

The Oil and Gas Sector in India: Balancing Business Policies and Public Interest by the Supreme Court of India

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Abstract:

Indian authorities have formulated and implemented several policies for exploration, production, refining, transportation, and distribution of its Oil & Gas (O&G) resources. With respect to governance of O&G industry, though, the Indian Constitution envisions larger role of Central government, however, the legislative power, over O&G resources, has been in contention between Centre and States over the past seven decades. Moreover, the legislative power of the central government over O&G resources is subject to 'public interest' ensuring that the resources are regulated for *common good*. The interaction between business policies and public interest, and law-making power between Centre and States have been subject to the Supreme Court's (Court's) review covering the constitutional aspects of O&G sector. These constitutional decisions determined the energy progression in India, especially understanding the 'shape and form' of energy justice in India. The paper analyses the role of the Supreme Court of India in balancing public interest and business policies through mapping of all the constitutional cases and also important administrative matters, consecutively laying down the foundation of distributive energy justice in India.

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1. INTRODUCTION

One of the initial and widely accepted definitions of energy law enunciated by Adrian Bradbrook¹ emphasises on the allocation of rights and duties concerning exploitation of all energy resources 'between governments and between states'. In India, the allocation of rights and duties among various authorities is laid down under the written Constitution through a 'three-list system' that distributes the legislative power over natural resources among central and respective state governments, or concurrently. Irrespective of the governing authorities, the expansive interpretation of Indian constitution maintains that natural resources are owned by the citizens of India and that the government (be it central or the state) manages the natural resources, as a trustee, in 'public interest'.² The Supreme Court of India (hereinafter referred as the Court), through a series of judgments has clarified the scope and meaning of 'public interest' with an aim to strike a creative balance between the business interest and public policy issues.³ Additionally, due to overlapping legislative authorities between states and the central government, the Court's pronouncements on the constitutional aspects of Oil & Gas (hereinafter referred as O&G) sector has played a crucial role in developing the current regulatory regime governing the business policy aspects as well as public interest dynamics of O&G sector.⁴ These pronouncements have shaped unique system of 'check and balance' on India's energy decision-making with an aim to involve stakeholders at every stage of the energy cycle.⁵

1. Bradbrook AJ, 'Energy Law as an Academic Discipline' [1996] 14 Journal of Energy & Natural Resources Law.
2. Jona Razzaque, 'Application of public trust doctrine in Indian environmental cases' [2001] 13(2) Journal of Environmental Law 221–234.
3. Common Cause a Regd. Society v Union of India and Others (AIR1997SC1886), Essar Steel Ltd. v Union of India and Ors. (AIR2016SC1980), GAIL (India) Limited v Gujarat State Petroleum Corporation Limited [(2014)1SCC329], Mahinder Kumar Gupta and Ors. v Union of India, Ministry of Petroleum and Natural Gas [(1995)1SCC85], Petroleum and Natural Gas Regulatory Board v Indraprastha Gas Ltd. and Ors. (AIR 2015 SC 2978), Reliance Natural Resources Ltd. v, Reliance Industries Ltd. [(2010)7SCC1].
4. Supra 2.
5. See Raphael J Heffron and Kim Talus, 'The Evolution of Energy Law and Energy Jurisprudence: Insights for Energy Analysts and Researchers' [2016] 19 Energy Research & Social Science 1 'Energy justice is a relatively new term and has only been in use for less than a decade, but has come into more widespread use over the last few years. In a nutshell, energy justice concerns ensuring just and equitable decision-making and results for all members of society at each stage of the energy cycle'.

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Under Indian Constitution, legislative powers over various subject matter are distributed through three list systems- Union list (List I: subject matter on which parliament can make law), State List (List II: subject matter on which state legislature makes law), and Concurrent List (List III: subject matter on which both Parliament and State can make law). In a case of a conflict between these subject matters, any Central law is considered superior and States are denuded from legislating on matters regulated by the central government (Article 246, Indian Constitution). With respect to O&G, the central government has law making powers regarding 'Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products' (Article 246; Entry 53, List I). Accordingly, the central government has exclusive domain over allocation of O&G blocks and operational activities covering exploration, production, transmission, refining, etc. State-governments on the other hand, have legislative powers over certain natural resources that are imperative for extracting (and doing other operations relating to) O&G blocks namely: 'Land',⁶ 'Water',⁷ and 'Gas and Gas Work'.⁸ Since 1950, several states in India having O&G resources in their territorial jurisdiction enacted laws on the O&G blocks. However, on every such occasions, the Court⁹ was categorical that if a dispute between Centre and State, over the law-making powers on O&G sector arises, the central government's power would prevail¹⁰. Be that as may, several states enacted legislations regarding other ancillary matters concerning interactions between O&G Sector and other natural resources, resulting into overlapping jurisdictions leading to protracted disputes regarding Centre-state law making powers. Though the legislative power relating to exploration, production (and other operations) of O&G resources is within the Central Government, this power is not absolute and is subject to public interest.¹¹ The Supreme Court while interpreting the Article 14 of Indian Constitution, *Equality Before Law*,¹² underlines that central government must distribute natural resource keeping the interest of people in mind and should opt for democratic methods of allocation

6. The Constitution of India, Seventh Schedule, Entry 18, List II, 'Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.'

7. The Constitution of India, Seventh Schedule, Entry 17-List II, 'Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water-power...'

8. The Constitution of India, Seventh Schedule, Entry 17-List II, 'Gas and Gas Work'.

9. George Anderson, *Oil and Gas in Federal Systems* (Oxford University Press 2012) 416.

10. Ibid.

11. Entry 54, List I.

12. The state not deny to any person equality before the law or the equal protection of the laws within the territory of India.

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like 'competitive bidding'¹³. The Court further clarified that there are no standard allocation methods for the natural resources and thus 'disposal of natural resources should depend on the facts and circumstances of each case...'.¹⁴

In many cases which are discussed below, the Court clarified¹⁵ that the legislative intention to place O&G sector in Union list is to ensure equitable distribution of O&G resources and to protect public interest through fostering equal access. Specifically, on private parties' exploitation of natural resources, the Court, applying the 'Public Trust Doctrine'¹⁶ emphasized that the government must protect natural resources for the enjoyment of general public at large rather than allowing exploitation of these resources exclusive for private companies and commercial purpose. On the issue of natural gas as well, since this form of energy came to be used much later in energy evolution, the court maintained that the distribution of natural gas should be based on the principle of equality which implies just, non-arbitrary and transparent system.¹⁷

In order to regulate the distribution of O&G resources systematically, the central government, has issued two key policies (1) the New Exploration and Licensing Policy (NELP, 1997), and (2) the Hydrocarbon Exploration and Licensing Policy (HELP 2016). The main aim of both the policies is 'to attract more investment in oil exploration and production'.¹⁸ These policies allowed 100 percent foreign direct investment in O&G sector and have 'investor friendly' (such as tax holidays, enhanced recovery models, and comprehensive access over hydrocarbon resources) provisions for creating 'an enabling environment for industrial investments'.¹⁹ With this understanding, the emerging business policies that allow private parties to exploit O&G sector needs a deeper analysis on the yardstick of 'Public Interest'.

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

14. The Goa Foundation v M/S Sesa Sterlite Limited and others, Special Leave to Appeal (Civil) No. 32138 of 2015.

15. Cauvery Water Dispute Tribunal, AIR 1992 SC 522, Association of Natural Gas v Union of India (2004) 4 SCC 489.

16. In MC Mehta v Kamal Nath, (1997) 1 SCC 388, 'The State as the trustee of all natural resources meant for public use, including lakes and ponds, in under a legal duty to protect them. This duty is of a positive nature requiring the State ...not only to protect the peoples' common heritage of lakes, ponds, reservoirs and streams but to prevent them from becoming extinct and to rejuvenate and preserve them quantitatively... and qualitatively.'

17. (2004) 4 SCC 489.

18. Directorate General of Hydrocarbon, *India's new Hydrocarbon Exploration and Licensing Policy (HELP) A Prelude*, available at <http://dghindia.gov.in/index.php?page?pageId=59&name=E&P%20Regime> last accessed May 3, 2020.

19. Indian Ministry of Petroleum and Natural Gas, *Annual Report 2016-17*, available at <http://petroleum.nic.in/sites/default/files/AR16-17.pdf>, last accessed May 3, 2020.

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This article explores the dynamic judicial interpretation of O&G sector in India; it further highlights the important of such interpretation in defining contours of Centre-State relationship and their sovereign powers.²⁰ The existing literature on energy law states 'Energy Justice' is the most dominating factor in the current revolution of energy law. This article asserts that through reinforcing 'public interest' in Indian O&G sector, the Court has strengthened the distributive energy justice²¹ in India.

To highlight the Court's role in balancing business and public policy aspects of O&G resources, this article covers three types of cases: (1) the matters having sovereignty over O&G resources as one of its key issues; (2) the constitutional-bench determinations that have directly affected the sovereign power of Centre or States over O&G resources, and (3) the administrative matters that have *ratio* impacting O&G resources in India. After analysing series of judgments, we categorize the discussion in four categories: the conflict between Central and state government; balancing act between business interest and public policies; sectorial analysis of O&G sector (upstream, midstream, and downstream), and administrative & pricing matters.

2. CONFLICT OVER LAW MAKING POWER BETWEEN THE CENTRE AND STATES

By placing O&G resources in Union List, the constitution-makers ensured that no state regulates the exploration and production of O&G restricting its distribution among people at large, beyond the territorial boundaries of a particular state.

Invoking its law-making powers, the Central government enacted, *The Oil Fields (Regulation and Development) Act, 1948*, conferring itself with the power to (1) make rules for regulating the authorization of the contract areas, including offshore and onshore, (2) determine rates of royalty payable by the operators for both onshore and offshore blocks, and (3) provide for the regulation of oilfields and for the development of mineral oil resources in public interest. Subsequently, in 1962, a legal tussle emerged on the subject matter of interpreting the States' power over 'Gas and Gas Work' (List II, Entry 25)²². In this matter, the impugned statute, *Oriental Gas Company Act, 1960* passed by the West Bengal State legislative assembly transferred certain powers regarding manufacturing and sale of 'fuel gas'²³ to one of the state

20. Raphael J Heffron and others, 'A treatise for energy law' [2018] 11(1) *The Journal of World Energy Law & Business* 34–48.

21. Raphael J Heffron, 'The application of distributive justice to energy taxation utilising sovereign wealth funds' [2018] 122 *Energy Policy* 649–654.

22. *The Calcutta Gas Company and others v The State of West Bengal And Others*, 1962 AIR 1044.

23. Defined as 'coal gas, natural gas and the like' under the impugned State Act.

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authorities. Subsequently, the state authority issued directions regarding manufacturing and selling of 'fuel gas'. These directions of the state authority was challenged by a private corporation involved in selling of 'fuel gas' on the ground that 'manufacture and sale of fuel gas' is under the domain of central government asserting that state government cannot make law on 'fuel gas' under the 'Gas and Gas Work'.

The Court rejected the challenge determined that since 'Gas and Gas Works' is included in State List, fuel gas, being gaseous in its state, is exclusively a subject matter of State. On the overlapping subject entries, the Court emphasized the subject matter conflict between Centre and State should be resolved by harmonizing the overlapping effect on the subject matter rather than declaring the legislative power of state authorities over the disputed subject matter as *ultra vires*. Later the same year, the Court deviated from its early observation concluding that natural gas does not fall under 'Gas and Gas Work', Entry 25, List-II. The Court through a reference²⁴ (under Article 143 of Indian Constitution) made by the president of India²⁵, assessed the constitutional validity of the state of Gujarat's '*Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001*'. This Act conferred Gujarat with exclusive powers to regulate matters connecting or incidental to transmission, supply, and distribution of 'natural gas', in the interest of public and to promote gas sector in the State. Gujarat asserted that 'Gas and Gas Work' under the State List includes natural gas and that it has legislative power to regulated 'matter in gaseous state which predominantly consists of methane'. On the other hand, the Central Government contended that 'natural gas' exclusively falls under O&G resources.

The Court, considering the wider issue: if State governments can regulate any aspects of natural gas, determined that gaseous matter comprising mainly of 'hydrocarbon' cannot be isolated from the definition of 'petroleum products' which is already governed by central authorities (by the virtue of Entry 53, List I). The Court invoked the doctrine of 'pith and substance'²⁶ to assess the

24. Article 143: Power of President to consult Supreme Court... If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

25. In Special Reference No. I of 2001 v Under Article 143(1) of Constitution of India.

26. State of Bombay v FN Falsara (1951 AIR 318), The doctrine is used as a legal test when one level of government encroaches the exclusive jurisdiction of the the other level of the government. Primarily, in case of Indian Constitution, the Doctrine is applicable to test if state governments have encroached the exclusive jurisdiction of the central government by legislating on a particular subject matter. The doctrine states that if some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under

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nature and content of the State legislation and stated: 'when there is an irreconcilable conflict between the two legislations, the Central legislation shall prevail. However, every attempt would be made to reconcile the conflict'.

The Court while declaring the State Act as ultra-varies clarified the status of natural gas:

Under Entry 53 of List I, Parliament has power to make legislation for regulation and development of oil fields, mineral oil resources; petroleum, petroleum products, other liquids and substances declared by Parliament by law to be dangerously inflammable. Natural gas product extracted from oil wells is comprising of methane. Production of natural gas is not independent of the production of other petroleum products... For free and smooth flow of trade, commerce and industry throughout the length and breadth of the country, natural gas and other petroleum products play a vital role.

While rejecting the State's argument that a State can regulate natural gas by the virtue of Entry 25, List II, 'Gas and Gas Work', the Court concluded: 'The meaning of the term "gas works" is well understood in the sense that the place where the gas is manufactured. So, it is difficult to accept the proposition that "gas" in Entry 25 of List II includes Natural Gas, which is fundamentally different from manufactured gas in gas works. Therefore, Entry 25 of List II could only cover manufactured gas and does not cover Natural Gas within its ambit'.

The Court clarified that 'Gas and Gas Work' under the State List is restricted to 'manufacture gas and gas work only' and does not cover natural gas which falls under legislative competence of the Centre and concluded:²⁷ '...Thus, the legislative history and the definition of "petroleum", "petroleum products" and "mineral oil resources" contained in various legislations and books and the national interest involved in the – all these factors lead to the inescapable conclusion that "natural gas" in raw and liquefied form is petroleum product and part of mineral oil resource, which needs to be regulated by the Union.'²⁸

Fortifying this position, the Court, in *Association of Natural Gas vs Union of India*,²⁹ observed: 'If one State alone is allowed to extract and use natural gas, then other States will be deprived of its equitable share. This position goes on to fortify the stand adopted by the Union and will be a pointer to the conclusion that "natural gas" is included in Entry 53 of List I (*central law-making power, emphasis added*).'

another List, then it must be held to be valid in its entirety, even though it might incidentally trenches on matters which are beyond its competence.

27. In Special Reference no. 1 of 2001.

28. Special Reference No. 1 Of 2001 v Under Article 143(1) Of Constitution of India.

29. 2004 4 SCC 489.

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With this understanding, a legal conundrum emerged when the State of Nagaland, by the virtue of its special status in Indian Constitution,³⁰ passed regulations for allocating and further managing O&G blocks within its territory. The State of Nagaland was conferred with the special status for its power to own and transfer land and incidental resources with an aim to safeguard the interest of tribal communities.³¹ The State legislative assembly of Nagaland, by the virtue of its special status through Article 371-A (1) (a),³² in 2010, passed a resolution making all the central legislations governing O&G resources in the state redundant. Deriving its power this resolution, the Nagaland state legislature formulated 'Nagaland Petroleum and Natural Gas Regulations, 2012' (NPNG) and set up an NPNG Board for undertaking all activities related to oil and natural gas mining. As per the NPNG rules, the Nagaland government in 2012 invited Expression of Intention (EOI) for its eleven oil and gas blocks including those that were already distributed by the central government through centralized bidding under NELP regime. The NPNG rules were subject to public criticism as the rule did not provide compensation for requisition and acquisition of land to the land owners of the State and only offer sharing of revenue in case discovery of O&G resources.³³

The Central government, not agreeing to this action of Nagaland, issued an advisory conveying: 'Article 371-A does not confer legislative power to the Legislative Assembly of Nagaland on Regulation and Development of Mineral Oil. The power to make law in respect of subjects covered under List- 1 of the Seventh Scheduled and Constitution, including Entry 53 of List 1, rests with the Parliament. Therefore, the Ministry (central government) opined that, the resolution passed by the Nagaland in July 2010, is unconstitutional and invalid'.

The Gauhati High Court conducted a *suo-moto* hearing and passed an interim order clarifying that the State of Nagaland enjoys the special status to legislate over 'transfer of land and its resources' but the State does not enjoy exclusive legislative right over O&G resources. On this specific question of

30. Ligia Noronha and others, 'Resource Federalism in India: The Case of Minerals' [2009] 44 (8) Economic and Political Weekly 51–59 'The Indian constitution grants special status to Nagaland on the basis (1) resource crunch faced by the state, (2) Low per capita income, (3) Non-viable nature of state finances, (4) Economic and infrastructural backwardness, (5) Presence of sizeable tribal population, (6) Hilly and difficult terrain, (7) Strategic location along international borders, and (8) Low population density'.
31. Ministry of Home Affairs, Study on compensation to resource bearing States [Oil and Natural Gas] Submitted to Inter-State Council Secretariat, Project Report No. 2006RD21.
32. (1) Notwithstanding anything in this Constitution... a) no Act of Parliament in respect of ownership and transfer of land and its resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides.
33. Lotha Hoho and Others v State of Nagaland, PIL no. 4 (K) of 2015 Kohima Bench of Guwahati.

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legislative competence, the High Court, in its order stated that O&G sector falls under exclusive domain of Central government and the State under 371-A may not be able to legislate on O&G sector, stating: 'Article 371 (A) of the Constitution do not confer competence on the Legislative Assembly of Nagaland to legislate on a subject, which is within the exclusive domain of Indian Parliament and opined that it requires further deliberation of the Court'. The High Court, in its order, also highlighted that the impugned state legislation, NPNG Act, lacked the component of 'Public interest' as the NPNG does not provide any safeguards and provisions for compensation to the land owners in the process of oil exploration until and unless oil is discovered.

The settled position that Central Government has legislative power over O&G resources is not yet fully resolved considering the States enjoying special status in India, particularly Nagaland. These States may regulate its O&G resources leading to a conflict between central government's exclusive domain and special constitutional status of state government. Such matters are usually resolved through centre-state diplomacy; however, as of now, there is no clear legislative or judicial determination on such disputes under Indian legal regime. It would be interesting to see the evolving Centre-State trend if a matter concerning exclusive legislative power of central government vis-à-vis special constitutional status of a state reaches to the Court.

The O&G resources are unevenly concentrated within a few Indian states and if the constitution would have granted legislative power over these resources to the respective state government, it would have been difficult to uniformly distribute O&G resources among other states. This would, in turn, defeat the *quasi-federal* constitution of India that allows state government to legislate over a number of subject-matter. However, while the fair distribution of O&G resources was facilitated through the three-list system under the Indian constitution, more recently, the '*public interest*' in O&G resources has been in direct conflict with the accelerating business policies. The subsequent sections of the paper highlight such interaction between business policies and public interest and emerging conundrums from such interactions.

3. BUSINESS POLICY-PUBLIC INTEREST NEXUS

The 'business policy vis-à-vis public interest' discourse has constitutional foundation through Article 14 of Indian Constitution, *Equality before Law* (Fundamental Rights chapter) and through Article 39 (b) of Indian Constitution, *to Own and Control Resources for Common Good* (Directive Principles of State's Policy chapter). The Court has, although restrictively, reviewed the functioning of legislature on the yardstick of 'public interest' under Article 14 of Indian Constitution stating that Article 14 read with 39 (b) ensure that allocation of natural resources must not be done arbitrarily and

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should be made adhering to the 'public interest'.³⁴ It clarified that the judiciary may review policy matters only if it is satisfied that the policy in question or its implementation is arbitrary.³⁵ In matters, relating to natural resources, including O&G resources, the Court stated: 'No direction can be given or is expected from the judiciary unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provision.'³⁶

Also, the Court clarified that it may not propose a new policy or strike down the existing policy on the ground that 'another policy decision would have been fairer or wiser or more scientific or logical'; but the it may interfere when government's policy decision is 'patently arbitrary, discriminatory or mala fide' and in violation with Article 14 of Indian Constitution.³⁷ As per the contemporary judicial assessments, although, natural resources can be allocated by the government to a private operator for commercial exploitation, the method of allocation and further exploitation should not be arbitrary and must have a 'nexus to the objective of subservient the common good'.³⁸ In this context, the Court, while deciding on infamous 2G Spectrum case (Natural Resources Allocation, in re, Special Reference No. 1 of 2012),³⁹ observed⁴⁰ 'if the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.'

In the same case, the Court extensively reviewed the interaction between business policies (in the form of 'Contractual agreements' with the government) and 'public interest' determining that if an operator enters into a contract with the government, the contract, despite being a policy matter,

34. Sanjeev Coke Manufacturing company v Bharat Coking Corporation Limited, AIR 1983, SC 239.

35. See *Maharshi Avadhesh v Union of India*, 1994 Supp (1) SCC 713; *Ahmedabad Women Action Group v Union of India*, 1997 3 SCC. 573; *Satish Chandra v Union of India*, AIR 1995 SC 138; *English Medium Students Parent Assn. v State of Karnataka*, AIR 1994 SC 1702; *Peerless General Finance and Investment Co. Ltd. v RBI*, AIR 1992 SC 1033.

36. *K Garg v Union of India* (1981) 4 SCC 675 : (1982) 133 ITR 239.

37. *Permian Basin Area Rate cases, In re* (1986) 4 SCC 566, 605, 606, para 34: (1987) 1 SCR 1.

38. *Ibid.*

39. In 2008, the Central Government of India granted 122 telecom licenses to various companies in response to 575 applications for licenses. In a report in 2010–11, the Comptroller and Auditor General (CAG) of India concluded that the allocation of these 122 licenses was characterised by policy gaps and irregularities in procedure. On February 2, 2012, the Supreme Court of India, in response to a Public Interest Litigation (PIL), cancelled all 122 telecom licenses granted in 2008 and directed that the spectrum linked with these licenses be auctioned.

40. (2012) 10 SCC 1.

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would be subject to Article 14, 39 (b), and public trust doctrine. Therefore, all the contracts, regarding natural resources exploitation, must have an element of 'public interest' and should be allocated by the government in fair and non-arbitrary method. The Court clarified that such agreements would be subject to judicial scrutiny for public interest purposes and stated⁴¹ 'Public trust doctrine provides for a high degree of judicial scrutiny of any action of State in allocating/dispensing/alienating natural resource held on public trust, no matter how consistent with existing legislations.'

Whenever government enters into a contractual arrangement, the terms must be in harmony with the principles of equality before law and in public good: 'In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: public authority possesses powers only to use them for public good.'⁴²

3.1 Regulatory Development of O&G Sector in India: Emerging Contestations

The evolution of O&G sector from the post-independence period in India has been largely in three phases: first, since 1950 through late 1970s- the nationalization phase O&G blocks were awarded by the central government to National Oil Companies, namely Oil India Limited (OIL) and Oil and Natural Gas Corporation (ONGC). The second phase, towards late 1970s, the central government began inviting private players and offering O&G blocks systematically through competitive bidding for 'exploration and production' of the oil and related natural resources. During this phase the government did not have a uniform policy framework and the contractual regime between the government and operator was decided on case by case basis⁴³. However, the nine-bidding processes from 1979 through 1995 was not successful and the government failed to attract much investment as the operators were not offered substantive cost recovery models for exploration costs in case of no discovery. In pursuit of reviving the O&G sector to bring in private investment, during the third phase in 1999, the Central government allowed 100 per cent Foreign Direct Investment in Oil and Gas Sector through 'New Exploration Licensing Policy (NELP)'. The prime objective of the policy⁴⁴ was 'to attract significant risk capital from Indian and Foreign companies, state of part technologies,

41. Ibid.

42. Ibid.

43. Directorate General of Hydrocarbon, *Indian Oil and Gas Industry*, available at <http://www.dghindia.org/index.php/page?pageId=56&name=E&P%20Regime>, last accessed May 3, 2020.

44. Ibid.

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new geological concepts and best management practices to explore oil and gas resources in the country to meet rising demands of oil and gas’.

NELP conferred wider and favorable stakeholder-ship to private party through incentives such as differentiated royalties, custom duties and cess exemptions, and a period of seven-year tax holiday.⁴⁵ Under the NELP regime, a private operator entered in to a ‘Product Sharing Contract (PSC)’ with the central government. The PSC is a ‘profit sharing’ contract allowing operators to recover the exploration costs by not sharing a part of their petroleum production until the operators recover their exploration costs. The Court, in 2010, while assessing the NELP in light of public interest observed that this ‘business friendly’ policy framework that has cost-recovery mechanism for operator may be implement as long as they are not ‘in breach of any public policy and public interest’⁴⁶ (*Reliance Industries Limited vs. Reliance Natural Resources Limited*, (2010) 7 SCC 1, hereinafter referred as ‘Reliance Case’).

Subsequently, in 2012, the Government of India’s independent auditor–Comptroller Auditor General India (CAG)⁴⁷ examined the government’s contractual framework, including the NELP. The CAG report concluded that, under NELP when the operators were given an opportunity to recover their exploration costs in the form of entitlement over the produced hydrocarbon resources, they did gold-plate the exploration cost. CAG reported that the operators inflated their exploration cost and claimed wider share of ‘cost petroleum’ reducing the government’s share of revenue from the O&G resources India.⁴⁸ However, the DGH asserted that the difference in cost is due to the difference in cost-accounting method.

In 2018, the NELP was replaced with Hydrocarbon Exploration and Licensing Policy (HELP), where operators are obliged to share the produced hydrocarbon resources with the government without any recovery model and operators are no more allowed to recover their exploration costs and have to share O&G resources from the start of their production phase. The government stated that the HELP regime will ‘*remove the discretion in the hands of the Government, reduce disputes, avoid opportunities for corruption, reduce*

45. Directorate General of Hydrocarbon (2016), *Evolution and History of Oil and Gas Industry*, available at <http://www.dghindia.org/index.php?page?pageId=56&name=INDIA'S%20E%20and%20P%20REGIME>, last accessed May 3, 2020.

46. *Reliance Industries Limited v Reliance Natural Resources Limited*, (2010) 7 SCC 1.

47. See Article 148 and 149, Indian Constitution.

48. Comptroller Auditor General of India, *Audit of Hydrocarbon Production Sharing Contract for KG-DWN-98/3 Block for the Financial Years 2012–13 and 2013–14*, available at https://www.cag.gov.in/sites/default/files/audit_report_files/Union_Civil_Compliance_Report_11_2016_Chapter-14.pdf, last accessed May 3, 2020.

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administrative delays and thus stimulate growth'.⁴⁹ The, Ministry of Petroleum and Natural Gas (2016), noted that the cost-recovery framework, NELP, went against the 'public interest' as the Central Government will lose out its share of natural resources giving wider share to the operators. On the other hand, the DGH, categorically stated that although HELP does not provide a cost-recovery mechanism to operator, is a business friendly policy as it provides single clearance window for exploiting all kinds of hydrocarbon resources in a block irrespective of the nature of extraction activities involved.⁵⁰

The transition from NELP to HELP, like other regulatory changes in O&G sector, was fostered through the Court's interpretation of Article 14 and Article 39 (b)⁵¹ of Indian Constitution directing Central government to make policies that secure the 'ownership and control' of material resources for 'common good' (In re presidential reference, 2012). Further, the Court's observation in the Reliance Case highlighted that implementation of cost-recovery mechanism under NELP may not pass the test of 'public interest'. The Court's observation in the Reliance Case was corroborated by the CAG report that reported the inflation of exploration costs by operators in order to have wider share over natural resources ultimately defeating the purpose of 'public interest' in O&G resources. This narrative form a significant matter of discussion in judicial pronouncements on various aspects of O&G sector, which are discussed in following sections.

4. JUDICIAL ASSESSMENT OF UPSTREAM, MIDSTREAM, AND DOWNSTREAM ACTIVITIES OF O&G SECTOR

The Reliance Case which was discussed above remains the only case that comprehensively analyses the contractual regime under NELP from 'public interest' perspective invoking constitutional ethos of 'common good' to resolve private parties' dispute over O&G resources. As discussed in the earlier sections, the scope of cost inflation under NELP regime, as highlighted in Reliance Case triggered transition from NELP to HELP and acted as a fulcrum to the balance between business policy and 'public interest' in the O&G sector.

49. Press Information Bureau, Major Policy initiatives to give a boost to Petroleum and Hydrocarbon Sector, available at <http://pib.nic.in/newsite/printrelease.aspx?relid=137661> last accessed May 3, 2020.

50. Directorate General of Hydrocarbon, Policy Reforms, available at <http://www.dghindia.org/index.php/page?pageId=61&name=E&P%20Regime>, last accessed May 3, 2020.

51. 'The State shall, in particular, direct its policy towards securing ...that the ownership and control of the material resources of the community are so distributed as best to subserve the common good'.

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For the purpose of aligning the Court's assessment with the activities regulated through O&G polices, this section is divided into three parts: judicial assessment of (1) allocation, exploration & production activities, (2) distribution, supplying, and (3) other administrative matters. The first two sections are analysed through the Court's finding in the Reliance Case and the last section discusses the 'public interest' aspects of administrative matter, mainly allocation of retail outlets, in O&G sector.

4.1. Allocation, Exploration & Production Activities and Court Assessment

Allocation and 'exploration and production' of the oil and gas sector is widely regulated by the contractual terms between the government and the project proponent. As we seen above, the Court clarified that the government can still interfere in the manner the PSC is executed between the various stakeholders. The Reliance case saw the Court extensively looking into the constitutionality of NELP and PSC contractual framework. The prime issue was whether the central government, by virtue of Entry 52 and 53 of List I, can subject business policies and the contractual terms and conditions to 'Public interest'. The PSC framework, that central government signed with an operator under NELP regime, did not have any specific clause that allowed the government to change contractual obligations after the execution of the contract. However, in the *Reliance Case* the central government asserted that it may change the contractual obligations, after its execution, provided such change had been bought in the public interest.

The Court observed that the government's contracts with operators can be modified for public interest stating: '...constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the Public Trust Doctrine. Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application'.

The Court observed while assessing the reason for privatising the O&G resources and vesting the law-making power with the Central government that: 'due to shortage of funds and technical know-how, the Government has privatized such activities through the mechanism provided under the PSC. It would have been ideal for the PSUs (Public Sector Undertakings) to handle such projects exclusively.'

In the same case, the Court discussed that the nature of profits gained from O&G resources must ideally belong to the Central Government and the Centre must disseminate the profits as per the contractual obligations with the operator keeping in mind the interest of public at large.

The Court emphasized that the Central government's policies concerning natural resources must 'conform to Article 14 of the Constitution of which

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non-arbitrariness is a significant facet'.⁵² Central government may not exercise any 'unfettered' discretion in exercising its power as the central government as a public authority possess power only to use them for 'public good'. For this reason, the O&G policies promulgated by the Central government were made subject to 'public interest'. The Court continued that the private contractual terms, between the central government and the operators, are also subject to 'public interest' and the central government has power to change these contractual terms in interest of the public at large. The Court, in the *Reliance Case*, concluding its finding by analyzing the dynamic between the 'free market' business policy and public good: 'We are not saying that markets have no role to play in a developing economy or that private initiative be suppressed and that all markets are essentially and only tools for expropriation and continuance of social injustices. We are stating that our Constitution posits that markets can be inimical to social justice, especially when left unregulated.'

4.2. Supply and Distribution Activities

In the same case, the Court analysed the implementation of NELP and PSC regime for the purpose of distribution and supplying agreements. The main issue was whether Central Government through Empowered Group of Ministers (EGOM)⁵³ can interfere in the O&G resources distribution and supply contracts signed, under PSC regime, between two private entities. It was observed: 'the objective of the PSC inter alia is to regulate the supply and distribution of gas. Keeping this objective of NELP, the PSC must be interpreted to give the power to the Government to determine both the valuation and price of gas. It is not possible to restrict the power of the Government in such matters of national importance, especially when the governing contract, the PSC, also provides for it'. The Court highlighted the executive powers under the Indian Constitution and stated that the central government enjoys its Constitutional powers under Article 73⁵⁴ and

52. In *Food Corporation of India v M/s Kamdhenu Cattle Feed Industries*, 1993 1 SCC 71.
53. Empowered Group of Ministers (EGoM) is a Group of Ministers (GoM) of the Union Government who, after being appointed by the Cabinet, a Cabinet Committee or the Prime Minister for investigating and reporting on such matters as may be specified, are also authorised(empowered) by the appointing authority to take decisions in such matters after investigation.
54. Extent of executive power of the Union
- (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend
 - (a) to the matter with respect to which Parliament has power to make laws; and
 - (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any treaty or agreement: Provided that the

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Article 77(3)⁵⁵ in order to fulfil the objectives of the public policy directives relating to distribution of Natural Gas. The Court observed that an Operator's distribution and supplying operations are subject to contractual obligations which must conform to public interest derived from Article 14,⁵⁶ Article 39 (b)⁵⁷ of Indian Constitution and Public Trust Doctrine. The Court held: 'Reliance India Limited's (RIL) right of distribution is based on the PSC, which itself is derived from the power of the Government under the constitutional provisions, including Article 297, Articles 14 and 39(b) and the Public Trust Doctrine.'

The Court clarified that 'public interest' mandate transgresses through wide range of activities in O&G sector, namely allocation, exploration, production, distribution, and supply.

4.3. Administrative Matters

Since public interest has been a running narrative from exploration till distribution stage, the end-user activities such as refining, and supply has been subject to various administrative regulations by both Central and State government. Initial disputes surfaced when the State Governments started issuing guidelines on eligibility criteria for awarding O&G resources outlets. The respective state governments, based on their socio-economic conditions, have laid down regulatory mechanism over these activities. The central government has challenged these regulations claiming that it retains exclusive power to legislate over O&G resources. The Court assessed the legislative intent of state and central authorities and analysed the disputed regulations considering public interest.

executive power referred to in sub clause (a) shall not, save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect in which the Legislature of the State has also power to make laws

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution Council of Ministers.

55. The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.
56. 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
57. the ownership and control of the material resources of the community are so distributed as best to subserve the common good; It is a part of Part IVA that is Directive Principles of State Policy of the Indian constitution where it protects the economic equality of the citizens.

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The Court in 1994 stated that although the Central Government's legislation, Petroleum Act 1934, is constitutionally valid and regulates O&G sector comprehensively, the respective State Government may pass regulation concerning eligibility criteria based on its socio-economic conditions. These measures may include imposing eligibility restriction in awarding O&G retail outlets dealerships and distributorship guidelines, provided that such restriction is in harmony with constitutional ethos of economic and social justice. The Court observed that states' guidelines imposing eligibility criteria relating to distribution of O&G resources on socio-economic basis is aligned with Article 39 (b) of Indian constitution and preamble of Indian constitution that envisages economic and social justice.⁵⁸

In 1997, while deciding on the matter if allotment and allocation of petrol pump is subject to public interest, the Court clarified that the allotments of retail outlets for petroleum products (Petrol Pumps) must adhere to the principle of natural law under Article 14⁵⁹ of the Indian Constitution:⁶⁰ 'The petrol pumps/gas agencies are a kind of wealth which the Government must distribute in a bona fide manner and in conformity with law.'

For the Court, the fundamental right guaranteed under Article 19(1) (g), *right to practise any profession, or to carry on any occupation, trade or business*, does not prevent the State from making any law regulating the revenue of a corporation irrespective of the fact whether the corporation is government-funded or is completely self-funded. Although, the government in a past few decades concentrated specifically on privatizing the sector, the Court took a firm stand that 'common good and public interest' must be the key factor across the upstream, midstream, and downstream sectors of O&G resources.

5. PRICE FIXATION: CONTRACTUAL TERMS VIS-À-VIS PUBLIC INTEREST

The price fixation of O&G resources under government contracts may affect the end-users, public at large substantially. Showing reluctance to involve itself into the 'complex' fiscal matter, the Court, initially, refused to interfere in the price fixation matters of O&G resources. The first instance where the Court actively reviewed the price fixation methodology was while deciding the issues under *The Oil & Natural Gas Commission and another vs. The Association of Natural Gas Consuming Industries of Gujarat (1990)*. The case was an appeal against the Gujarat High Court Judgment deciding that Oil and Natural Gas

58. In *Shri Mahinder Kumar Gupta and Others v Union of India, Ministry Of Petroleum And Natural Gas*, AIR 1994 SC 5139.

59. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

60. in *Common Cause a Regd. Society v Union of India and Others* AIR 1997 SC 1886.

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Corporation, as a Public Sector Undertaking, has a duty to supply natural gas to anyone who requires and must follow a 'cost plus' method (adding reasonable returns for the investment to its cost of production) for calculating the gas price. The case was filed by the association of Natural Gas Consuming Industries challenging the ONGC methodology of price fixation. The High Court stated that price fixation is a legislative prerogative and ONGC should fix the gas price by adding reasonable returns for the investment to its cost of production (Cost plus). The ONGC appealed to the Court asserting (i) that its prices had been determined on the basis of well-known principle, i.e. the ruling prices for an alternate fuel which is not arbitrary; (ii) that while PSUs ought not to be allowed to exploit the consumers, it is necessary to ensure they make reasonable profits; (iii) that in integrated production of crude oil and gas, it was almost impossible to work out the cost of a particular product and hence cost plus method is difficult to implement.

Allowing the appeals and upholding the prices charged by the ONGC, the Court held that the ONGC does not 'primarily' have the legislative power but the cost plus method should not be insisted on ONGC as it is ideal for the commodities having monopoly and that are vital to human need. Thus, price fixed should be minimum possible as the customer or consumer must have the commodity for his survival and cannot afford more than the minimum. The producer should not, therefore, be allowed to get back more than a minimum profit.

The Court also observed that, even though price fixation is generally a legislative function, the Parliament generally provides for interference only at a stage where in pursuance of social and economic objectives or to discharge duties under the Directive Principles of State Policy, control has to be exercised over the distribution and consumption of the material resources of the community. The Court stated: 'it (price fixation) appears to have been guided by the needs of the situation and the nature of the distribution system that is in operation... where such manufacturer being a State instrumentality, has to conform to Articles 14 and 19 of the Constitution'.

The Court maintained this position for years, refusing to entertain the issues concerning 'price-fixation', stating that such issues were of administrative and/or legislative competence.⁶¹ For instance, in the case of *GAIL (India) Limited Vs. Gujarat State Petroleum Corporation Limited*⁶² (2014), and in *Arun Kumar Agrawal v. Union of India and Ors.*,⁶³ the Court specifically stated that it will preclude to review complex economic decision taken by the State or

61. *Arun Kumar Agrawal v Union of India and Ors.* 2013 7 SCC 1; in *Commissioner of Income Tax, Dehradun and Anr. v Enron Oil and Gas India Ltd.* AIR 2007 SC 1842.

62. *GAIL (India) Limited v Gujarat State Petroleum Corporation Limited* 2014 1 SCC 329.

63. (2013) 7 SCC.

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its instrumentalities and the same should be sorted through arbitration. Deviating from its earlier stance of precluding judicial review in O&G price determination, the Court, in *Essar Steel Ltd. vs. Union of India and Ors*⁶⁴ (2016), recognised the central government's over-riding powers under Indian Constitution, to make pricing related policies.

In this case, Essar Steel, (operator) signed Gas Supply (GS) Agreement with government agencies for purchase of *Regasified Liquefied Natural Gas*, RLNG at a fixed price. In June 2007, the Central Government issued a policy directive and changed the gas prices on a non-discriminatory basis and on a uniform pool price, to avoid loading high-cost of additional RLNG being made available to prospective customers. The operator, aggrieved with the change in price, approached the High Court which upheld the Central government's policy decision. Subsequently, the operator moved to the Court arguing that Central government cannot change the pre-determined fixed price through a policy derivative and that the government cannot interfere with the contract between the two private parties. Further, the operator contended that that change in policy can be no defence for breaching contract and is violative of Article 14 of the Constitution. The Court dismissed the appeal noting that the price change was made in 'public interest' as prices are controlled by global market forces. Further, the Court noted that the GS contract signed by the operator had clauses about price revision on account of change in government policy.

The Court quoted the judgement in *Association of Natural Gas vs. UOI* [(2004) 4 SCC 489] that: 'Natural gas being a petroleum product, we are of the view that under Entry 53 List I, Union Govt. alone has got legislative competence,' and stated:

by virtue of Article 73 of the Constitution of India read with Entry 53 of List I, the Union has the power to legislate and take policy decisions in relation to the matters pertaining to mineral oil resources and inflammable substances, which includes RLNG. Further, as has been correctly recorded in the impugned judgment and order, there is no existing legislative provision as far as fixing of the price of RLNG is concerned. Thus, the executive of the Union of India is well within its right to exercise its powers under the Constitution to take such decisions by way of policy decisions.

Although, the Court till 2016 did not actively involved itself in adjudicating financial matters, in recent years, intervened in the price fixation mechanism of O&G sector subjecting the matter to the test of article 14 of the Indian Constitution. The Court articulated that it may do so in the if an important question of public policy issue (as fixation of price in this case) emerges.

64. *Essar Steel Ltd. v Union of India and Ors.*, AIR 2016 SC 1980.

6. CONCLUSION

After the liberalisation of O&G sector in 1997, there have been challenges in balancing the vast magnitude of Indian constitutional public policy aspects vis-à-vis economic and business interests, and to regulate the hydrocarbon resources in just and equitable manner.

A review of the Court's judgments, relating to O&G sector, highlights that the judicial review of O&G regulations has been consistent in reinforcing the 'public interest'. On the specific question of the legislative intent in placing O&G sector in the Union List, the Court concluded that the Constitutional drafters' view that the Central government should regulate O&G resources to ensure *fair and equitable sharing* of the resources among all the states, ensuring that India's O&G policies are well-aligned with distributive energy justice. Further, the Court on the issue of 'natural gas', having hydrocarbons, falls under the Union List rather than State List and therefore, state governments cannot regulate the natural gas sector. This ensured equity, in order words, energy justice across states irrespective of which the state have the resources. Energy justice seems to be a new narration in this legal evolution. While the exclusive powers to regulate the O&G sector was vested with the Central government, the Court restricted the wider power and subject it to the public interest across all the operational fields of the O&G sector.

Even in terms of the contractual terms under NELP that gives leverage to operators in making marginally high profits at the cost of public interest, it was reiterated that through the Public Interest Doctrine the ultimate owner of the natural resources is the 'public at large' and the central government must safeguard their interest while regulating contractual terms and conditions with private corporations. Moreover, the Court also stated the central government, in public interest, may change its contractual obligations with the private parties and such modifications cannot be challenged on the basis on private contractual law. In striking a balance between business and public policies, though the Court showed reluctance in reviewing price regulation, but took a view any contractual regime of the sector will be tested within the lens of public interest. The state governments were allowed to reserve allocation of O&G refining and distribution on reasonable grounds like reserving such contract for socially and economically backward communities. Reiterating its finding regarding NELP contractual obligation, the Court determined that central government, through Empowered Group of Ministers (EGoM), can modify private contractual matters concerning 'public interest'.

Unlike other aspects of O&G sector, for end-consumer price fixation, the Court until 2016, maintained that judicial review precludes complex financial matters and such matter must be referred for arbitration. In 2016, however, the Court took a different approach emphasising the need for judicial intervention

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in determining if pricing mechanism complements the constitutional philosophy of common good and public interest.

While assessing the Court's judgment on O&G sector, it is clear that that, over the past seven decades, the Indian court has reaffirmed (time and again) the due process of energy decision making; such due process is characterised by ensuring accountability of decision making on the yardstick of common good. Consecutively, it would be safe to assess that the Court, through reinforcing 'public interest' in Indian O&G sector, that has strengthened the distributive energy justice in India.