

# The Supreme Court on 2G: signal and noise

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THE Supreme Court has delivered 714 judgments in the first 11 months of 2012. Though almost 40% less than the 1195 judgments delivered in the same period in 2011, it has breathlessly kept pace with the media news cycle by inserting itself as a key player in key political and policy debates. In this essay, I analyze what is arguably the courts most spectacular intervention: the 2G cases, particularly *Centre for Public Interest Litigation v Union*

*of India* (hereafter ‘*CPIL*’) and *In re Special Reference No 1 of 2012* (hereafter ‘*2G Reference*’). I will show that a close reading of these two cases leads to a conclusion that the Supreme Court has sacrificed sound and authoritative legal reasoning in *CPIL* to burnish its popular image as a corruption buster.

A fog of certainty hangs over the national debate on 2G spectrum law and policy: doubters are put on trial in

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a 24 hour news TV star chamber and quickly branded as corrupt or traitorous. In these times, an essay that employs close legal and constitutional reasoning seems quaint and outmoded and may quickly be dismissed as missing the point, or as heresy! My motivation for this essay is to reiterate that ‘facts matter’ and by extension the law – and the integrity of legal reasoning – matters to the quality of public reasoning in our political and legal system. As Nate Silver puts it: ‘The signal is the truth. The noise is what distracts us from the truth.’<sup>1</sup> This essay is about the signal amidst the noise in the Supreme Court’s adjudication on 2G-spectrum policy in India.

The Centre for Public Interest Litigation and other petitioners challenged the Department of Telecommunication’s (hereafter ‘DOT’) grant of licences in 2007 and 2008. The two core challenges before the court are: first, did the DOT follow applicable law and policy and second, is the DOT’s policy on spectrum allocation constitutionally valid? The first challenge is about administrative process and the second is about administrative policy. In *CPIL* a two judge bench of the Supreme Court held that the DOT’s grant of licence violated existing law and policy and that the existing policy was unconstitutional. In the *2G Reference* Justice D.K. Jain relies on the Attorney General’s admission that the government did not seek to review the correctness of *CPIL* to avoid any enquiry into whether the DOT followed existing law and policy (*2G Reference* para 36). He then goes on to effectively overrule every argument in *CPIL* about the invalidity of 2G-spectrum policy.

Hence, at the end of 264 pages of cumulative judicial opinion in these

two cases, we must conclude that: *CPIL* has the widest material impact with no substantive legal reasons/support and the *2G Reference* restores substantive reasons but with no impact on 2G-spectrum allocation. Substantively, the *2G Reference* erases *CPIL* from the legal record. The rest of this essay shows how the court has found itself in this paradoxical and ultimately unjustifiable situation. I begin with an analysis of *CPIL* on the administrative process in 2G-spectrum licensing.

The first issue for the court is to determine whether the DOT violated existing law and policy while allotting spectrum licenses in 2007 and 2008. The Supreme Court reviews whether the administrative authority acted *ultra vires* – beyond the legal jurisdiction vested in it by enacted law, stated policy or the Constitution – or through a process that violated natural justice, was motivated by irrelevant considerations or offended any other ground of administrative law review. In *CPIL* the court concluded that there was no breach of statutory authority, but the DOT failed to follow fair administrative process and violated the constitutional mandate. I will now look at each of these conclusions in turn.

**Ultra Vires Argument:** The statutory jurisdiction of the DOT is shaped by three enquiries: statutory power, stated policy and binding government decisions. The DOT has the power to issue telecom licenses under the proviso to section 4(1) of the Indian Telegraph Act 1885, which does not specify the method or manner in which the licenses must be issued. In other words, the act does not mandate auctions and leaves it to the executive to determine the mode of spectrum allocation.

The DOT has to exercise this licensing power in accordance with its stated policies as well as any other

government decision which binds it under the conduct of business rules made under Article 77 of the Constitution of India 1950. The applicable policy, namely the National Telecom Policy 1999, does not mandate auctions. While the mode of spectrum allocation and grant of licences was the subject of repeated communication between the Prime Minister’s Office, Law Ministry, Finance Ministry and the DOT, there was no categorical decision that the 2G-spectrum allocation must be carried out through an auction that could be understood to be binding on the DOT under the conduct of business rules.

The Telecom Regulatory Authority of India was concerned that any policy of spectrum allocation adopted by the DOT must maintain parity between existing (first come first served) and future licensees operating in the same 2G-telecom market. A failure to maintain parity between these two actors would have been subject to judicial review and almost certainly struck down by this court. Hence, the regulator equivocated on the administrative process to be followed for the grant of new licenses and did not make a clear recommendation.

Hence, it is clear that as a jurisdictional matter, the DOT had to choose whether to level up or down to achieve parity between existing and future licensees. The DOT chose to level down by granting new licences under similar conditions as those granted to incumbent operators. The court admonishes the executive for not taking account of changed market conditions and levelling upwards. It is unclear whether the court is better placed to determine these conditions: the tepid 2G auctions following this judgment confirm the general skepticism of the court’s ability to make such decisions. The general common law

1. Nate Silver, *The Signal and the Noise: Why Most Predictions Fail – but Some Don’t*. Penguin, 2012, p. 17.

rule that an administrative law court should not substitute judgment must apply in such circumstances, as there is no binding jurisdictional requirement for the auction of 2G licences. Even where an executive decision is within the jurisdictional competence of an executive authority, the court may review the nature of the process adopted by the executive authority to arrive at its decision.

**A**rbitrariness or Bias?: The second aspect of administrative process under scrutiny in *CPIL* is the alteration of the priority ordering among the first come first served (FCFS) licence applicants. The DOT had received applications for 2G licensees from 2002 and more than 200 applicants were in a queue. The DOT required that all licensees had to comply with fresh requirements in order to weed out non-serious applicants who had remained in the queue due to inordinate delay in the grant of licenses. However, the DOT's choice of requirements and the deadlines by which they had to be satisfied gave rise to the suspicion that this was an attempt to favour chosen applicants. In *CPIL* the court held that this administrative process was arbitrary and hence declared them illegal. The arbitrariness ground of review conveys the courts intuition that the shuffling of the FCFS queue criterion was motivated by corruption.

The claim of corruption is ubiquitous in Indian public life. The role of the court in a society governed by the rule of law is to sift valid from invalid claims – by employing a reified and disciplined form of public legal reasoning. In order to do so the court must correctly apply the existing rules and grounds of review and ascertain and evaluate the facts while maintaining the appropriate burden of proof. In *CPIL* the court misapplies the arbitrariness standard and is ill-equipped to make

the factual determination necessary to show that administrative action is motivated by pecuniary bias. In *CPIL* the court was right to enquire into the reasons for the administrative process in the grant of licenses.

The DOT offered two reasons in support of the changes to the administrative process: expediting the process and to weed out serious from non-serious applicants. The court was right to suspect that these reasons were not the motivation for the decision. However, inadequate reasons are not the same as having no justifiable reasons at all – to satisfy the arbitrariness ground of review. Even if the court was convinced that the changes in the queue and the new deadlines were structured to rule out some market participants, the court must explain why the reasons offered by the DOT are a smokescreen for the true motivation of the executive authority. Even if the *CPIL* court attempted to persuade us to this conclusion, which it does not, the appropriate remedy for such a finding would be to remand the matter back to the DOT with instructions on how to prune the list of applicants for the 2G licence.

**A**s H.M. Seervai had anticipated in his authoritative commentary on the Constitution of India, sanctifying 'arbitrariness' as an ingredient of constitutional equality rights protection<sup>2</sup> would be the source of judicial mischief, as it allows the court to simply substitute its judgment for that of the executive authority ex-post in a relatively unstructured fashion aided by 20-20 hindsight. While most common law jurisdictions<sup>3</sup> and the standard treatises of administrative law would confirm that the arbitrariness ground is to

2. H.M. Seervai, *Constitutional Law of India* (3rd edn., vol. I), p. 382.

3. See *Dunsmuir v. New Brunswick* (2008), 1 S.C.R. 190, 2008 SCC 9 for the Canadian

be used in the rarest cases where no defensible reason may be offered in support of the executive action, any participant or observer of Indian law would point out that arbitrariness is routinely claimed in almost every case before the court. This trend of constitutionalizing administrative law review has contorted a common law based Indian administrative law, and simultaneously granted the courts the power to routinely substitute judgment and seriously disturb the constitutional division of powers, thereby rendering institutional decision making by the legislature and the executive precariously unstable till the court pronounced on every matter.

**T**his is not the inevitable outcome of administrative law judicial review. As there is no articulate 'anti-corruption' doctrine in Indian constitutional and administrative law review, corruption when alleged must be tackled through the available grounds and processes of public law review. In *CPIL* the appropriate ground of review is bias, as this ground of administrative law review can accurately target corruption in public office.<sup>4</sup> The court should have shaped its enquiry around whether the authorities had a pecuniary interest or were biased in their approach. The choice of the appropriate ground of review is not a semantic quibble among lawyers and legal academics, but one that carefully circumscribes the jurisdiction of the court and prevents the court from sacrificing the requirements of careful public reasoning and sliding into a populist mood.

Supreme Court's restrictions on the scope of the reasonableness enquiry in administrative law review.

4. In the absence of well-developed principles of tortious liability of public officers including misfeasance, malfeasance and nonfeasance in India, the analysis is confined to the ground of bias. I thank Tarunabh Khaitan for pointing out this option.

However, satisfying the ground of bias in *CPIL* would have posed evidentiary problems in this case. As Abram Chayes in his influential article on public law adjudication points out, ‘...in dealing with the actions of large political or corporate aggregates, notions of will, intention or fault increasingly become metaphors.’<sup>5</sup> In a complicated multi-actor institutional environment, deciphering the motivations of the parties from a scanty documentary record is fraught with uncertainty. So Justice Singhvi vacillates between reliance and doubt on the recommendations of the Telecom Regulator and communications from the Prime Ministers Office, Finance or Law Ministry. However, he is resolute that the DOT and the Telecom Ministry were acting in an unjustifiable manner: for example, when Justice Singhvi discusses the meetings of the Telecom Commission, there is nothing on the record besides the claims of the petitioner (*CPIL* para 51) and a series of meeting dates (*CPIL* paras 23-41) from which he concludes that this was an instance of the manoeuvring of the DOT and the minister. There is no further evidence adduced by parties or procured by the courts to establish this claim.

At this stage I must clarify that there is some lack of clarity about the standard of proof required in a public law matter that relies on affidavit based evidence. To be sure the court does not have to establish bias beyond reasonable doubt – this is the standard of proof for the criminal court and Justice Singhvi clearly states that nothing in *CPIL* should influence the criminal investigation (*CPIL* para 81). However, as Chayes points out, ‘The extended

impact of the judgment demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that more explicitly recognizes the complex and continuous interplay between fact evaluation and legal consequence.’<sup>6</sup>

While Chayes sought to illustrate the differences between an ordinary civil trial by jury and public law adjudication, we must appreciate that the broader the factual claims sought to be relied on by a public law court, the greater the burden of proof that will need to be discharged. In *CPIL* the court proceeds on scanty and inadequate evidence to satisfy the claim that the minister and DOT were indeed motivated by a pecuniary interest and bias. This is not to suggest that the DOT was motivated by reasonable considerations, but only to stress that better evidence must guide decision making in public law decision making.

The upshot of the discussion so far is to show that the reasoning in *CPIL* on administrative process review is misdirected and inadequate to support the remedies offered by the court. First, DOT acted within its legal jurisdiction to adopt a FCFS process. Second, the alterations in the priority order of FCFS applicants were supported by DOT reasons. In the presence of reasons, the court may not simply conclude that the process is arbitrary. It must show why these reasons were inadequate and the appropriate remedy is to remand the matter back to the DOT with a ruling on how the FCFS queue must be administered. Third, the arbitrariness ground of review as developed by the Indian courts is inarticulate and overbroad leading to the routine substitution of judgment. If the court seeks to be an

anti-corruption crusader, it should show that executive action is motivated by pecuniary interest and bias. The bias enquiry focuses the courts attention on the facts of the case and adversely affects only those parties that have used or benefited from inappropriate methods of influencing the administrative process. In *CPIL* the court does not have the evidence to show that bias motivated the grant of 2G licences.

Now turn to examine the decision in the 2G cases on the legal and constitutional validity of the 2G-spectrum policy. In the section above, the discussion on administrative process review was primarily concerned with the *CPIL* as the *2G Reference* did not go in to these issues. In this section we read the *CPIL* and *2G Reference* cases together. One may discern two distinct, but interlinked, constitutional arguments in the 2G cases against the validity of 2G-spectrum allocation policy: equality and natural resources allocation. I will examine each of these arguments individually and then assess whether in combination they alchemically produce support for the courts conclusions.

The Equality Argument: Article 14 of the Constitution of India 1950 mandates that the state ‘shall not deny to any person equality before the laws or equal protection of the laws.’ The Supreme Court has developed two mediating doctrines in the application of the equality right: rational classification and non-arbitrariness. In *CPIL* and *2G Reference* the court considered both mediating doctrines. In the discussion above on administrative process review I have dealt with the non-arbitrariness doctrine and argued that it was misapplied in *CPIL* and that courts should maintain a distinction between constitutional and administrative law grounds of review in their

5. A Chayes, ‘The Role of the Judge in Public Law Litigation’, *Harvard Law Review* 89, 1975-76, pp. 1281-1316.

6. *Ibid.*, p. 1297.

analysis. In this section I will assess the remaining equality arguments in these cases.

Remarkably, the court does not develop or apply the rational classification doctrine in the 2G cases. Mediating doctrines allow the court to structure their enquiry in a manner that permits the appropriate level of scrutiny. The first step in the rational classification enquiry is to identify the distinction made by the executive action, policy or legislation. In 2G-spectrum policy the key distinction made is between existing 2G licensees and prospective 2G licensees. It is the DOT's case that it must maintain parity between these two categories of actors by allocating licences to both actors on the same basis: first come first served (FCFS).

The second limb of the rational classification analysis requires the state to show that the classification reasonably achieves the legally sanctioned purpose. In this case the DOT will need to show that the FCFS policy achieves the primary purposes of the National Telecom Policy 1999: 'Access to telecommunications is of utmost importance for achievement of the country's social and economic goals. Availability of affordable and effective communications for the citizens is at the core of the vision and goal of the telecom policy.'<sup>7</sup> In other words, the DOT would have to show that FCFS improves the availability of affordable and effective communications. However, this argument is entirely missing in *CPIL* or *2G Reference*.

Instead, in *CPIL* the court concludes that FCFS violates the equality guarantee (*CPIL* para 77) and reasons in this manner: 'There is a fundamen-

tal flaw in the first come first served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first come first served policy has inherently dangerous implications. Any person who has access to the corridor of power at the highest or the lowest level may be able to obtain information from the government files or the files of the agency/instrumentality of the state that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim... the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

'In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first come first served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the state is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process' (*CPIL* para 76).

It is evident from this excerpt of the judgment that there is no effort to apply the rational classification doctrine as a mediating principle. Further, the court does not develop any other mediating principle to guide the application of the equality guarantee. It is clear that the court is motivated by its urge to prevent the abuse of public office by corrupt public servants. Without any further doctrinal or constitutional support it then concludes that the equality guarantees requires that the state is duty bound to conduct a well publicized auction while transferring or alienating all natural resources.

The thinness of the court's conviction in the breadth and application of this legal proposition is exposed by its response to Harish Salve's argument that all telecom licences issued between 2001 and 2007 should be declared unconstitutional and invalid under the new equality rule. Justice Singhvi holds that this is unnecessary as this writ petition has not challenged those licences and those licensees are not parties (*CPIL* para 78). This unsatisfactory conclusion is completely exposed in *2G Reference* as question number 6 of the reference squarely asks the Supreme Court to clarify the constitutional validity of all licences granted between 1994 and 2007 that do not satisfy this new constitutional equality rule.

In *2G Reference*, Justice D.K. Jain considers this question in considerable detail in a section titled Mandate of Article 14. In his conclusion he holds that: 'Therefore, 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

7. National Telecom Policy 1999 available at <http://www.dot.gov.in/osp/Telecom%20Policy/Objectives.htm> last visited on 17 December 2012.

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 of the Constitution of India' (*2G Reference* para 107). In these five sentences Justice D.K. Jain strings together key words with little attention to the rules of syntax or semantic meaning to leave any careful reader puzzled as to what Article 14 analysis requires!

However, he recovers remarkably from this staggering paragraph to 'unhesitatingly' conclude that '[r]eading the mandate of auction' into Article 14 is 'completely contrary to the intent of the Article apparent from its plain language' (*2G Reference* para 106). The clear and emphatic statement that Article 14 cannot cast a positive injunction on the state to adopt a particular policy (i.e. auction of natural resources) eviscerates a key justification for the *CPIL* judgment. As if to rub this in, he observes that, 'The submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization, and thus by auction, is based *neither on law nor on logic*. There is no constitutional imperative in the matter of economic policies – Article 14 does not predefine any economic policy as a constitutional mandate' (*2G Reference* para 120). If the five judge Constitutional Bench in the *2G Reference* is right to conclude that the mandate of auctions under Article 14 has no support of logic or law, how can the application of this auction rule to radio spectrum by the two judge bench in *CPIL* be sustained!

However, Justice Jain does not foreclose the application of Article 14 to future cases. He suggests that the court must assess on a case-to-case

basis whether state policy serves the common good and if the policy is implemented in a fair and reasonable manner. Earlier I have excerpted Justice D.K. Jain's inscrutable account of what Article 14 requires. In the section on administrative process review above, I argued that the grounds of administrative law review provide us with an adequate basis for scrutinizing administrative action unaided by constitutional law doctrine. The novelty in the equality analysis in the *2G Reference* is the suggestion that all executive policy must suitably pursue the common good as a goal of state policy. This is the argument I turn to as the constitutional argument on natural resources.

The Natural Resources Argument: In *CPIL* the court announces a new constitutional doctrine on the governance of natural resources. The Indian Constitution does not mention the phrase 'natural resources' except to set out the powers of local government bodies under Articles 243 ZD and 243 ZE. Despite this constitutional silence in *CPIL*, the court advances three unsupported and erroneous propositions about the constitutional position on natural resource governance: first, that '(n)atural resources belong to the people but the state legally owns them on behalf of its people.' The law applicable to the resource determines the ownership and control over various national resources. For example, the right to groundwater is appurtenant to the real property interests of the landowner unless there is a law that provides otherwise. No provision of the Constitution or any other law grants the state ownership over groundwater or radio spectrum. Hence, while the state does have regulatory power over this precious resource, it is a mistake to treat it as state property and apply the case law relating to the disposal of public property.

Relying on this legally and factually erroneous first proposition, Justice Singhvi claims that the state is the legal owner of all natural resources and must act as a public trustee in managing these resources. Justice Singhvi suggests that the role of the state is best understood through the lens of the public trust doctrine. The public trust doctrine has been used by the court in various contexts. The court relies on the public trust doctrine as developed in the United States Supreme Court where it operates as a restriction on the power of the state to alienate public property into private hands in order to preserve and protect valuable natural resources.<sup>8</sup>

The Indian Supreme Court first deployed this doctrine in cases that required the environmental protection of water bodies.<sup>9</sup> In *CPIL* the court erroneously suggested that the public trust doctrine was applied in *Secretary, Ministry of Information and Broadcasting, Govt. of India v. Cricket Assn. of Bengal*<sup>10</sup> where the court essentially held that the right to free speech and expression enjoyed by citizens imposed obligations on the state to allow citizens regulatory access to broadcast airwaves. There is no mention of the public trust doctrine though there are some overbroad generalizations about the airwaves being public property. However, in *Reliance Natural Resources Limited v. Reliance Industries Ltd.*,<sup>11</sup> Justice Singhvi finds support for the erroneous view that all natural resources are state owned and are subject to the public trust doctrine. In *Reliance Natural Resources*, the

8. *Illinois Central Railroad Company v. People of the State of Illinois* 146 U.S. 387 (1892).

9. *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388 and *Fomento Resorts and Hotels Limited v. Minguel Martins* (2009) 3 SCC 571.

10. (1995) 2 SCC 161.

11. (2010) 7 SCC 1.

court was concerned with the determination of the price of natural gas using divergent formulae set out in state regulation and a contract between private parties. Whatever the value of the public trust doctrine in constitutional adjudication might be, it certainly does not provide guidance on the pricing of natural resources.

In *CPIL* there is heavy reliance on a quotation from an article by Joseph L. Sax titled, 'The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention', which was first cited in *Fomento Resorts*. The cited portion of the article confirms that the public trust doctrine operates as an 'implicit embargo on the right of the state to transfer public properties to private party if such transfer affects public interest.' It is not clear how Justice Singhvi uses this doctrine to support the auction of radio spectrum to private parties: if anything the doctrine prohibits such transfers.<sup>12</sup>

The inapplicability of the public trust doctrine to radio spectrum was strenuously argued in the *2G Reference* where Justice D.K. Jain gave the

12. For a more thoughtful application of the public trust doctrine and commons concerns to issues of radio spectrum see L. Lessig, *The Future of Ideas*. Vintage, 2002; J. Brito, 'The Spectrum Commons in Theory and Practice', *Stanford Technology Law Review* 1, 2007; Y. Benkler, 'Open Wireless v Licensed Spectrum: Evidence from Market Adoption', available at [http://www.benkler.org/Open\\_Wireless\\_V\\_Licensed\\_Spectrum\\_Market\\_Adoption\\_current.pdf](http://www.benkler.org/Open_Wireless_V_Licensed_Spectrum_Market_Adoption_current.pdf); Patrick S. Ryan, 'Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum', *Michigan Telecommunications Technical Law Review* 10, 2004, p. 285. For a more rigorous account of the nature and purpose of the public trust doctrine, see Sun H., 'Towards a New Social and Political Theory of the Public Trust Doctrine', University of Hong Kong Faculty of Law Research Paper No. 2011/2009; W.D. Araiza, 'The Public Trust Doctrine as an Interpretive Canon', University of California, *Davis Law Review* 45, 2012, p. 693.

doctrine a quiet burial. He concludes that 'for the purpose of the present opinion, it is not necessary to delve deep into the issue' (*2G Reference* para 90), as the scope of judicial review in this case was best understood under Article 14. With this the first limb of the natural resources argument—the public trust doctrine—cannot be called on to support the decision in *CPIL*. Hence, the *CPIL* view on the auction as the only valid administrative policy for the disposal of natural resources now exclusively rests on the application of directive principles that direct the state to secure general welfare to which I now turn.

In *CPIL* Justice Singhvi states that Articles 38, 39, 48, 48A and 51A(g) provide 'for the protection and proper allocation/distribution of natural resources' and these constitutional principles must be complied with 'in the process of distribution, transfer and alienation to private persons' (*CPIL* para 66). The Indian Supreme Court has not developed clarity on the extent and manner in which directive principles must be used in constitutional adjudication. Justice Singhvi does suggest that directive principles should guide state action but does not clarify how they operate as constraints or guidance, except to implicitly suggest that these principles mandate an auction of radio spectrum.

The application of directive principles receives more attention in the *2G Reference*. Justice D.K. Jain clarifies that the mandate of auction of all natural resources in *CPIL* distorts the 'constitutional principle in Article 39(b)' (*2G Reference* para 111). So why did *CPIL* so dramatically misunderstand the scope and application of Article 39(b) to recommend a policy option which on closer review damaged the directive principle? It is useful to follow the reasoning in the *2G*

*Reference* as it deals with the matter rather clearly.

Article 39(b) provides that 'The state shall, in particular, direct its policy towards securing—(a) ... (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.'

The force of Article 39 is to indicate the ends of state policy and action: namely the furtherance of the common good. The article does not mandate a particular mode of ownership or control: private ownership, state ownership or community ownership. So long as the distribution arguably achieves the public good, the constitutional mandate is satisfied. As Justice D.K. Jain points out, '[d]istribution has broad contours and cannot be limited to meaning only one method i.e. auction' (*2G Reference* para 112).

The Indian Supreme Court has had to clarify and etch the relationship between the state and the economy in varied contexts. In the early years, the court acceded to a severely limited right to property thereby giving the state considerable power to acquire and regulate property rights with modest compensation. Subsequently, the court has permitted the nationalization of vast swathes of the economy including textile mills, banks and the distribution of oil and petroleum products. More recently, the court has permitted the privatization of nationalized industries and the creation of new regulatory agencies in sectors where national monopolies prevailed. The court has occasionally imposed procedural legal restraints on the process of nationalization and privatization but has never claimed that the Constitution mandates a particular relationship between the state and economy. While several of these cases were cited before

the court in *CPIL* it failed to appreciate the force of these binding precedents.

In the *2G Reference* the court surveys this doctrinal landscape and rightly concludes that, 'In the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. *It respects the mandate and wisdom of the executive for such matters.* The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them... The Court cannot mandate one method to be followed in all facts and circumstances... Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate' (*2G Reference* para 146).

Though the court retains the jurisdiction to review state action for compliance with Article 14, it expressly rejects the claim that auctions must be the sole mode of distribution under Article 39(b). By articulating the appropriate standard of judicial review for compliance with directive principles the *2G Reference* deprives *CPIL* of the second constitutional justification for its order declaring FCFS invalid.

In the previous sections I have reviewed the Supreme Court decisions on 2G to assess whether any part of the reasoning in *CPIL* survives careful legal and constitutional scrutiny. I argue that read with *2G Reference* no part of the *CPIL* judgment operates as valid legal precedent hereafter. A puzzled reader may now wonder how it is that several telecom licences remain cancelled and the threat of investment treaty arbitration hangs over the telecom sector.

There are two reasons why *CPIL* continues as valid law: first, the *2G Reference* court clarified that 'the learned Attorney General has more than once stated that the Government of India is not questioning the correctness of the directions in the *2G Case*, in so far as the allocation of spectrum is concerned, and in fact the Government is in the process of implementing the same, in letter and spirit' (*2G Reference* para 36). Second, the *2G Reference* court charitably concludes that 'as long as the decision with respect to the allocation of spectrum licenses is untouched, this court is within its jurisdiction to evaluate and clarify the ratio of the judgment in the *2G Case*' (*2G Reference* para 62). Justice D.K. Jain then promptly goes on to strip the *CPIL* judgment of any legal or constitutional basis.

These two gracious concessions by the Attorney General and the fraternal Constitutional Bench in the *2G Reference* mean that the *CPIL* ruling on mandatory auctions will continue to apply to radio spectrum policy despite the absence of legal or constitutional reasons to support this decision. It is unlikely, however, that students, practitioners and academics will look back so kindly at *CPIL* which will come to be recognized as the boldest judgment of the Supreme Court to have no substantive reasons. In our everyday public discourse, the giving of public reasons is yet to establish itself as the primary justification for the exercise of public authority. However, if India has to compensate radio spectrum licensees in international investment disputes arbitration venues where the reasons for decision will be scrutinized more carefully, then the careless muddling of signal and noise in the Supreme Court's approach to radio spectrum may well cost the Indian taxpayer more than what has already been lost in the last year.