

# ***Regulating India's Coal Sector: Lessons for the Future, from the Past***

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***Shivjeet Parthasarathy***

## ***Abstract***

*This essay will examine the desirability of establishing a regulator for the coal sector, and demonstrate its essentiality. The argument is centrally premised on the Government's policy towards the coal sector, and how these policies are poised to turn the sector into the biggest contributor to India's 5 trillion USD economic goal. With such lofty ambitions, it becomes imperative to ensure that there is an independent regulator, who can steer the sector into efficiency while balancing competing interests. Analysing the need for a coal-sector regulator becomes all the more important when considering how the history of the sector has been coloured with concerns of inefficiency, scams, human rights abuses, and environmental concerns. This paper will look at the historical context of the sector's operation in India and the current policies, evaluate the efficiency of the sector by looking at the policy for allotments of coal blocks and the surrounding litigation, and attempts to chart out a way forward.*

***Keywords- Coal Sector, Regulation, Nationalisation, Privatisation***

In 2020, the Indian Government promulgated a policy wherein it would exit completely from sectors it deemed to be ‘non-strategic’ and leave these in the hands of private players. Even in the ‘strategic’ sectors, it has chosen to reduce the number of state enterprises to allow more private players to operate (Gupta and Nair 2020). Such a move harks back to the bifurcation of public sectors into ‘strategic’ and ‘non-strategic’, and divestment from notified ‘non-strategic’ sectors as had been done in the Budgets of 1998-1999 and 1999-2000 respectively<sup>30</sup>. The move is said to be the most ambitious move since the Vajpayee government’s similar attempt of disinvestment back in the 2000s (Gupta and Nair 2020). The aim of this move is to boost efficiency in these sectors, and to channel these investments into social and development agendas. One such sector that the Indian state has deemed to be ‘strategic’ is the coal sector. The state has adopted a very gung-ho approach to the coal sector, deeming it crucial to India’s target of a 5 trillion USD economy. State-run and private firms are expected to invest 4 trillion INR in the areas of surface coal gasification, new mining plans and cleaner coal projects (Bhaskar 2021). Given this bullish approach to the coal sector and the incremental approach towards privatisation, the time seems ripe for the establishment of a regulator to govern the coal sector. This paper argues for the same, and notes that it is time an independent regulator was established in order to act as a check on activities in the coal sector. Historically, the coal sector has been marred by inefficiency, opacity in the allocation of coal fields, environmental degradation, opacity in the rehabilitation of affected communities, and human rights abuses. Establishing a regulator can help set certain standards for the operation of coal mines which can help reduce the economic and social harms that their operation results in (Baldwin, Cave and Lodge 2012, 15-23).

Regulation theorists posit various factors which are conducive to the facilitation of a regulator. Hancher and Moran note that there can be various factors that lead to the rise of regulation namely, national, political and legal contexts, historical timings, and the character of the markets (Hancher and Moran 1989, 271). Majone states that it is the goal of bringing in efficiency by correcting market failure, informational asymmetry and negative externalities that leads to the creation of a regulatory state, and privatization can in fact strengthen the regulatory capacity of the state (Majone 1994, 79). The merits of these arguments are manifested in the coal sector in India, and it is these factors which have been conducive to the development of the sector as it moved from a nationalised setup to a privatised one. However, if the full potential of the sector is to be realised, a stable regulator is the need of the hour. This paper will focus on the historical context of the coal sector in India, look at the concerns of efficiency and the opaque methods of allotment that have plagued the sector, and then plot a way forward for India to truly take advantage of its coal deposits.

### Historical context of coal in India

In the period post Independence up until 1970, coal mining and production in India were performed by both private players and government undertakings such as the Singareni Collieries Company Limited (SCCL) and the National Coal Development Corporation (NCDC) in India<sup>31</sup>. However, due to concerns of unplanned growth, shortage of coal on account of having to cater to the needs of the growing steel and iron sectors, and unscientific mining and exploratory techniques, the result was the nationalisation of private players in the coal sector (Nayak 2014, 2). This was first done in a phased manner by taking over Coking Coal and Coal Mines, and then subsequently by the nationalisation of coal mines<sup>32</sup>. Privatised coal mines came under the umbrella of the Bharat Coking Coal Ltd. (BCCL) and the NCDC subsidiaries of the Coal Mines Authority Ltd. (CMAL) was formed in 1973. The mandate of this nationalisation project was to reorganise and restructure coal mines to ensure that there was a rationalised, coordinated, and

<sup>30</sup>A historical overview of the Past Disinvestment Policies enacted in India can be found on the Department of Investment and Public Asset Management’s (DIPAM) website. <<https://dipam.gov.in/past-disinvestment-policy>>

<sup>31</sup>A historical overview of the history of coal and its nationalization in India can be found on the Ministry of Coal’s website. <<https://coal.gov.in/en/about-us/history-background>>

<sup>32</sup>The Coking Coal Mines (Emergency Provisions) Act 1971; Coal Mines (Taking Over of Management) Act 1973.

scientific utilisation and development of coal resources in line with what was required for the development of the country<sup>33</sup>. By transferring the ownership of the coal sector to the Indian state, it was hoped that there would be better utilisation of resources to protect the interests of both the coal industry itself and ancillary industries such as the steel and iron industry. In addition to this mandate, it was also hoped that nationalisation would help serve the common good of the development of the nation.

Coal was conferred with a statutory monopoly and brought under the umbrella of Coal India Limited (CIL), an entity spawned out of the CMAL in 1975. CIL would have exclusive rights to perform exploration, prospect, mine, and produce coal. Relevance to Majone's work can be found in attempting to understand the process of nationalisation of coal in India. Majone notes that the rationale for public ownership of utilities is to ensure economic development, employment opportunities, regional income distribution and technical improvements (Majone 1994, 79).

The justification for nationalisation also fell under these broad themes as Kumar notes (Kumar 1981, 824). The private industry was unable to keep up with the demands of the metallurgical industry for coking coal, and it was believed that only the government could 'properly exploit' the resource to serve the common good under Article 39(b) of the Indian Constitution<sup>34</sup>. The mismanagement of employees' wages as well as violations of additional safety standards forced the government to step in to resolve these issues. Lastly, it was also felt that the private sector would not make the requisite investments on its own for output expansion, and would require substantial public funding for the same. It seemed more prudent for the government to take control of the sector and thus ensure better utilisation of resources, a stronger watch over safety and labour matters, and generation of the requisite investments to boost productivity in the sector. This move was also in line with Sah and Daintith's argument of explicit constraints on regulatory arrangements (Sah and Daintith 1993, 468). This argument seemed well justified, as after nationalisation, output from the sector grew from 78 million tons of coal in 1974–75 to 230 million tons in 1995–96 (Sengupta 1999, M25).

However, despite the leap in production, nationalisation brought along with it other inefficiencies that were far below international industry standards. Output quality, movements in productivity, and mining techniques were some of the indicators on which India was not on par with the rest of the world, and it meant that the experiment with nationalisation was turning out to be a failure. Thus began the move towards disinvestment and the liberalisation of the coal sector.

The larger economic liberalisation of the 1990s included the coal sector as well. The first set of reforms came in 1992. The sector was opened up to allow private players, but only in captive mines of end-using industries such as steel, power and cement. There was a decline in the growth rate where from 1992–1996, it clocked in at 4 percent per annum compared to the 6 percent per annum rate during the nationalised years. This was due to a decline in output from 45.36 million tons in 1992–1993 to 40.10 million in 1995–1996 (Sengupta 1999, M26). Consequently, there were high levels of coal being imported despite India having over 200 billion tons in reserves at the time. The reforms were not going according to plan and soon the gears were shifted.

Under the aegis of the Planning Commission, a Committee on Integrated Coal Policy was established by the government in 1995 (Sengupta 1999, M27). The report submitted by the Committee had the following recommendations<sup>35</sup>:

<sup>33</sup>The Coking Coal Mines (Nationalisation) Act 1972; The Coal Mines (Nationalisation) Act 1973.

<sup>34</sup>The Constitution of India 1950, art. 39(b).

<sup>35</sup>Report of the Committee on Integrated Coal Policy, Planning Commission, 1996.

- Open up mining to private investors not only for captive use but also for sale.
- Foreign equity being brought in would receive automatic approval if the foreign equity was up to 50 percent. Amounts higher than that would require requisite clearance by the Foreign Investment Promotion Board and the involvement of the Registrar of Companies.
- Permit foreign investors to set up 100 percent subsidiaries to undertake mining and exploratory ventures.
- Install a competitive bidding mechanism for coal and lignite blocks to determine mining activities.

Given that one of the premises of establishing a regulatory state is the inefficiency of the state in providing certain goods and utilities, liberalisation and allowing private actors entry into the sector seemed like an opportune moment for the establishment of an independent regulator within the sector. As Hancher and Moran have also argued, national timing and political outlook can create a conducive environment for regulatory activity (Hancher and Moran 1989, 279–80). The same can be viewed in the context of the coal sector in India. The liberalization period allowed private players to enter the market and this forced independent regulatory bodies to govern economic activity from an arm's length rather than have the government be directly involved in the activity itself. Moreover, given that liberalization was in line with the kinds of economic policies being adopted by the rest of the world at the time, the manifestation of Hancher and Moran's argument can be seen once again in the restructuring of the Indian economy. Unfortunately, despite there being a very conducive environment created to establish a regulator in the coal sector, it remained uncappeditalised.

Moving ahead in time to the present day, a regulator still has not been established. The closest attempt to establish a regulator was in the form of the Coal Regulatory Authorities Bill 2013 (hereinafter 'the Bill') laid in the Lok Sabha by the Minister of Coal. Unfortunately, the Bill lapsed, highlighting yet another missed opportunity. The aim of the Bill was to establish a regulatory authority that would oversee and conserve resources in the coal sector, protect the interests of coal consumers and producers, and perform any ancillary functions related to the coal sector<sup>36</sup>. Its functions would be to specify methods of testing for quality of coal, monitor and enforce mine closure in accordance with the mine closure plan, regulate standards of operational efficiency except for mine safety, specify the principles of pricing coal and its by-products, and advise the Central Government in the formulations of various related policies<sup>37</sup>. The Regulator also allowed for dispute resolution<sup>38</sup>, as well as for appeals at the Appellate Tribunals for Electricity<sup>39</sup>.

The present push to further liberalise the sector presents another opportune moment for the establishment of a regulator. Leaving operations within the coal sector to an unregulated free market might not lead to the desired outcomes of efficiency that the government seeks to achieve by opening up the sector. Moreover, given that the sector has already been rocked by the 2012 scandal concerning opacity in allocations (which will be looked at in the following section), it is all the more important to have an independent oversight mechanism in place to prevent market failures.

<sup>36</sup>Coal Regulatory Authorities Bill 2013.

<sup>37</sup>Coal Regulatory Authorities Bill 2013, s 18.

<sup>38</sup>Coal Regulatory Authorities Bill 2013, s 20.

<sup>39</sup>Coal Regulatory Authorities Bill 2013, s 21.

## Analyzing the opacity of coal mine allocations

The allocation of coal mines has historically been such that non-arbitrary, just and reasonable methods employed to allocate resources as long as they are in the ambit of public good and public interest, have been constitutionally acceptable. Despite the Mines and Minerals (Development and Regulation) Act outlining that the process of allotment has to be done through auction<sup>40</sup>, judicial decisions have held that the government might dispense with the need to have an auction and can directly work with a private player who approaches the government.

In *Kasturi Lal Lakshmi Reddy v. State of J&K*, the petitioners argued that the state of Jammu and Kashmir did not advertise for inviting offers and created a monopoly in favour of the company who was allotted the resin extraction lease. The Supreme Court observed that it was discretionary for the state government to advertise for inviting offers, but it would not breach constitutional or other legal obligations if it were to directly negotiate and agree to provide resources to a party approaching it to set up an industry<sup>41</sup>. However, the Court also qualified that state action had to be within the confines of Articles 14 and 19, and any arbitrary and unreasonable actions or actions contrary to public interest would invalidate such state action. These principles of non-arbitrariness, reasonability and larger public interest have been the guiding hand for the Supreme Court to decide that as long as there exists a rational basis that is not mere convenience for departing from fixed principles of public tenders and auctions, the government may do away with these mechanisms in its pursuit of socio-economic goals<sup>42</sup>. However, 'pursuit of socio-economic goals' is a very wide ambit, and doing away with public auctions in favor of closed-door transactions are sure to allow rent-seeking behaviour to occur. The fact that India has seen scams relating to allotment of resources is an indictment of the same.

After the 2G Scam and the Coal Allocation Scam (also referred to in common parlance as 'Coalgate'), urgent reviews of the allocation of resources had to be done. Through a special Presidential Reference under Article 143, the Supreme Court analyzed the constitutionality of auctions and whether they were the only acceptable method of allotting resources. The Court held that while auctions were not the only permissible means, it should not be interpreted to mean that resources cannot be allotted through auctions. It observed that 'an auction as a constitutional mandate would distort other constitutional principles such as those enshrined in Article 39(b), that ownership and control of resources be so distributed to serve the common good.'<sup>43</sup> The effect of this observation continues to tilt the position towards allowing the Indian state to directly provide allowances to parties who approach the state, with the belief that such a position of direct allotment would further the interests of Article 39(b). However, this would only have the opposite effect. In addition to being opaque, direct allotments might not really be expedient to the socio-economic objectives of the state, and might incentivize rent-seeking behavior by companies and reduce public confidence in governance and state capacity. The Supreme Court's cancellation in 2014 of the allotments of 204 coal blocks which had been allotted since 1993 given that 'there was no fair and transparent procedures, resulting in the unfair distribution of national wealth' is a scathing indictment of the manner in which rent-seeking behavior can manifest itself, and why allowing the state to directly contract with parties is not a feasible idea<sup>44</sup>.

As Gupta and Goyal argue, the lack of specified criteria for allocations have resulted in the creation of a festering inefficiency within the space (Gupta and Goyal 2018, 14–17). Even after the government's damage control mechanisms to revamp allotment to private and public

<sup>40</sup>Mines and Minerals (Regulation and Development) Act, s 11A.

<sup>41</sup>*Kasturi Lal Lakshmi Reddy v State of J&K*, 1980 4 SCC 1, [22].

<sup>42</sup>See *Sachidanand Pandey v. State of W.B.*, (1987) 2 SCC 295 [40]; *T.M. Hassan Rawther v. Kerala Financial Corpn.*, (1988) 1 SCC 166; *Netai Bag v. State of W.B.*, (2000) 8 SCC 262; *5M&T Consultants v. S.Y. Nawab*, (2003) 8 SCC 100.

<sup>43</sup>*Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1, [129].

<sup>44</sup>*Manohar Lal Sharma v. Principal Secy.*, (2014) 9 SCC 516 [163].

companies, there are still concerns regarding the efficacy of such moves. The auctions could not be considered a success as multiple blocks had to be withdrawn due to a lack of qualified bidders (multiple bids were withdrawn and many blocks currently do not have clearances), and the direct allotments to public companies allowed for backdoor privatisation and further whittled down protections in the public interest<sup>45</sup>. Allocations, if performed in a more transparent manner keeping in mind defined criteria, can be far more efficient and can further the common good.

Establishing a regulatory authority would help in laying down definite standards that ought to be followed and can definitely help in providing a level playing field for operators. It can also ensure that natural resources are allotted in ways that are in keeping with the Constitutional Scheme of Article 39(b).

### **Establishing a regulator: the way forward**

The coal sector is in dire need of a regulator for many of the complex processes involved in the activities of the sector. Leaving it in the hands of the free market might not lead to the desired competition and will not take into account the social costs of coal mining. Currently, the output of the sector has been poor, for despite having the fourth-largest reserves in the world, nearly 250 million tons of coal are imported into India. Many unscientific exploratory and mining practices are adopted by companies, and there have been concerns at the creation of natural monopolies in the past, due to the quality of coal produced and prices for the end results varying across different grades of coal. With larger participation of private actors, these concerns are greatly exacerbated in the absence of a regulatory framework. There is also the need to clearly define and outline the allotment process, as that has been a historical sore point. Lastly, the impacts of coal mining are widespread: there are concerns of emissions and toxic gases, worker safety, and concerns of lack of rehabilitation for people displaced from the land under which coal blocks lie.

A regulatory regime would be greatly beneficial if it outlines certain parameters. Such a scheme could draw on existing regulatory regimes such as those in the telecommunications, electricity, and oil and natural gas sectors. Firstly, relating to allotments, the scheme should specify minimum technical criteria required for players to be eligible to participate in the auctioning of coal blocks. There also ought to be curbs on direct allotment to government companies due to reduced government participation. Apart from technical criteria, keeping in mind the large amounts of displacements, the regulator ought to require that plans for rehabilitation are put into place with evidence that rehabilitation will occur at the earliest rather than it being an empty promise. There also ought to be specified safety and quality standards (such as washing of coal), for if it is to be sold on the open market, it would mean more use of coal and an increase in carbon emissions. Ensuring these minimum quality standards would be beneficial to the environment and improve the quality of life in the long run.

Structurally, keeping the regulator independent of ministerial or governmental control allows the requisite autonomy for functioning and prevents regulatory capture from within the government (Sengupta 1999, M30; Stigler 1971, 3). This does not mean an abdication of governmental oversight and giving the regulator unbridled power. The statute that establishes the regulatory body must contain a clause that mandates the laying of regulation before Parliament, which will act as a check on the power of the regulator (Massey 2018, 111-13)<sup>46</sup>.

However, it would be inaccurate to suggest that no regulation is taking place within the sector. This is not the argument the essay seeks to make, rather it is the establishment of an independent regulatory body that is required. Regulation can be done either through

<sup>45</sup>Coal Mines (Special Provisions) Rules 2014, Rule 11 (10).

<sup>46</sup>Within the realm of administrative law and delegated legislation, every delegate is subjected to the control and authority of its principal and the delegate's actions can be modified or cancelled at the behest of the principal. The principal is the Parliament, and the control over the regulator's functions is done by laying the created regulations before Parliament. Such mechanisms go towards ensuring that the legislature does not abdicate essential legislative functions and upholds the core tenets of separation of powers and the rule of law.

ministerial administrative departments or independent regulators. The coal sector is presently regulated through a few instruments and bodies which perform different regulatory functions.

There exists the Directorate General of Mines Safety (DGMS) and the Coal Controller's Organization (CCO) which come under the Ministry of Labour and Ministry of Coal respectively. The DGMS enforces the Mines Act, 1952 and is entrusted with ensuring adequate safety standards within all mines including coal mines. The CCO is entrusted with enforcing the Colliery Control Rules, 2004 which specify how categorization of coal is to be done, examine the quality of coal, lay down procedures pertaining to the opening of coal mines and their closure<sup>47</sup>.

While these organisations do perform important functions pertaining to regulation of the sector, one issue is the large extent of ministerial control over these bodies. It leaves these bodies open to capture, as many of the players governed would have direct access to the ministerial staff and the most powerful players would use their political power to control the entry of new firms or seek relaxed regulation on themselves (Stigler 1971, 5). Therefore, it becomes more desirable to have an independent regulator, situated at an arm's length from state machinery as it introduces layers of separation and can go towards preventing capture by vested interests. In the Indian scheme of things, it becomes all the more important for such a separation as Coalgate and the 2G Scandal exposed the cronyism occurring with ministerial control of the sector. Moreover, it simply becomes more efficient to consolidate and create a single entity that performs multiple functions within the sector, rather than having multiple different entities for each function which can lead to overlapping and encroachment of jurisdiction between these numerous entities (Sengupta 1999, M-30). Accordingly, this would mean that the CCO would need to be disbanded and replaced by a coal regulator, and the DGMS would have to cede jurisdiction over coal mines and coal safety to the newly-established coal regulator in order to prevent capture and to promote efficiency in functioning. Additionally, these changes will prevent a conflict in objectives of fair pricing for the consumers along with setting an optimum rate of return (Sengupta 1999, M-30).

Another important piece in the regulatory framework of coal is the Mines and Minerals (Development and Regulation) Act, 1957 (amended most recently in 2021)<sup>48</sup>, and its allied Mines (Auctions) Rules, 2015 (which was again amended most recently in 2022). While these legal instruments do lay down the parameters and standards for auctions of coal, they are carried out by the government directly and once again create conditions that favour cronyism<sup>49</sup>. Having an independent regulator would create a much-needed separation, and prevent such capture of ministerial staff.

When looking at the trajectory of the sector from nationalization to the current day, it is puzzling why a regulator has not been established yet. There have been demands for a regulator at various points in time, and yet the times when the sector was conducive to the same have not been taken advantage of properly. Perhaps it was hoped that the existing set-up would be capable enough to regulate the sector without the need for an independent regulator. However, this has not been the case. The ramifications of this have been seen in the various scams that have crippled the economy, unchecked practices of mining which have not yielded the expected output, and many social externalities by way of pollution and displacements. The frequent amendments to many legislations and rules of the sector also indicate that a scattered, piecemeal approach is being adopted in the hope that it would be sufficient. However, if India is to truly harness the power of being one of the largest producers of coal, it must learn from its past mistakes and establish a regulator at the earliest, lest past mistakes be exacerbated more than they already are in the present day.

<sup>47</sup>The Colliery Control Rules, 2004.

<sup>48</sup>Mines and Minerals (Development and Regulation) Act, 1957.

<sup>49</sup>Mines (Auctions) Rules, 2015.

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