

INDIAN CONSTITUTION & PUBLIC TRUST DOCTRINE: *ITS APPLICABILITY & ANALYSIS IN OIL AND GAS EXPLORATION SECTOR IN INDIA IN THE CONTEXT OF DISPUTE SETTLEMENT MECHANISM UNDER PRODUCTION SHARING CONTRACTS*

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ABSTRACT

The Article will try to reflect the recent approach taken by the Supreme Court of India while dealing with Oil and Gas exploration sector specially focusing on the applicability and analysis of “Public Trust Doctrine”. The Article will try to demonstrate how Government of India through its policies like NELP¹ by introducing concepts like PSC² actually failed to fulfil the constitutional mandate as provided under the Constitution of India. The Article will try to investigate that how that government by referring Oil and gas exploration dispute to Arbitration is unable to fulfill its constitutional mandate towards natural Resources by virtue of being the trustee of Natural Resources under the Public Trust Doctrine. The Article is basically divided into two parts, the very first part will deal with the “Emergence of New Jurisprudence of Scarce Natural Resources (with reference to Oil & Gas exploration in India)” in the list of the recent judicial pronouncement and its analysis with regard to Public Trust Doctrine. The Second Part will deal with “Implication of this new Jurisprudence of scarce Natural Resources and its relation to the Process of Arbitration with special reference to Oil and Gas exploration Disputes in India” where Article will reflect the paradox created between the Public Trust Doctrine with regard to Oil and gas and Its dispute settlement mechanism i.e., Arbitration.

Keywords: Public Trust Doctrine, Production Sharing Contracts, Arbitrability, Public policy, NELP, HELP.

1. Emergence of new Jurisprudence of Scarce Natural Resources with special reference to Oil & Gas sector in India

1.1. Historical Background:

Natural gas was only produced in the early 1990s, prior to the New Exploration and Licensing Policy (NELP) and pre-NELP years, from fields operated by “government companies, namely Oil & Natural Gas Corporation (in short 'ONGC') and Oil India Limited (in short 'OIL)”, from blocks that have been given to such companies on a nomination basis by the government. The government's capacity to control the Natural Gas Sector was total because these fields were provided on a nomination basis and solely to government companies.

Subsequently, in the mid-1990s, it became planned to enter the industry to private sector investment, and some blocks were allocated to private sector corporations under a “Production Sharing Contract (better known as the pre-NELP Production Sharing Contracts)”. This was done to encourage private investment in the industry, as oil and gas exploration and production is fraught with danger, and no investment would've been encouraged if the APM regime had remained in place.³

Contractors that signed the PSC, on the other hand, were compelled to sell all gas generated and saved to the “Gas Authority of India Limited”, a government-owned corporation, and did not enjoy natural gas marketing independence. The PSC relevant to this case was entered into between a Joint Venture formed of RIL and NIKO Resources Limited and the Government of India under the pre-NELP regime. The contractor has been allowed limited marketing discretion in the NELP-1 PSC, subject to the Government's overall oversight.

1.2. Constitutional framework of Oil and Gas in India:

To comprehend India's petroleum policy, one must first comprehend Article 297 of the Indian Constitution. “Natural gas and petroleum” in their natural condition in India's territorial waters and continental shelf are “vested in the Union of India, i.e., the government”, as per Article 297⁴.

¹ New Exploration Licensing Policy (NELP) is a policy adopted by Government of India in 1997 indicating the new contractual and fiscal model for award of hydrocarbon acreages towards exploration and production (E&P).

² Production Sharing Contract (PSC) is a term used in the Hydrocarbon industry and refers to an agreement between Contractor and Government whereby Contractor bears all exploration risks, production and development costs in return for its stipulated share of (profit from) production resulting from this effort. The costs incurred by the contractor are recoverable in case of commercial discovery. Thus, PSC is a fiscal regime existing in the exploration and production of hydrocarbons.

³Product Pricing, Mopng.gov.in (2022), [https://mopng.gov.in/en/marketing/product-pricing#:~:text=Under%20APM%20\(1975%20to%202002,and%20domestic%20LPG%20by%20cross](https://mopng.gov.in/en/marketing/product-pricing#:~:text=Under%20APM%20(1975%20to%202002,and%20domestic%20LPG%20by%20cross) (last visited Feb 1, 2022).

⁴ “Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union. (1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

Other than that, the “Constitution's Article 39(b) and Article 14” are both important, with “Article 39(b) requiring the State to direct its policies toward assuring the distribution of ownership and control of the community's material resources in the most efficient way to serve the common good”.

The present situation is that the Indian government, via “the people of India, owns natural resources (including gas) for the purpose of development in the people's interests, until it reaches the final consumer”. As a result, the government owns the gas, and title goes only when the gas is sold at the distribution point. The PSC governs the relationship between the Government and the contractor, including the contractor's right of distribution, overriding any other contractual responsibilities.

The Supreme Court has recognized in its 3 decisions made in *RNRL v RIL*¹ that the country's Obligation has been that “natural resources belong to the people of the country” and that the word “vest” in “Article 297 of the Constitution” must be interpreted in light of the “Doctrine of Public Trust.” The public trust theory is based on the idea that some natural resources, such as “air, water, and gas”, should be freely available to all people and must not be susceptible to “private ownership”. The theory, which is most commonly used in environmental law, has a broader application. The Court therefore emphasized that gas, as a critical natural resource, is held in trust for the people of India by the government. As a trustee of the people, it decided that it is the government's responsibility to give total protection to natural resources. This is in accordance with the “Constitution's Article 39(b)”.

Whereas the Constitution of India specifies the basis of natural resource ownership, such as gas, it is the legislative structure that specifies the parties' rights and duties. A combined reading of the “Oilfields Act and the PNG Rules” governs the statutory structure of natural resource exploitation, regulation of petroleum activities, and the awarding of licences and leases for petroleum “exploration, development, and production” in India.

Now to understand the emerging jurisprudence of Oil and gas natural resources and application of Public Trust Doctrine over energy resources like oil and gas we need to trace the first case in India which highlighted the Public Trust Doctrine in the light of Energy Resources inspite of restricting its application to only Environmental Jurisprudence.

1.3. An Analysis Of The Supreme Court'S Judgment of “*Reliance Industries Limited V Reliance Natural Resources Limited* (2010) 7 SCC 1”:

Controversy over through the exploitation and usage of finite and “nonrenewable natural resources” (also known as resource curse²) was on the thoughts of India's founding fathers. For example, the Indian Constitution not only vests “all land, minerals, and valuables under the territorial waters and Exclusive Economic Zone in the Union of India to be used for the benefit of the Union (Article 297)”, and it also supervises the govt to allocate the “community's” material resources for the public good to “benefit everyone and prevent a concentration of wealth in the economic system (clauses (b) and (c) of Article 39)”. The mandatory requirements of “Article 14 and Article 19(1) (g) read with clause (6) of Article 19 of the Indian Constitution”, that necessitate those laws adhere towards the fairness and equal treatment for all and defend freedom of “business, trade, and commerce subject to reasonable restrictions”, further constrain this.

While each of the following prior mentioned sections has always been the topic of numerous analysis and constitutional interpretation and debate by the Indian Supreme Court,³ they have not even been recognised as part of a larger system that safeguards the country's natural resources against abuse and holds the “resource curse at bay”. The verdicts rendered in the historic case of *Reliance Industries Limited v. Reliance Natural Resources Limited*⁴ are perhaps the only instance of the Supreme Court acknowledging the mentioned framework in the Constitution (the Reliance case). The Judiciary has expounded what we believe are the “fundamental principles of what might be called the jurisprudence of finite natural resources” in separate, but essentially concurring judgements given by “Sathasivam J (on behalf of himself & the CJI)⁵ and Sudershan Reddy J.” We are limited ourself to “exhaustible, non-renewable natural resources” such as “minerals, petroleum, and natural gas” for the sake of this discussion and in comprehending the breadth of the concepts of this burgeoning area of law.

Though some facets of this emerging new territory have indeed been elucidated upon in previous Supreme Court judgments, people believe that the Reliance case judgment brings such facets together again and cohesively lays out the “principles of the new jurisprudence of scarce natural resources”, firmly rooted in the provisions of the Indian Constitution. Such principles, we say, could not have arrived at a better moment, as India struggles with numerous disputes (ranging from political to outright military conflict) over the exploitation and distribution of natural resources in various sections of the nation.

Because of specific economic policies that prioritise growth in the economy and modernization, the demand for raw materials will inevitably lead to more struggle over finite natural resources, not less. It also is conceivable that judiciary will play a significant role in solving such issues involving not only the Government and people, but also disagreements between various groups of citizens with competing interests. We believe that the Apex Court's approach in the Reliance case is worthy of emulation in the hereafter, and that it should be expanded upon in order to prevent India from succumbing to the resource curse.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament”.

¹ *RNRL v. RIL*, (2010) 7 SCC 1.

² See “for instance Joseph E. Stiglitz, *Making Natural Resources into a Blessing rather than a Curse*, in *Covering Oil* Ed. Svetlana Tsalik and Anya Schiffrin, Open Society Institute (2005); See also Richard M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993). London: Routledge”.

³ For “a discussion on the scope of territorial application of India's laws *vis-a-vis* Article 297 see *Aban Lloyd Chiles v Union of India* (2008) 11 SCC 439. However, this case is arguably the first which interprets Article 297 in depth and with reference to its relation to the other provisions of the Constitution”.

⁴ (2010) 7 SCC 1.”

⁵ *Ibid*.

There are three components to this study. The first section contains the historical context, procedural context, and the Supreme Court's principal decisions in the "Reliance case". The second portion delves more into Reddy J's concurring opinion in this issue, with an emphasis on the principles governing regulation of limited natural resource extraction and exploitation that he elucidates in his decision. In the final and closing part, we'll see what the Court has interpreted the constitutional system in a commendable way that should be followed in future instances.

1.3.1. "Factual Background and Summary of Main Findings":

One would reasonably wonder why the Judge was engaging with constitutional issues in a case involving a "Company Petition" filed in the High Court of Bombay. The solution, as we'll see in this part, rests in the unusual circumstances that led to these inquiries, with a special focus on how and why the government was engaged in this instance.¹

After significant amounts of natural gas were discovered "off the Krishna Godavari (KG) Basin in 2003", RIL agreed to cooperate with govt. to develop plans to begin extracting the gas. Meanwhile, RIL was restructured when its founder, Dhirubhai Ambani, died, into two groups of firms led by his two sons, Mukesh and Anil Ambani. RNRL, one of several businesses in the Anil Ambani group, asserted it had a permission to be provided "28 mmscmd of natural gas at \$ 2.34 for a period of 17 years based on a family MoU entered into between the two brothers, and filed a Company Petition in the High Court of Bombay seeking enforcement of the same".²

At his final judgement and direction dated 15.10.2007, "the Single Judge of the High Court of Bombay declared that the appropriate arrangements established to deliver natural gas had to be formed in line with Government policy and legislation, and so required the parties to re-negotiate in that manner".³

Both stakeholders appealed to the Bombay High Court's Division Bench. The Bombay High Court issued injunctions order on the establishment of third-party claims in natural gas at KG D6 while the case was pending. However, "when natural gas demand soared and the KG D6 field's production date approached, the government petitioned the Bombay High Court to lift the injunction." The Union of India was named as a participant in the litigation between RIL and RNRL for this reason, and the Court "lifted the injunction and allowed commercial natural gas extraction from the KG D6 field after hearing the parties". Having followed that, the government established "the Gas Utilization Policy", emphasizing particular economic sectors including "power generation, fertilizers, LPG, and transportation".⁴

The Division Bench of the Bombay High Court dismissed the appeals in its final decision and order dated 15.06.2009, stating, among other things:

- "1. A fixed quantum of gas, i.e., 28 mmscmd for a period of 17 years stands allocated to RNRL from the KG D6 field;*
- 2. RIL will have to supply RNRL natural gas at rates prescribed in the private arrangements irrespective of Government decisions on the same".*
- 3. "The price, quantity and tenure as decided in the private arrangement between Mukesh Ambani and Anil Ambani will prevail over the Government fixed price, quantity or tenure. RIL was free, as per the terms of the PSC, to sell the natural gas extracted at any price since the price fixed by the Government was only for purposes of valuation.*
- 4. Government decisions will apply only to the 10% of the natural gas extracted and saved, i.e., profit gas.*
- 5. Any further allocations of gas made by the Government will apply only to the 10% of the gas which is the government's take."*⁵

Allegedly dissatisfied, all parties involved filed appeals with the Indian Supreme Court. The Union of India was particularly harmed by the High Court's decision, which totally delegated the government's jurisdiction to regulate the natural gas sector to private agreements between parties solely as the latter was earlier in point of time.

The Court seems to overlook the fact that Production sharing Contract, which has been signed before to the date of "Mukesh and Anil Ambani's MoU", regulated the production and delivery of natural gas and would override any future agreements made by one of the parties. The High Court of Bombay's viewpoint of the PSC had the effect of "vesting complete ownership of natural gas in the KG D6 field in the producer, i.e., RIL, despite express provisions of the Constitution and the PSC itself stating that ownership of natural gas remains with the government until it reaches onshore and is delivered to a customer".

The Supreme Court of India, in its three benches in two concurring judgements, overruled the Bombay High Court's decision and ruled as regards:

- 1. "All natural gas vests in the Union of India by virtue of Article 297, and title vests to the delivery point in accordance with Article 27.1 of the PSC.*
- 2. Since some functions of the Union relating to the exploration and supply of natural gas have been privatized, such private parties are also bound by other Constitutional obligations that would have been applicable to the Union of India if such functions had not been privatized."*

¹The Court was also concerned, in the *Reliance case*, with the interpretation of the scope of certain provisions of the Companies Act, 1956, but we have limited ourselves to the constitutional law issues that were thrown up. It is also our belief that the company law issues, while interesting in themselves, were secondary to the more important questions of law raised in the context of the PSC and the Government's powers of regulation over natural resources, since, as Reddy J points out, private arrangements can never override policy considerations. See *Reliance* (supra n 6) 70, para 134.

² Mmscmd stands for Million Standard Cubic Metres per Day. The size of the RIL find was estimated at 11.5 trillion cubic feet See <http://www.eia.doe.gov/cabs/India/pdf.pdf>.

³ *Reliance Natural Resources Limited v Reliance Industries Limited*, [2009] 149 CompCas 129 (Bom).

⁴The Gas Utilization Policy is available at <http://petroleum.nic.in/gasutilpolicy.doc> (last accessed 03 Sept. 2010). However, no decision was taken with respect to the power plants sought to be set up by the RNRL group since the same matter was under litigation.

⁵ *Reliance Industries Limited v. Reliance Natural Resources Limited*, 2009 (111) Bom LR 2507."

3. *"The power of the Union of India to regulate supply and production of natural gas is paramount under the Constitution. It is put into operation through relevant statutes and the PSC itself and this cannot be superseded by a private arrangement."*
4. *Allocation of natural gas made by the EGOM cannot be overridden by a contractor through a private arrangement.*
5. *Contractor, i.e., RIL, is bound by the decisions of the EGOM on price, quantity and tenure of supply of natural gas".*
6. *"Supplies of natural gas can only be made in accordance with the policies of the Government and RNRL will have to approach the Government seeking allocation of gas before any supplies are made to it. Further, such supplies must be in accordance with the price, quantity and tenure fixed by the Government in the decisions of the EGOM".*

1.3.2. Evaluating the Judgment

The Supreme Court's decision is noteworthy not just because of the names of the corporations affected and the staggering sums at stake. at The Supreme Court's decision is significant not only because of the companies involved and the enormous sums at risk, but also for the unambiguous manner wherein the Judge asserted the "government's power to regulate the natural gas sector and approved the current method of regulation of this scarce commodity". Currently, then under "Empowered Group of Ministers' Gas Utilization Policy", large-scale natural gas customers demand supply, and allotment are determined based on the Policy's priorities.

It should be mentioned that this system of control was chosen largely due to the high demand for natural gas and the restricted supply of the commodity ("being limited to a few fields across the country").

It's arguable if this type of rule would stand up to judicial scrutiny under "Articles 14 and 19 of the Constitution", but the Court didn't bother to look into it because none of the Respondents really challenged the policy on its merits. Instead, despite recognizing the way of regulation of the natural gas industry in the nation, the Court only took notice of the style of regulation and the grounds behind it. The Supreme Court, notably Reddy J's well researched and reasoned decision, has evaluated the constitutional structure for natural resource control in remarkable detail and precision.¹

The natural resources inside India's borders are vested in the Union, according to Reddy J. He highlights that this is not ownership in the classic meaning of the term. The government of the day does not have total choice over how to use the resources. In that sense, it is not a power that the government has been given.² Instead, the state is under a responsibility or duty to employ these resources in the way provided by the Constitution. "Hardwired" and "genetically encoded" are words used by Reddy J.³ to express how the Indian Constitution limits the government's ability to deal well with country's natural resources.

Parts III and IV of the Constitution include certain requirements, according to Reddy J. These are found in "Articles 14 and 39(b) of the Constitution", according to Reddy J. "Articles 14 and 39(b)" have been connected before, and then in the context of natural resource, but it is the first time it is directly related to the Government's ownership of natural resources.⁴

To summarize, the state should assure not just equitable access to natural resources, as well as an allocation of those resources that does not favors a select few at the expense of everyone. This is significant in light of the fact that natural resource exploitation and extraction are no longer solely the province of the government. In the aim of boosting investments and efficiency, private actors have been permitted to engage in the process, raising problems about how the government should regulate this sector of the economy.

As previously stated, the whole regulatory framework was not challenged in this case, and Reddy J does not hold every facet of the oil and natural gas sector's management to constitutional examination.⁵

He does, however, provide general rules to be followed in evaluating the extent of the Production Sharing Contract's terms. These include, in general:

- (1) *"transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;*
- (2) *allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources";*
- (3) *"allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements;*
- (4) *allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions";*
- (5) *"allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilization policy; and"*

As they were established in the perspective of Production Sharing Contracts, ideas provide a good foundation for analysing the legality of regulation in other industries.

¹It "is also hard to miss the tone of incredulity in Reddy J's judgment as to why these issues had to be raised in what began essentially as a private dispute. As he himself puts it so clearly, it was because one of the parties' laid claims to a significant part of India's natural gas resources on the basis of a secret private pact, free of governmental oversight and regulation. *Reliance*," (supra n. 6) 75, para 145".

²Power "being used here in the Hohfeldian sense. See WH Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 16 (1913)".

³In "the same sense as Hohfeld ibid uses the term".

⁴In the "context of coal, see Sanjeev Coke Manufacturing Company v, Bharat Coking Coal, (1983) 1 SCC 147".

⁵For "a more detailed examination of the process by which the bids were awarded and PSCs were entered into, see Centre for Public Interest Litigation v. Union of India, (2000) 8 SCC" 606.

When a challenge to the way regulations is implemented is filed in the future, the Court will very certainly have to perform this exercise. Reddy J discusses these concerns in the light of the problems that every country has in regulating “the extraction and exploitation of natural resources”. He describes them as follows:

- (1) “adequate supplies to meet overall energy and industrial needs;
- (2) equitable access across all sectors, especially those which have implications for quality of life; and
- (3) equitable pricing, even if market forces are allowed to play a much larger role”.
- (4) “energy security of the nation;
- (5) energy defense links; and
- (6) inter-generational equities”.

He also recognizes the issue of conservation in view of the paucity of recognised sources as a matter that states contend with in the context of natural resource governance.

These risks do not appear to be limited to natural gas or petroleum. These worries are justified in the context of a variety of natural resources that are critical to India's energy and infrastructure demands. To that regard, the criteria established in this judgement in the context of natural gas would be completely relevant in establishing the legitimacy and scope of laws in the context of other limited natural resources in the future. Such concepts, in my perspective, provide guidance and advices that should be implemented not just by judiciary, but also by state when developing natural resource regulation laws in the future.

Conflict over limited natural resources is not a far-fetched scenario. It is also unlikely to take the shape of a legal battle between major corporations, decided by their attorneys' analytical ability and the wisdom of judge. Unrestricted exploitation of limited natural resources has resulted in significant outbreaks of violence in tribal communities, as well as a serious deterioration of democratic institutions.¹

In this framework, our Constitution's appeal to the Government to guarantee that now the society's material riches are used for the advantage of all rather than aggregated in a few hands is more than a homily or an ideology canon; it is an obligation put on the Government to make sure that “democratic institutions” and citizens' welfare are not significantly threatened by the “resource curse.” Reddy J understands that unrestrained and unregulated natural resource extraction is harmful not just to the environment and the economy, but also to the country's democracy and institutions of government.²

Even though the Government of India is the exclusive owner of natural resources located in India's territorial seas and on its land, its “rights” as an owner of the property are limited by Part IV of the Constitution's constitutional imperative and the citizens' rights under Part III. In that respect, the state does not literally “own” the property in the way that it is understood by a private owner. The Supreme Court's articulation of the scope and limitations of the government's capabilities in exercising its duty as the owner of finite natural resources plainly supports this.

It might be claimed that the above-mentioned jurisprudence with regard to limited natural resources is similar to the “Public Trust Doctrine”, which has now been applied to the Nature and environment.³

However, there are significant distinctions. The most evident is that the public trust doctrine wants to safeguard and maintain what it is attempting to protect, namely the natural environment,⁴ The law on finite natural resources acknowledges that all these resources must be utilised for the welfare of the community, but that this exploitation is regulated by concerns pertaining not just to “the environment and equality toward coming generations, but also to effectiveness and broader benefit”.

It's worth noting that this new law is still developing, but it worked effectively in “the Reliance case” in terms of preventing the accumulation of natural resources within few hands. Its evolution will be driven by the types of cases heard by the nation's appeals courts, but the essential structure has been established in this case.

The ideas have been articulated in light of the Constitution's design, which we believe is appropriate. With respect to the proper usage of finite natural resources, more difficult and sophisticated issues will surely arise, and these, we believe, will have to be resolved in light of the Constitution's framework. Because “the Reliance case” acted as a forerunner in this respect, courts in the future will benefit from following the pathways blazed by the Supreme Court of India's Hon'ble Judges.

2. Implication of applicability of Public Trust Doctrine to the Oil and Gas sector and its relation with dispute settlement mechanism:

To understand its implications firstly we need to understand the Structure of Production Sharing Contracts⁵ entered between the parties in “RIL vs. RNRL”. Some of the salient features of the PSC entered between the parties and also mentioned under the given judgment are as follows:

- i) “Clause 6 of the Preamble of the PSC makes it clear that **discovery and exploitation will be in the overall interest of India.**

¹ For “an examination of the influence of ‘iron ore barons’ on the politics of Karnataka and Andhra Pradesh see *The Revenge of the Reddy Republic*, Tehelka, Vol 6, Issue 45, November 14, 2009, http://www.tehelka.com/story_main43.asp?filename=Ne141109the_revenge.asp (last accessed 03 Sept. 10) and “Despite Mining Scandals, Indian Mining Bosses Thrive,” The New York Times, August 18, 2010 http://www.nytimes.com/2010/08/19/world/asia/19india.html?_r=1 (last accessed 03 Sept. 10)”.

² It “is no surprise that his concurring opinion begins with a quote from Dr. B.R. Ambedkar on the importance of ensuring economic justice in protecting political democracy in *India Reliance* (supra n. 6) 69, para” 132.

³ See *MC Mehta v. Kamal Nath*, (1997) 1 SCC 388.

⁴ For a detailed discussion by the Supreme Court in the context of environmental concerns see *MC Mehta* *ibid*, 407 - 413 paras 24-34.

⁵ Hereinafter will be referred as “PSC”.

ii) *Article 8.3(k) makes the contractor is to be mindful of the rights and interest of the people of India in the conduct of petroleum operations”.*

iii) *“Article 10.7(c) (iii) the contractor is duty bound to ensure that the production area does not suffer any excessive rate of decline of production or an excessive loss of reservoir pressure.*

iv) *Article iv) Article 32.2 makes it clear that the contractor is not entitled to exercise the rights, privileges and duties within the contract **in a manner which contravenes the laws of India”.***

v) *“Article 21(1) mandates that the discovery and production of natural gas shall be in the context of government's policy for the utilization of natural gas.*

vi) *Article 27(1) deal with title to petroleum under the contract areas as well as natural gas produced and saved from the contract area vests with the Government unless such title has passed in terms of PSC. As per Clause (2), title remains with the Government till the time the natural gas reaches the delivery point as defined in the PSC”.*

The above clauses in the form of articles make it clear that PSC is subject to the

1. “Constitution of India,
2. The Oil Fields Act, 1948,
3. The Petroleum and Natural Gas Rules, 1959,
4. The Territorial Waters, the Continental Shelf and exclusive Economic Zone and other Maritime Zones Act, 1976 and also
5. The gas utilization policy”.

Now the question arises “How to protect such rights and liabilities” mentioned under PSC. And as per the existing legal framework of the dispute settlement mechanism such issues are resolved through Arbitration under the Arbitration clause mentioned under the PSC.

Such clauses are very common in PSCs and today it has now become questionable that how process like Arbitration (specially that Arbitration where Seat of Arbitration and laws applicable are foreign) will able to protect such rights and duties flowing from the constitution and other above-mentioned statutes.

2.1. “Under the PSC does the title get transferred to Contractor on account of it expending monies on exploration, development and production”?

As per the Learned Senior Counsel for RNRL in the case of “RIL V RNRL”, Article 27.2 of the PSC states that title “to Petroleum to which the Contractor is entitled under this Contract and title to Petroleum sold by the Companies shall pass to the relevant buyer party at the Delivery Point...”, implying that title naturally goes to the Contractor because the Contractor has spent money on “exploration, development, and product development”.

This is only a partial reading of the PSC. Article 27.1 states that the “Government is the sole owner of Petroleum underlying the Contract Area and shall remain the sole owner of Petroleum produced pursuant to the provisions of this Contract except as regards that part of Crude Oil, Condensate, or Gas the title whereof has passed to the Contractor or any other person in accordance with the provisions of this Contract.” The title does not flow via the contractor as an offset under these terms. By inference, offset cannot be read into these phrases. All petroleum operations are geared at selling petroleum, in this instance natural gas, at the Delivery Point, as previously mentioned.

“The title can pass from the sovereign owner, the people of India, at the Delivery Point upon a sale, and not as a matter of offset against any expenditures spent by RIL”, as provided in Article 27.1 of the PSC. RIL's rights under the PSC are to retrieve its expenses, first “from sale of Petroleum, and only up to 90% of the total value realised from sale each year.” This is a continuation of the risk, in that the contractor under such a PSC assumes the risk that exploration expenditures will not be recouped until petroleum is discovered in a commercially viable form. The reservoir might, for example, stop producing or have its output drop dramatically.

The issue of an “automatic offset of incurred expenses” in order to accomplish an automatic transfer of title is not addressed in this PSC. Only entities in a class of purchasers defined by a usage policy, as detailed below, can get title.

It's worth noting that, while title transfers on only sale at the Delivery Point, the actual owner, “the people of India”, acting via the Government of India, have a sovereign right, controlled by public law, to decide how that sale is carried out. The distribution and disposal of public resources cannot be done at will.

2.2. A Constitutional Mandate! (Applicability of Public Trust Doctrine):

The Supreme Court issued a constitutional mandate in RIL v RNRL, which was written into the Indian Constitution from the outset but remained dormant.

According to paragraph 84 of the judgement: -

"It must be noted that the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word vest must be seen in the context of the Public Trust Doctrine (PTD).¹ Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application".

The idea of "public trust" has inspired a lot of law on the limits of the state's capacity to use natural resources. According to Prof. Joseph Sax, the concept of a public trusteeship is based on **three ideas as follows-**

"Firstly, some interests are so vital to the population as a whole that it would be absurd to turn them over to private control. Secondly, they benefit so much from nature's bounty rather than individual enterprise that they should be made freely available to all citizens, regardless of economic standing. And finally, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from public uses to restricted private benefits..."²

The notion of public trust has its origins in the seas and waterways, and some have even linked it back to the "Chinese Ch'in Dynasty (249-207 BC) and the Roman Justinian Institutes". This has been greatly expanded, and the wider idea though is that the government is only operating in a fiduciary relationship. *"The intent is simple: nation states' sovereign rights over some environmental resources are fiduciary, not private."³*

It can be clearly inferred that Government of India cannot sign an agreement that enables the extraction of natural resources in a way that would usurp its fixed sovereignty over such natural resources, associated with the public trust elements inherent in such natural resources, the unique nature of "Article 297", the impacts of natural gas for India's energy independence, as well as the implications of development of the nation - along with the basic ideas of social equality and advancement of inter-regional parity. It really isn't merely an issue of a contract's or a statute's textual contents.

It's a legal obligation under the Constitution. In relation to "natural resources extracted and utilized from the geographic zones mentioned in Article 297", it can be believed that the govt. of India may not:

- (1) "transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;
- (2) allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources";⁴
- (3) "allow the extraction of such resources without a clear policy statement of conservation", which "takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements";
- (4) "Allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions;
- (5) allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilization policy; and
- (6) No end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government".

Based on the prior explanation, we now turn our attention to the specific PSC under examination in this circumstance. On the surface, we cannot infer that the PSC violates the Constitutional ideals enumerated above based on a thorough review of its provisions, as detailed below.

The Government of India's subsequent policy actions have no bearing on the PSC's agreements.

The PSC explicitly recognizes that India's interests are of utmost concern. The PSC states in provision 6 that *"Government desires that the petroleum resources..... be discovered and exploited with utmost expedition in the overall interests of India and in accordance with Good International Petroleum Industry Practices"*.

In **"Association of Natural Gas v. Union of India"**⁵, the Apex Court's Constitution Bench decided, referencing **"Re: Cauvery Water Dispute Tribunal"**⁶, that:

"In Re: Cauvery Water Dispute Tribunal (Supra) the right to flowing water of rivers was described as a right 'publici juris', i.e., a right of public".

Similarly, the people of the entire nation have an interest in natural gas, as well as the benefits must be shared equally.

Natural gas should be used in a fair and reasonable manner for national growth. If just one state is permitted to harvest and use natural gas, other states will be denied their fair share. This viewpoint strengthens the Union's stance and serves as a guide to

¹ By "virtue of Article 297, natural gas and petroleum in its natural state in the territorial waters and the continental shelf of India are **vested** in the Union of India, i.e. the Government." It states that: *"Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union."*

(1) *All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.* (2) *All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.* (3) *The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament."*

² 62 Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (1971).

³ *Ibid.*

⁴ "Turnipseed, Roady, Sagarin & Crowder, *The Silver Anniversary of the United States Exclusive Economic Zone - Twenty Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*," 36(1) ENERGY L. QUARTLY. (2009).

⁵ *Association of Natural Gas v. Union of India*, (2004) 4 SCC 489.

⁶ *Re: Cauvery Water Dispute Tribunal*, AIR 1992 SC 522."

the conclusion that “natural gas” is included in List I Entry 53. Thereby, the legislation and definitions of “petroleum,” “petroleum products,” and mineral oil resources” contained throughout various statutory provisions and books, as well as the national interest involved in the equal and fair distribution of natural gas among States - all of the other considerations give rise to the unavoidable conclusion that “natural gas” in raw and “liquefied form is a petroleum product and a mineral oil resource that must be regulated by the Union”.

In “**M.C. Mehta v. Kamal Nath**”, the Supreme Court ruled on the “Public Trust Doctrine”:

“The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life”.

The concept calls for the government to protect resources for the benefit of the general public rather than permitting “private ownership or commercial” exploitation.

The public trust idea is an element of our legal system's jurisprudence, which is based on English Common Law. The state is in charge of all natural resources that are intended for public use and enjoyment. The public benefits from the shoreline, flowing streams, air, woods, and environmentally fragile areas. As a trustee, the state has a legal duty to protect natural resources. These resources cannot be transformed into private property because they are meant for public use. This concept is founded on Indian law, and it also applies in this case.

As a trustee of the people, it is the government's responsibility to ensure total protection to natural resources.

With its conclusion, the Supreme Court said plainly in regard to oil and gas that:

“It is thus the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large.”

It's worth noting that the Constitution considers gas exploration, extraction, and distribution to be governmental activities. It is the Union's responsibility to ensure that all these resources be utilized for the benefit of the country's population.

Due to a lack of funding and technical expertise, the government has privatized such tasks under the PSC system. It would have been preferable if the PSUs were solely responsible for such initiatives. Even though it is admirable that private entrepreneurial initiatives exist, “the nature of the gains derived from such operations should ideally belong to the government, which is in a better position to distribute them in the best interests of the people. Even if private parties are used for this purpose, they must be held responsible to the constitutional framework”.

A combined reading of the “Oil Fields (Regulation and Development) Act, 1948, the Petroleum and Natural Gas Rules, 1959, and the Maritime Zones Act” governs the statutory structure of natural resource control.

As previously stated, the right “interpretation of PSC empowers the government to choose not only the foundation of gas value, but also its price. Before the contractor sells the gas, the Government must approve the price, according to Article 21 of the PSC”.

According to the verdict, the government's responsibility is as follows:

The Supreme Court outlined the government's responsibility in the verdict, saying, “*In a constitutional democracy like ours, national assets belong to the people. Natural resources held in trust by the government as a result, the government has legal ownership of such assets in order to develop them in the public interest. The government owns the gas in this situation until it reaches the final user*”.

The underlying premise for dealing with finite natural resources, notably oil and gas, is clearly set forth in paragraph 91 of the judgment²:

- 1) “The natural resources are vested with the Government as a matter of trust in the name of the people of India. *Thus, it is the solemn duty of the State to protect the national interest*”.
- 2) Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatize some of its functions. *For this reason, the constitutional restrictions on the government would equally apply to the private players in this process.* Natural resources must always be used in the interests of the country, and not private interests”.
- 3) “The broader constitutional principles, the statutory scheme as well as the proper interpretation of the PSC mandates the Government to determine the price of the gas before it is supplied by the contractor.”
- 4) The policy of the Government, including the Gas Utilization Policy and the decision of EGOM would be applicable to the pricing in the present case”.
- 5) “The Government cannot be divested of its supervisory powers to regulate the supply and distribution of gas”.

With the evolution of such a jurisprudence of Natural Resources the burden on government undoubtedly very much increased so closer watch and scrutiny from the side of the government is involved but the question again comes-

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

² Reliance Industries Limited v. Reliance Natural Resources Limited, 2009 (111) Bom LR 2507.

1. By saying that “*the constitutional restrictions on the government would equally apply to the private players in this process of dealing with Natural Resources (oil and gas)*” The Supreme Court has shown the constitutional obligation or burden even to Private Players dealing with Indian scarce Natural Resources. Exploration or Extraction of Natural Resources are the prime function of the Government and Supreme Court clearly said by Privatization govt. has privatized not the natural resources but only the dealing with such natural resources and hence –

“Constitutional Restrictions applied to government will also be applicable to Private Players” and ultimately the interest of the People and the nation is supreme but again the issue comes “Who will keep watch on such mandate?”, Because by referring such disputes to Arbitration specially foreign seated Arbitration where foreign players are also involved who will balance the Economic interest of such players along with the National Interest keeping in mind the constitutional obligations as set out by the Supreme Court.

2. For the sake of the argument if we accept that there is no such issue because ultimately during the enforcement of such awards, the parties have option to challenge such Award under ACA, 1996 on the ground of – “Public policy” or “violation of Fundamental Law of the Land”. But the existing vagueness of public Policy exception as discussed in first part of the paper has shown that it’s now giving too many possibilities for parties to challenge the Award in the court of Law which is ultimately defeating the whole purpose of Arbitration Process. And if every second Award is being challenged on different grounds, then why even to refer such disputes to Arbitration? It should directly be resolved in the court of law. But this also won’t serve the purpose and ultimately the only solution left is to solve the existing Paradox related to Such Jurisprudence and provide a clear path which make us sure” “Whether the Public Policy of India Supports the Arbitration of Oil and Gas Disputes or It Oppose such Dispute to refer to Arbitration” because until and unless such paradox is not resolved the Arbitration will not give fruitful outcome.

3. Conclusion

Therefore the above study clearly described the recent approach taken by the Supreme Court of India while dealing with Oil and Gas exploration sector specially focusing on the applicability and analysis of “Public Trust Doctrine”. The study demonstrated how Government of India through its policies like NELP by introducing concepts like PSC actually failed to fulfil the constitutional mandate as provided under the Constitution of India. The study investigated that how that government by referring Oil and gas exploration dispute to Arbitration is unable to fulfill its constitutional mandate towards natural Resources by virtue of being the trustee of Natural Resources under the Public Trust Doctrine.