are also an important sub-set of rights that are not the subject of this paper.

Rights over mineral resources are intertwined with land rights but sub-soil rights were separated from the land and the popular understanding is that it was handed over to the state or crown by the colonial rule.[19] It is however noteworthy that several regions like Goa[20]

16 This changing role is reflected in the changes to the Mines and Minerals Act where the emphasis on regulation and development is provided.

17 These provisions have been diluted in recent years with exemptions being introduced; See generally, Kanchi Kohli and Manju Menon, 'Narratives of Natural Resource Corruption and Environmental Regulatory Reforms in India' (2021) 56 (52) Economic and Political Weekly 53-59.

18 Property rights can be broadly mapped into five categories – open access (also called common property rights or res communes), no-man's land, where no rights have been assigned (also called res nullius), communal property (where rights reside in the community as a whole, also can be termed as group rights or res universitatis), state property (resources vest in the public management by the state or res publica) and private property (rights assigned to individuals or res privatae); Gary Flomenhoft, 'Historical and Empirical Basis for Communal Title in Minerals at the National Level: Does Ownership Matter for Human Development?' (2018) 10(6) Sustainability, MDPI, Open Access Journal 1-27.

19 For a more nuanced historical reading of rights over coal see Matthew Shutzer, 'Subterranean Properties: India's Political Ecology of Coal, 1870-1975' (2021) (63 (2) Comparative Studies in Society and History 400-432.

20 Article 2 of the Portuguese Colonial Mining Laws 1906 establishes state ownership over sub-soil minerals. See generally <https://www.dmggoa.goa.gov.in/upload/35.pdf>.

and Pondicherry were governed by civil law, as they were governed by Portugal and France respectively. The British rule did not extend to the entire country and large areas governed by Kings, Nizams and tribal chieftains remained untouched and continued with their traditional or customary laws concerning land and mineral resources.[21] Central and Northeast India was also classified as excluded area and these tribal-dominated regions continued to exercise their traditional rights over resources with limited interference from the British. This complex land and mineral rights regime is being acknowledged and researched only in recent years.

4.1 Ownership of Mineral Resources

With a few exceptions, the world over, minerals are popularly understood as being owned by the State but also as being the property of the federal governments. However, the ownership over mineral resources is not entirely straightforward, with a more complex set of ownership claims existing simultaneously. This is more so in the Indian context with its complex legal history. Article 297 of the Indian Constitution states that the Central government is the sole owner of offshore minerals. Article 294 and 295 affirms that the States are successors to the properties and estates of the governments that previously ruled those areas. Given India's complex historical past of princely states and colonial rule, the constitutional framework acknowledges significant variations in the land ownership claims across India.[22] Several categories of land ownership are prevalent in the country but broadly areas covered by the colonial common law are understood to have accorded all rights over sub-soil rights to the state.

The question of mineral ownership was examined in detail by the Supreme Court in 2013. In Theresiamma Jacob & Ors v. Geologist, Dept of Mining,[23] Justice Jasti Chelameswar, writing on behalf of the three-judge bench, ruled clearly that 'there is nothing in the law which declares that all mineral wealth sub-soil rights vest in the State, on the other hand, the ownership of sub-soil/mineral wealth should normally follow the ownership of the land, unless the owner of the land is deprived of the same by some valid process'.[24] It examined the application of the colonial laws in a dispute over mineral ownership in the state of Kerala. Exemption from payment of royalties to the state of Kerala, was the principal plea of the owners as they were the rightful traditional owners under the jenmon (the traditional proprietary rights over land) system.

The state of Kerala in this case argued that the extension of the ryotwari system during the colonial times meant that the jenmis (land rights holders under the jenmon system) ceased to be absolute owners under the new system. However, the jenmis argued that the ryotwari system did not in any way impact the proprietary rights and was only a system for the collection of revenue.[25] In dealing with the question of the rights of the holder of jenmon rights, the judges sought to answer the question of whether the holder of jenmon rights is not only the proprietor of the soil for which he has jenmon rights, but also the owner of the mineral wealth lying beneath the soil.

In the next few paras, I provide a detailed overview of the rationale provided by the judges in arriving at their conclusion, as it has important implications for understanding the mineral ownership framework in

21 See generally, Namita Wahi, 'Property and Sovereignty, Creating, Destroying and Resurrecting Property Rights in British India (1600-1800)' (2020) CPR Working Paper <https://www.cprindia.org/system/tdf/working_papers/30.12.2020.Working%20paper_PROPERTY%20AND%20SOVEREIGNTY.pdf?file=1&type=node&id=9409&force=1>.

22 Goenchimati, 'Who Owns Title to Minerals in India?' (23 May 2016) http://goenchimati.org/who-owns-title-to-minerals-in-india/.

23 AIR 2013 SC 3251.

24 It is worth noting here that the court did not directly deal with issue of the grant of mineral lease (state or jemni) and (b) determination of the consideration for the mineral extracted.

25 Krishnadas Rajagopal, 'Owner has Right over Mineral Wealth Subsoil: SC' The Hindu (24 July 2013) <https://www.thehindu.com/news/cities/kozhikode/owner-has-right-over-mineralwealth-subsoil-sc/article4948222.ece>.

the country. Principally, the judges examined colonial laws which provided exceptions, interpreted Constitutional provisions that clearly indicate a divergent approach to land-based minerals and minerals in the seabed, and as applicable to the specific facts of the case before it, it examined case law to glean the impact of the royatwari settlement on the jenmon rights. This fascinating judicial examination is captured below in some detail:

a) Interpretation of Colonial Statutes- Based on an extensive reading of legislative history, the court concluded that the colonial enactment - Madras Estates Land Act, 1908, which extensively dealt with the rights and obligations of the landlords/landholders owning an estate (popularly known as Zamindars). It expressly recognises the right of the landholder to reserve mining rights while admitting a ryot to the possession of the ryoti land. By necessary implication, it follows that the landholder had the legal right and title to the minerals/subsoil in the lands comprising his estate and he is legally entitled either to grant the mining rights to the tenant (ryot) or withhold the same. This reading, the court held, was fortified by the reading Section 3 of Estates Abolition Act which expressly declares that with effect from the 'notified date', the estate with all the assets including mines and minerals shall stand transferred to and vest in the State. If the minerals/subsoil did not belong to the estate holder, the judges concluded, there was no need to make an express declaration such as the one made in Section 3(b) of the Abolition Act.[26]

Similarly, the court observed that under various enactments abolishing the different land tenures in South India such as Inams, etc., express provisions were made that the mines and minerals existing in such abolished tenures shall stand transferred to the Government and vest in the Government. For example, Section 2-A of The Andhra Pradesh (Andhra Area) Inams (Abolition and Conversion into Ryotwari) Act, 1956. To further bolster its interpretation, the court relied on a Supreme Court judgment[27] in 1963 which a Constitution Bench examined the rights of the Inamdar under the legal regime that existed in the Madras province and based on the decision of the Privy Council concluded that every Inamdar necessarily did not own the subsoil rights. Such rights depended upon the terms of the original grant i.e., the Inam and it follows that in a given case if the original grant of Inam specifically conveyed the subsoil rights (by the grantor), the Inamdar would become the owner of the mineral wealth also.

The court in this case thus concluded that the 'necessary inference is that the British recognised that the State had no inherent right in law to be the owner of all mineral wealth in this country. They recognised that such rights could inhere in private parties, at least Zamindars and Inamdars or ryots claiming under them in a given case'.[28]

b) Interpreting the Constitution of India - Article 294 of the Constitution provides for the succession by the Union of India of the property vested in the British Crown immediately before the commencement of the Constitution. On the other hand, Article 297 makes an express declaration of vesting in the Union of India of all minerals and other things of value underlying the ocean. It states thus '297. All lands, minerals, and other things of value underlying the ocean within the territorial waters or the continental shelf of India shall vest in the Union and be held for the purposes of the Union'.

The court held that the 'contradistinction between both the articles is very clear and, in our opinion, is not without any significance'. The makers of the Constitution were aware of the fact that the mineral wealth obtained in the landmass (territory of India) is not vested in the State in all cases. They were conscious of the fact that under the law, as it existed, proprietary rights in minerals (subsoil) could vest in private parties who happen to own the land. Hence the difference in the language of the two Articles.

c) Precedents – The critical question before the court was whether the colonial settlement of land rights changed the nature of rights over land and hence over mineral resources. In other words, whether the jemoni rights converted to ryotwari? Relying on the Balmadies

26 Supra note 23.

27 State of Andhra Pradesh v. Duvvuru Balarami Reddy and Ors. MANU/SC/0009/1962: AIR 1963 SC 264.

28 ibid para 25.

Plantations case[29] this Court took note of two facts - (1) that originally jenmis of Malabar area were absolute proprietors of the land; and (2) when Malabar area was annexed, the British expressly disclaimed the proprietorship of the soil. (These conclusions were recorded based on Ashtamurthi case.) Thus the Court relying on the Balmadies Plantations case concluded that the legal position concerning the jenmom lands of Malabar rejects the contention that as a result of the resettlement of 1926, jenmom rights stood converted into ryotwari estate.

Thus, ownership over mineral resources in India is a complex arena with select landowners still considered to be owners of sub-soil rights. Even where the landowner is not the rightful owner of the sub-soil, the landowner has to grant lease rights over the land for mining or the land has to be acquired through a process of land acquisition. In other words, while mineral ownership or rights over sub-soil resources is one crucial part of the mineral rights regime, the other crucial aspect to be examined is access to the land and land rights over the area to be mined.

In the next two sections, I move away from private or individual rights flowing from land ownership to look at customary rights over land in the Fifth[30] and Sixth Schedule areas and their bearing on mineral rights. In these sections I also examine the common law doctrine - Public Trust Doctrine -adopted by the Supreme Court to classify all natural resources, including mineral resources as trust resources. The rights regime has been significantly altered by court rulings in recent years.

4.2 Customary Land Rights and Mineral Resources

Acquisition of land is the first task in accessing mineral resources by the public sector mining companies or private mining conglomerates. Large deposits of mineable ore are in thickly forested areas that are inhabited by local tribes. This is confirmed by the CSE report which notes that the mineral-rich areas lie predominantly in the tribal-dominated regions of the Fifth and the Sixth Schedule areas.[31] A key protection accorded to tribal areas is the protection against alienation of the tribal land to non-tribals. Post liberalisation, large-scale land acquisition, and transfer of land for mining purposes shifted from the public sector into the hands of the private sector.[32] This shift of land and mineral resources has significant implications on the customary rights of indigenous people and communities. The implications of customary land rights on mineral resources are different for the Fifth and Sixth Schedule areas and I will discuss them separately in the sections below.

4.2.1 Fifth Schedule Areas

The Supreme Court ruling in the Vedanta Case (Nyamgiri) took forward the essence of the Samata ruling, the latter having been actively subverted by several state governments. It is therefore useful to take a detour to revisit the Samata ruling here before moving to the principles outlined by the Nyamgiri judgment.

In the early years of liberalising the economy, this significant judgment of the Supreme Court Samatha v. State of Andhra Pradesh[33] set the tone for viewing customary land rights and mineral resources. The leasing of land to private mining companies against the wishes of the tribal communities in the state of Andhra Pradesh was challenged. The legal question before the court was whether tribal lands can be alienated to non-tribals and if the Andhra Pradesh Scheduled Area Land Transfer Regulation would apply to the transfer of Government land to a non-tribal

29 Balmadies Plantations Ltd &Anr v. State of Tamil Nadu1972 SCC (2) 133.

30 Notified districts or parts thereof in 10 States: Himachal Pradesh, Rajasthan, Gujarat, Maharashtra, Andhra Pradesh, Telangana, Odisha, Jharkhand, Chhattisgarh, and Madhya Pradesh. Source DTE, <https://www.downtoearth.org.in/news/governance/very-little-is-understood-about-fifth-and-sixth-schedules-of-indian-constitution-58603>.

31 See generally, Chandra Bhushan and Monali Zeya Hazra, Rich lands, Poor People: Is Sustainable Mining Possible? State of the Environment Report, CSE, 2008.

32 'According to a recent report compiled for the industry by Ernst and Young, of the 4.9 lakh hectares of land given out in mining leases in 23 States by the end of 2009, 95 per cent of the leases comprising 70 per cent of the land were given to private companies'. (Brinda Karat, Of mines, minerals and tribal rights, The Hindu May 15 2012 accessed on 18th Jan 2022 at <https://www.thehindu.com/opinion/lead/ofmines-minerals-and-tribal-rights/article3419034.ece>.

33 (1997) 8 SCC 191.

private mining company. The court ruled that the transfer of mining leases to non-tribals, companies, or corporations was unconstitutional and declared all the subleases issued by the government to private companies as void. The court, however, ruled that State corporations or their instrumentalities like APMDC (Andhra Pradesh Mineral Development Corporation Ltd) and/or cooperative society of tribals are permitted to carry out mining activities.[34]

The Samata ruling captures the essence of the struggle over natural resources and community rights. To quote

> The object of Fifth and Sixth schedules to the Constitution ... is not only to prevent acquisition, holding or disposal of the land in Scheduled Areas by the non-tribals from the tribals or alienation of such land among non-tribals inter se but also to ensure that the tribals remain in possession and enjoyment of the lands in Scheduled Areas for their economic empowerment, social status, and dignity of their person. Equally exploitation of mineral resources [for] national wealth undoubtedly, is for the development of the nation. The competing rights of tribals and the State are required to be adjusted without defeating rights of either.

The Samata judgment was interpreted to apply only to the State of Andhra Pradesh. In the Balco case,[35] the judges distinguished the Madhya Pradesh land law from that of Andhra Pradesh and ruled that the Samata judgment does not apply to it. Similarly, the state of Orissa, a mineral-rich state, set up a committee to study the implications of the Samata judgment for the state, used the Balco reasoning to exclude the state of Orissa from the applicability of the Samata ruling.[36] Thus, both Madhya Pradesh and Orissa sought to subvert the Samata ruling thus depriving the large tribal population of their rights.

The Samata ruling was followed by the Narmada Case[37] where the Supreme Court upheld the resettlement and rehabilitation of tribes from Madhya Pradesh, thus prioritising the development needs for water and electricity through the construction of a dam over that of tribal/community rights. The next big challenge concerning Fifth schedule areas arose when Vedanta Aluminia Ltd sought to construct an alumina refinery in Orissa, on the Nyamgiri hills which has spiritual and cultural significance for the Dongria Kondh tribes. It was argued that the mining would not just impact the environment adversely but also the tribe's cultural and customary rights. Relying on international conventions, the court in Vedanta/Niyamgiri case[38] highlighted the need to preserve the social, political, and cultural rights of the indigenous people.

The Supreme Court in the Orissa Mining Corporation Ltd. v. Ministry of Environment & Forest & Others[39] took note of the special status and rights of Dongria Kondh (classified as a primitive tribal group) under the Forest Rights Act, 2006 held thus on the critical role played by Gram Sabha's in determining their rights: 'Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of "individual" or "community rights"'.[40] It added 'Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act must safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources, etc.'.[41]

34 For more, see generally K Ratnabali, 'Judicial Appreciation of Tribal's Right: Samatha_Case_Judgment', (Hueyein Lanpao, 04 November 2015) http://e-pao.net/epSubPageExtractor.asp?src=education.Human_-Rights_Legal.Judicial_appreciation_of_tribal_right_Samatha-_Case_judgment_By_Konbrailatpam_Ratnabali.

35 Balco Employees Union v. Union of India, AIR 2002 SC 350.

36 See generally P Oskarson, The Law of the Land Contested: Bauxite Mining in Tribal, Central India in an Age of Economic Reform (PhD thesis, UK: University of East Anglia, 2010) for a detailed historical outline on Samata and the subsequent fallout.

37 Narmada Bachao Andolan v. Union of India, 2000 10 SCC 664.

38 Orissa Mining Corpn. Ltd. v. Ministry of Environment and Forests, (2013) 6 SCC 476.

39 ibid.

40 ibid para 56.

41 ibid para 58.

The right to land, forest, and spiritual sites were acknowledged by the Supreme court by reading Article 21 of the Constitution with Articles 25 and 26 to acknowledge the implicit rights to the land of tribal people. Between the ruling in Samata and the Nyamgiri challenge, the legislative history and jurisprudence on the rights of indigenous people saw a sea change with the enactment of PESA and FRA. Thus, the interpretation shifted between the ruling in Samata and the Vendanta case; the rights of forest dwellers had been further fortified by the Forest Rights Act. This transformation in jurisprudence is within the continuum of rewriting historical wrongs and ensuring traditional and customary rights of indigenous people are recognised.

While the Fifth schedule areas benefitted from the ruling in Nyamgiri/Vedanta case, the same cannot be said of the Sixth Schedule areas that faced a setback with the Supreme Court ruling in the case of rat hole mining in Meghalaya.

4.2.2 Sixth Schedule Areas:

The Sixth Schedule of the Indian Constitution provides a separate governance structure for the Northeastern states. To maintain their distinct identity Articles 244 (2) and 275 (1) of the Constitution continue the colonial policy of excluded areas. In particular, the Sixth Schedule areas, recognise community-based natural resource ownership and management, with powers vested in traditional local institutions to govern according to customary law. Perhaps more so than the fifth schedule areas, the sixth schedule areas have invested in small-scale mining but with mixed results.

The customary rights over mineral resources remain an illusory one, as starkly illustrated by the rat hole mining and the coal saga in the state of Meghalaya. Mineral rights are linked to land rights. Land ownership in the state of Meghalya is predominantly community-owned. Meghalaya carved out of the state of Assam, carried with it the institutional baggage of the Autonomous District Councils (ADCs) established to protect the rights of tribal-dominated areas within the state of Assam. Although the administration of land is the domain of local institutions governed according to customary law, their functioning has been undermined by ADCs. The ADCs in turn have been undermined by the formation of the State.

Whether the central laws apply to the states in the Sixth Schedule areas is another area of contention as the rat hole mining case brought up the issue of the application of MMDRA to the state of Meghalaya. Paras 3 (1) (power of District Councils to make laws), 8 (power to assess and collect land revenue), and 9 (lease or license for prospecting and mineral extraction) of the Sixth Schedule confer powers to the District Councils to legislate on the subjects enshrined in the Sixth Schedule and this includes powers over land. In the states of Meghalaya and Mizoram. Paras 12- A and B have been inserted in the Sixth Schedule to override the application of the Central laws to these states through a Presidential notification and empowering the state government to override the powers of the District Councils. A constitutional amendment in 1988 also requires the Governor to consult with the council of ministers of the state in carrying out his functions. Overlapping rights and jurisdictions without a clear delineation of power adds to the complexity of governance.

As noted above, regulation of coal mining is linked to land rights – a subject squarely within the domain of customary rights. Although the Sixth Schedule and the new Land Acquisition Act permit land acquisition after obtaining consent from the District Council, any such move is met with opposition from the locals. Attempts to acquire rights to carry out uranium mining in Meghalaya has seen sustained opposition[42] even though this is covered by the Atomic Minerals Concession Rules, 2016. The opposition to coal mining, however, is not a unified one as local business interests benefit from the mining, and landowners leasing out land for coal mining stand to lose. The environmental damage and the harm to young miners are insignificant from the rat hole mining.[43] But the

42 Anupam Chakravartty, 'Won't Grant NOCs to Uranium Mining Projects in Meghalaya: Khasi District Council' (Down to Earth, 20 February 2017) <https://www.downtoearth.org.in/news/mining/won-t-grant-nocs-to-uranium-mining-projects-in-meghalaya-khasi-district-council-57156>.

43 For a detailed analysis of the impact of rat-hole mining and the legal issues see also: Anthony Moses, 'Analyzing the Need to Reinstate the NGT Ban with Respect to Meghalaya's Rat-Hole Mines' (2020) 9(1) Christ University Law Journal 21-48.

tussle over rat-hole coal mining throws to relief the more critical question of customary rights over land and minerals.

The opposition to rate hole coal mining led to two legal proceedings being initiated – one before the Meghalaya Bench of the NGT and the other before the Principal Bench in New Delhi.[44] The Meghalaya Bench declared the mining activity illegal as it was carried out in an unregulated manner, in violation of the statutory protections. The NGT Principal Bench at Delhi took it a step further and directed the police to ensure that the illegal rat-hole mining is stopped, and no transport of coal be permitted until further orders.[45] The key legal question before the court was whether the state government is correct in arguing for a Presidential Order to be promulgated to exempt the Sixth Schedule areas in the State from the purview of the central mining laws. This question finds a strong resonance in the appeals before the Supreme Court.[46]

Appeals against the NGT judgment were brought before the Supreme Court, by traders, mine owners, and the State of Meghalaya and the court delivered its judgment in 2019.[47] In the State of Meghalaya v. ADSU, the legal challenge addressed several issues, but the key issue that I pick up on here is the question of ownership over mineral resources and the application of Central laws to Sixth Schedule areas. In carrying out this narrow examination, I wish to state here that the larger issues of environmental damage, poor working conditions of those employed in the rat-hole mines, illegal mining, and the extraordinary powers exercised by the coal mafia are not lost sight of. However, it is important to acknowledge here that the issues of environmental damage and illegal mining plague other regions of the country too, but these issues do not alter the question of ownership of mineral resources.

Before we proceed, it is useful to summarise some of the key arguments made by the State of Meghalaya before the court pertaining to the key issues– (a) Tribals are owners of the land, subsoil, and minerals on their land. The land tenure system was different in the Khasi, Jaintia, and Garo hills, with no transfer of the mineral rights to the state. As a result, they did not require permissions to carry out mining activities from the state, (b) Unlike the Land Revenue Codes in other parts of India which deprive the landowner of rights over mineral resources, no such law exists that removes the rights of owners over the mineral resources; (c) the MMDR Act does not apply to coal but covers within its scope other major minerals; (d) the prospecting and licensing arrangement that the MMDRA facilitates cannot apply to Meghalaya as the State does not have proprietary rights over the mineral resources; (e) the NGT finding that mining in the State was unregulated was also challenged. Further, it was contended that administration of tribal areas was vested with the Autonomous District Councils, that the State had no jurisdiction to make a mining policy under the MMDRA and that the EIA need not be obtained for mining that is carried out in an area under five hectares. (f) it was also contended that the ban imposed by the NGT was impacting adversely the livelihood of tribes in the region; (g) referring to Minerals Concession Rules, 1960 (rules framed under Section 13 of MMDR Act, 1957) it was argued that even though Rule 13(f) refers to mining application with regard to land in which minerals vest in persons other than the Government, this provision shall not apply for owners when they carry out the mining themselves. The question of taking a lease may arise when the owner of the land leases the land to some other person to mine the minerals.

Interestingly, a representation was also made by the Garo Hills ADC which argued that the NGT had overlooked the role of the ADC in mining regulation. That under the Sixth Schedule, the ADC's were empowered to a share of the revenue from the coal mining, and the NGT orders of constituting a committee and imposing a ban on further mining both encroached on and undermined the constitutional schema empowering the ADC to have jurisdiction over land, forests, and mineral resources. The landowners

44 State of Meghalaya v. All Dimasa Students Union Dima Hasao Dist. Committee, Original Application No. 73 of 2014; Threat to Life Arising Out of Coal Mining in South Garo Hills District v State of Meghalaya, Original Application No. 110 (THC)/2012 (Principal Bench, New Delhi).

45 Hugo Stokke, 'Legal Limits to Tribal Governance: Coal Mining in Meghalaya, India' (2017) 16(2) CMI Brief 2 <https://www.cmi.no/publications/6185-legal-limits-to-tribal-governance>.

46 ibid 4.

47 State of Meghalaya & Ors v. ADSU and Ors (Appeal No. 10720 of 2018) judgment dated 03.07.2019,MANU/SC/0877/2019.

and coal traders in their appeal asserted that prior to the NGT order vesting all coal in the State, the mining was carried out as per prevailing customary law.

The Supreme Court ruled on both these issues against the arguments offered by the State, the ADC, landowners, and coal traders. In essence, it held that the central enactment (MMDRA) applies to coal resources in the State of Meghalaya and against the community ownership of mineral resources, using inter alia the following rationale – (a) examining the land tenure system in the Hill Districts, the court concluded that most of the land was owned either by the community or privately with the state claiming no rights. It notes that both private and community owners have both the surface right as well as the sub-soil rights and hence, the tribes owned the land as well as the minerals. (b) The core issue of extension of the central laws to the Sixth Schedule areas is decided by examining if any of the provisions of the law are not applicable to the Hill Districts of State of Meghalaya.

In answering this question, the court relied on three key aspects – (a) the Comptroller and Auditor General (CAG) noting, (b) the existence of a Mining Policy, and (c) the request sent by the State for exemption from the enactment. To elaborate on these three points –

(a) CAG Report - Relying on a quote from a 2013 CAG report of 2013 (para 7.1.5) the court stated that the CAG has clearly stated that the Act, 1957 is fully applicable for the regulation of mines and regulation of minerals in the State of Meghalaya. It is to be noted here that the CAG is merely an audit body and not a body with the capacity to interpret laws.

(b) Mining Policy: The court also made a note of the submission of the State of Meghalaya which brought on record the Meghalaya Mines and Minerals Policy, 2012 issued by the Government of Meghalaya as well as draft guidelines of coal mining activities in the State prepared in the year 2015. Noting the key clauses in the policy of 2012 the court concluded that it contemplated a regulatory regime for mining leases by the State. 'We may further notice that Meghalaya Mines and Minerals Policy, 2012 was already framed by the State of Meghalaya, even before directions were issued by the NGT. In pursuance of NGT directions, it was draft guidelines of 2015, which were prepared by State of Meghalaya. We, thus, are of the view that direction of NGT to declare Mining Policy by the State of Meghalaya cannot be said to be without jurisdiction. However, the State in its Mining Policy can only include those areas where it has jurisdiction under the MMDR Act, 1957 and the Rules framed thereunder'.

(c) Exemption Request by the State: Finally, the court relied on the communication in 2015 by the Government of Meghalaya requesting the Government of India for issuance of Presidential notification under Para 12A(b) of Sixth Schedule for exempting State of Meghalaya from certain provisions of the MMDR Act, 1957. Based on this request, the court concluded that there is nothing in the Sixth Schedule of the Constitution that in any manner excludes the applicability of Act, 1957 to the tribal areas of Hills District of State of Meghalaya. At no point does the court address the question of customary rights and the rights of ADCs to proceeds from mineral resources, thus bypassing the question of community rights over mineral resources.

Having thus concluded that the MMDRA extends to the State of Meghalaya, the court then examines whether a lease can be obtained under the Act for mining of coal on privately/community-owned land. Here the court is forced to examine the question of ownership of land and mineral resources. Reading Section 13 of the Act which provides for rulemaking powers, it stated: 'When we read clause (a) and clause (f), it makes clear that the Rules can be made for grant of mining lease in respect of land in which minerals vest in the Government as well as in respect of any land in which minerals vest in persons other than Government. The statutory scheme, thus, is clear that lease can be granted with regard to both the categories of land, land in which Government is owner of minerals and land in which minerals vest in person other than Government. The tribals, owners of the minerals shall expressly fall in Rule making power of the Government under Section 13(f)'.

The court also went on to examine the applicability of the Mines Act 1952 and the Environment Protection Act 1986. It concluded that while implementing the statutory regime for mining operations in the Hills District of the State of Meghalaya, the State of

Meghalaya must ensure compliance of not only MMDR Act, 1957 but Mines Act, 1952 as well as Environment (Protection) Act, 1986.

In the next point on who has the powers to grant lease or licenses for private or community-owned land, the court concluded that as per the statutory provisions contained in Rules, 1960 especially Chapter V, a mining lease for minerals, which belongs to a private owner or a community owner, it is not the State Government, which is entitled to receive any application or grant any mining lease, but it is the private owner or community owner, who is entitled to grant a lease for mining minerals owned by them. Thus, the court stated that mineral resource lease can be granted by the tribal owner or the community owner but also extends the application of the Central Enactment of MMRDA to the state, even when the Meghalaya Assembly had expressly passed a resolution in 2015 (albeit no Presidential Order had been passed) excluding the application of the act in response to the NGT ruling.[48]

At para 137, the court questions the bona fides of the State never once alluding to the special status granted to the state by the Constitution. 'Our country being governed by the Constitution of India all the States are to implement Parliamentary Acts in true spirit and in the present case the State having been advised time and again by Comptroller and Auditor General and being well aware of its statutory obligation as noticed above it comes ill from the State to contend before this Court that there is no requirement of mining lease for winning the minerals. The above stand of the State taken before this Court gives the impression that instead of implementing the Parliamentary enactment and regulatory regime for mineral regulation some vested interests wants to continue the illegal regime of illegal mining to the benefit of the few persons which is unacceptable and condemnable. We, thus, conclude that the State of Meghalaya has jurisdiction and power to ensure that no mining of coal should take place except when a mining lease granted under Mineral Concession Rules, 1960, Chapter V, as discussed above'.

The court, in an attempt to protect the environment, circumvents the complex question of ownership of resources in the Sixth Schedule Areas. This is not to say that the question of unregulated mining and its adverse impact on mining is not an area of concern. However, the solutions lie elsewhere. It is in acknowledging the non-state ownership of mineral resources, giving credence to the customary rights that come with artisanal mining, and granting legal status to the large informal sector workers that eke a livelihood through small-scale mining. The environmental concerns cannot be deemed to be resolved by handing over control over resources to the central government, without addressing the issue of an absent or ineffective regulatory framework for small-scale mining, including environmental mitigation measures where mining is not being carried out at a large scale.[49] This ruling is contrary to the broader trend towards decentralisation of resource rights and recognition of indigenous customary rights. It reinforces the centralising trend of resource ownership bypassing the more complex question of customary rights over resources.

4.3 Citizens' Rights, Public Trust Doctrine and Mineral Resources

While customary rights are both region and community-specific issues in India, the broader citizens' rights concerning mineral resources (and all-natural resources) received attention in recent years with the courts adopting the public trust doctrine. The Public Trust Doctrine (PTD for short) clarifies the long-held colonial state framework of a landowner and asserts that the state is merely a trustee of the natural resource. It firmly asserts the rights of the beneficiary citizens to the resource and makes all decisions by the trustee to be directly scrutinised by the beneficiary. It thus enlarges the public rights over natural resources in a significant manner requiring both a duty and accountability to the beneficiaries. First adopted by the Supreme Court in the M.C.Mehta case,[50] over the last two decades the court has expanded the scope of the doctrine to all-natural resources. The idea of trusteeship also ties into the long-term vision of inter-

48 PTI, 'Resolution to Invoke 6th Schedule Provision in Meghalaya' (Business Standard, 24 September 2015) <https://www.business-standard.com/article/pti-stories/resolution-to-invoke-6th-schedule-provision-in-meghalaya-115092401095_1.html>.

49 I argue this in greater detail here, Roopa Madhav, 'Environmental Governance of Artisanal and Small Scale Mining in India' (2020) 51(4) Asian Affairs 895-912.

50 M.C. Mehta v Kamal Nath, (1997)1 SCC 388.

generational equity, requiring the state to plan with future generations in mind.

These two legal principles find resonance in judicial rulings on natural resources. In the Goa Foundation Vs. Union of India (UOI) and Ors case, the court, while relying on the Shah Commission report on the irregularities in iron ore and manganese mining irregularities in the state of Goa, held t that the State of Goa heavily depends on iron ore mining for revenue as well as employment, and hence a complete prohibitions on mining would have an adverse impact on the economy. They however, went on to add that 'if mining has to continue, the lessees who benefit the most from mining, must contribute from their sale proceeds to the Goan Iron Ore Permanent Fund for sustainable mining'[51] Thus while permitting mining, it sought to create a Permanent Fund that would take forward the principles of inter-generational equity.

In 2019, the National Mineral Policy 2019, brought the two concepts of public trust and intergenerational equity into the policy discourse by stating that 'natural resources, including minerals, are a shared inheritance where the State is a trustee on behalf of the people and therefore it is imperative that allocation of mineral resources is done fairly and transparently to ensure equitable distribution of mineral wealth to sub-serve the common good'. It further notes that: 'the state is the trustee on behalf of the people to ensure that future generations receive the benefit of inheritance'. The broader idea of public rights over mineral resources is now a part of Indian jurisprudence.

4.4 Profits from Mining – District Mineral Fund, Cess and Tax

As noted in the previous section, where the individual owner or community is recognised as the owner of sub-soil rights over the land they occupy, the question of whether the owner has a legally established right to receive royalties or similar payments in return for the extraction of minerals is now before a larger bench of the court. However, in most instances, the citizens of the country receive indirect benefits through cess and taxes imposed on the private sector extracting the minerals. The contentious issues related to a share in profits are two-fold – the sharing with communities impacted directly by mining and the tussle between the Centre and the State.

Some legislative efforts to ensure greater distribution of mining wealth to the indigenous people need to be noted here. A draft bill in 2011 proposed sharing of profits with local people at the rate of 26 percent for coal and the equivalent of the sum of the previous year's royalty for other minerals.[52] The rationale offered at the time was that 'mining proceeds will not be appropriated entirely by mining companies, the central government (through taxes) and the state government (through royalties and local levies). The people in mining areas will also benefit as stakeholders'.[53] The move was opposed by the planning commission and industry argued that it would deter foreign investors. It was also contended the true picture of profits earned would be concealed to prevent a large pay-out to communities.[54] Thus the realities and difficulties of working a profit-sharing mechanism scuttled the government's initial proposal for benefit sharing with communities directly impacted by the mining. Instead, a more benign District Mineral Fund that seeks to correct social, economic, and ecological impacts on the communities directly impacted by mining, was adopted.

The primary aim of DMF is to 'work for the interest and benefit' of people and areas affected by mining. To ensure that people are appropriately served, DMFs are required to function in an inclusive and participatory manner. With mandatory contributions from mining companies, the fund has nearly 30 crores in DMFs across all mining districts. The fund seeks to address issues relating to income security, drinking water, nutrition and healthcare, education, etc.[55]

51 Supreme Court ruling dated April 21, 2014, in the matter of Goa Foundation Vs. Union of India (UOI) and Ors., Writ Petition (Civil) No. 435 of 2012para 63.

52 SA Aiyar, 'Mining Royalty Gives Tribals a Better Deal' (Times of India, 10 July 2011)<https://timesofindia.indiatimes.com/blogs/Swaminomics/mining-royalty-gives-tribals-a-better-deal/>.

53 ibid.

54 ibid.

55 See generally, Centre for Science and Environment, People First: DMF Status Report, 2018 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad-=rja&uact=8&ved=2ahUKEwiFq66l2sPuAhU9yDgGHTLgAbQQFjACegQIARAC&url=https%3A%2F%2Fwww.cseindia.org%2Fcontent%2Fdownloadreports%2F8893&usg=AOvVaw3uoffG90qF4nMTva_pRXMk>.

The Centre-State tussle over share in profits from mineral resources is best illustrated by the State of Orissa. The Government of Orissa, a mineral-rich state, over the decades has attempted collecting additional revenue from mining, but to no avail. The three attempts at using legal instruments to raise revenues were stalled by the Supreme Court. The Orissa Cess Act, 1962 imposed a tax on mineral-bearing lands and the Orissa Rural Employment, Education, and Production Act of 1992 were struck down by the Supreme Court as ultra-vires the Indian Constitution. The Orissa Rural Infrastructure Socio-economic Development Tax Act, 2004 was struck down by the Orissa High Court as lacking in competence and asked for the tax collected to be refunded to the mining companies.[56]

However, in 2004, the Supreme Court in State of West Bengal v. Kesoram Industries[57] upheld the levy of cess on mineral-bearing land by the State of West Bengal. It held the 'power to tax or levy for augmenting revenue shall continue to be exercisable by the legislature in whom it vests, i e, the State Legislature in spite of regulation or control having been assumed by another legislature, I e, the Union'. Nearly a decade later, the Supreme Court in April 2014, at the behest of Goa Foundation, mandated that in the future, 10 percent of the value of iron ore, be deposited into a Goa Iron Ore Permanent Fund. It is a major first step in protecting the rights of people, future generations, and communities, thus ensuring benefit-sharing through an established legal mechanism.

5 CONCLUSION

This mapping provides a brief snippet of the major changes to the jurisprudence on mineral resources and the rights to the resource. The shift towards a greater acknowledgment of customary and traditional rights over mineral resources, of communities and individual landowners is significant. However, a simultaneous shift towards greater centralisation to protect against environmental harm indicates that the space for indigenous rights holders or communities to evolve their governance structures to incorporate environmental concerns is limited. The expansion of public rights over natural resources through the incorporation of the public trust doctrine and the principles of inter-generational equity demonstrates the changing legal landscape concerning rights over resources.

Despite the changing nature of the discourse, greater private participation in the mineral sector, requires a more vigilant regulatory state along with an engaged and active citizenry. For a long, the decisions of the state pertaining to the mineral sector have been beyond scrutiny as it was run by state corporations, and the public management was implicitly seen to be in the public interest. The shift away from public management and the deregulation of the sector to private participation requires all stakeholders to be proactive in ensuring that the resource is well managed and intergenerational equity is protected.

56 ibid.
57 (2004) 10 SCC 201.

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