



## THE COAL BLOCK CANCELLATION JUDGMENT: A CRITICAL EXAMINATION

Vol. I | Issue 2 | February 2015

*There have been two recent Supreme Court judgments on the coal block allocation case. In the run up to the coal block cancellation by the Court, and in its aftermath, much has been written about the issue. However, the ruling itself has not been subjected to any critical assessment. The purpose of this issue of the Law & Policy Brief is to subject the Court's ruling to a closer and critical inspection. This issue analyses the misapplication of the doctrine of arbitrariness followed by a critical analysis of the flawed legal reasoning in the Coal Block Case. The Brief concludes by recognizing that interests of justice would have been better served had the Court followed its reasoning in *In Re: Natural Resource Allocation*.*

In the judgment delivered on August 25, 2014 in *Manohar Lal Sharma v. Principal Secretary*, (2014) 9 SCC 516 (*First Coal Block Judgment*) a unanimous three judge bench of the Supreme Court declared the entire allocation of coal blocks, made as per the recommendations of the Screening Committee, and through the Government Dispensation Route, as suffering from “*the vice of arbitrariness and legal flaws*”. The Court held that this was because the Screening Committee did not follow “*any objective criteria in determining as to who is to be selected or who is not to be selected*”. In the follow up order passed on September 24, 2014 in *Manohar Lal Sharma v. Principal Secretary*, (2014) 9 SCC 614 (*Second Coal Block Judgment*) the allotment of these 'arbitrarily' allotted coal blocks was quashed. The beneficiaries of this 'arbitrary' allotment were also ordered to pay to the Government, as compensation, an “*additional levy*” of ₹295 per metric ton for the coal extracted from the date they started extracting coal. The determination of this amount was based on the Comptroller and Auditor General's (CAG) report. In the run up to the coal block cancellation by the Supreme Court and in its aftermath much has been written about the issue. Most of the writings, however, have been restricted to reporting what the Supreme Court held in the case.

The ruling itself has not been subjected to any critical assessment. The purpose of this short piece is to subject the Court's ruling on this point to a closer and critical inspection.

### *The 'Arbitrary' Conundrum*

The word 'arbitrary' has been a source of much mischief in the constitutional courts in India. Several government decisions have been quashed by the Supreme Court and the High Courts in India by declaring them to be arbitrary. But this doctrine of arbitrariness that forms a part of Article 14 jurisprudence is a double-edged sword. It is extremely useful in certain situations but equally dangerous in others. The most memorable caution against the use of the doctrine of arbitrariness was first noted by the celebrated jurist H. M. Seervai. Seervai, in his authoritative work on the Indian Constitution, cautioned against the use of the doctrine of arbitrariness. Highlighting the danger of this double-edged sword, he observed that this doctrine would one day become the source of judicial mischief as it will allow the courts to *post facto* substitute its judgment for that of the executive authority. Seervai's wise counsel is not the only one on the point. The indiscriminate use of the word 'arbitrary' has also been criticized by a senior member of the Supreme Court Bar, T. R. Andhyarujina.

**Law and Policy Research Group**, at the Jindal Global Law School, brings the tools of legal analysis and policy analysis in conversation with each other. Its **Law & Policy Brief** presents inter-disciplinary analyses of Bills pending before the Parliament, recent court judgments, amendments to existing laws, recently enacted laws, and other topical legal issues that have important policy implications.

### Editors

Dr. Ashish Bharadwaj  
Saptarshi Mandal  
[jgls-lpb@jgu.edu.in](mailto:jgls-lpb@jgu.edu.in)  
[www.jgu.edu.in](http://www.jgu.edu.in)  
[www.jgls.edu.in](http://www.jgls.edu.in)



Jindal Global Law School  
India's First Global Law School

JGLS offers B.A. LL.B., B.B.A. LL.B., LL.B. and LL.M. programmes. It promotes research on legal and policy issues to support an informed policymaking and legislative process. It also publishes the *Jindal Global Law Review*.

\* JGLS ranked 1<sup>st</sup> among all private law schools in India by **Careers360 Magazine** (2014)

\* JGLS ranked 5<sup>th</sup> among all law schools in India in **Legally India's Graduate Recruitment Rankings** (2014)

\* JGLS ranked 2<sup>nd</sup> by an **India Today – Nielsen** survey for top emerging law colleges in India (2014)

He says that the word 'arbitrary' has become a favorite 'cliché' in the vocabulary of lawyers and the courts in India and is used to describe many sins. Its careless use has encouraged loose thinking and imprecise concepts in law and has stunted the development of public and constitutional law in India. This *post facto* substitution of government's decisions by the courts on ideal grounds discovered later, runs a very high risk of rendering executive decisions dangerously unstable.

### **An 'Arbitrary' Allotment & the 'Inter Se Merit' Argument**

Why was the coal block allocation 'arbitrary'? Because, in the *First Coal Block Judgment*, the Court held that the application of norms by the Screening Committee were changed from meeting to meeting and that "[t]here was no consistent or uniform consideration." The Court also held that the minutes did not "...disclose the criterion which the Screening Committee applied..." for allocating coal blocks to various applicants, and that there was no evaluation of the comparative merit of applicants. Let us examine this closely.

The minutes of the 1<sup>st</sup> meeting of the Screening Committee show that coal blocks were to be allocated to private entities in areas where basic infrastructure like roads and railway links etc. were yet to be developed. However, areas where adequate infrastructure was available were not to be allotted to private players but to Coal India Limited. In the meetings that followed, the Screening Committee took stock of the situation, considered and allotted coal blocks, and reviewed the progress. In the 12<sup>th</sup> meeting it transpired that reserves in the allotted coal block for one particular applicant were higher than their requirements. Some of those reserves were then allotted to another applicant. In the 14<sup>th</sup> meeting, the Screening Committee directed that the Administrative Ministries should assess the soundness of the proposals in consultation with the state government before submitting their recommendations. Allotting coal blocks after an examination of *inter se* merit was first raised in the 18<sup>th</sup> meeting and it was laid down that, "[t]he blocks in the captive list should be allocated to an applicant only after the same have been put in the public domain for a reasonable time and not immediately after their inclusion in the list of blocks identified for captive mining, so as to give an opportunity to interested parties to apply for the same...." The question of competitive bidding was raised in the 21<sup>st</sup> meeting and a need to evolve necessary guidelines was noted.

The Court criticizes the proceedings from the 1<sup>st</sup> to the 21<sup>st</sup> meeting for it found that they were silent about *inter se* priority between the applicants for the same block and that the guidelines did not contain any objective criterion for determining the merits of applicants. Similar observations were made in the context of the 32<sup>nd</sup>, 34<sup>th</sup>, 35<sup>th</sup> and 36<sup>th</sup> meetings. This is incorrect for two reasons.

*First*, there is no constitutional or legal mandate to treat a certain method of coal block allotment as constitutionally binding. This was made clear by a unanimous five judge bench of the Court in *In Re: Natural Resources Allocation*, (2012) 10 SCC 1 (hereinafter *Natural Resources Allocation*). Therefore the Court in the *First Coal Block Allocation Judgment* is incorrect in insisting on an *inter se* comparative evaluation of the merits of the applicants. This point is elaborated in more detail in the following section.

*Second*, the Court's objection essentially seems to be that coal blocks were allotted on an unclear and undiscernible basis. However, this objection seems unfair. The 1<sup>st</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 18<sup>th</sup> and 21<sup>st</sup> meetings clearly show that the Screening Committee was evolving new guidelines as the circumstances were changing. The Court however insists that only a particular method of allotment should have been used for allotting coal blocks. This insistence of the Court is, with due respect, incorrect because this is not an exercise in constitutional decision making. This is an exercise in policy making. The 22<sup>nd</sup>, 28<sup>th</sup> and 29<sup>th</sup> meetings are criticized by the Court on the same ground and those criticisms are incorrect for the same reasons. The 23<sup>rd</sup> meeting is criticized by the Court on the ground of 'ad-hocism'. This is also not a fair criticism, for the Government has to be allowed a broad leeway in changing its allocation policies mid-way if the situation demands. It is the government that is in the right position to determine the policies for governance, not the Court. The Court has to ensure that the policies are determined in accordance with the law and the Constitution. The non-discernibility criticism of the 24<sup>th</sup> and 30<sup>th</sup> meetings can be subjected to the same criticism. The Court's remarks on the 25<sup>th</sup> meeting is perhaps most illustrative of the problem when it ends up substituting its own judgment for that of the Government. This is the dangerous side of the otherwise useful doctrine of arbitrariness against which Seervai had cautioned – the side that makes governmental decisions extremely unstable.

However, the Court's criticism of the 26<sup>th</sup> Meeting, where it says that allocation of coal blocks was in violation of the Coal Mining (Nationalization) Act, 1973, seems a fair criticism and represents the traditional and better way of deciding such cases. This way contentious issues like allocation of natural resources can be decided without sacrificing institutional autonomy. The Court decides what the law is and the government decides what policies it should make within the ambit of the law. This is where perhaps the line was crossed. If the coal blocks were allotted in violation of the law, then the question of examining the constitutionality of the whole process and insisting on a particular method of allotment, does not actually arise.

Generally, in such situations the Court clarifies the legal position and remands the matter to the concerned authority to decide as per the legal position stated by the Court. Perhaps a more efficient way of deciding this case would have been to (1) declare all allotments illegal because they violate the Coal Mining (Nationalization) Act, 1973; (2) clarify the legal position; and (3) let the concerned governmental authorities act on the decision.

#### ***A Continuation of the Flawed Reasoning in the 2G Case?***

The legal reasoning in the *First Coal Block Allocation Judgment* and the *2G Case* [*Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1] appears to be very similar. The problem however is that the legal reasoning of the Court in the *2G Case* has been, for all practical purposes, overruled in *Natural Resources Allocation*. If that is the case, the correctness of the part of *First Coal Block Allocation Judgment* that deals with the constitutionality of the allotment becomes highly suspect.

In the *2G Case* grant of Unified Access Services licenses to private companies was challenged on the ground that the procedure adopted by Department of Telecommunication (DoT) was arbitrary, illegal and violative of article 14 of the Constitution. Citing heavily from the correspondence between the then Prime Minister (PM) and the then Minister of Communications and Information Technology (MoCIT), the Court found that whereas the PM had recommended the auction of the spectrum as preferred mode of allotments, the MoCIT was of the view that auction would be unfair, discriminatory and arbitrary. During the narration of facts of the case the Court had observed that the suggestion made by the PM was consistent with the constitutional principle of equality, thus making its inherent bias very clear in the opening parts of the judgment. Unfortunately, the Court expressed a bias in favor of auction and this bias continued throughout. For example, the Court held that, "... the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."

The *2G Case*, decided by a 2 judge bench, created considerable uncertainty. Holding that the executive authorities did not follow the law is one thing, but declaring those decisions to be unconstitutional by insisting that only a particular method of making such decisions is constitutional is quite another. The executive authorities cannot reasonably be expected to predict what mode of executive decision making the Supreme Court might find to be constitutional and what unconstitutional. This is the dangerous edge of the otherwise powerful sword of the doctrine of arbitrariness, what economists sometimes call 'Ricardian Vice' i.e. abstract model building based on unrealistic assumptions. It was this vice that was addressed in *Natural Resources Allocation*.

The first important thing done in *Natural Resources Allocation* was restricting the 'auction-the-spectrum' holding of *2G Case* to spectrum only. The preference for auction was described as "... a conclusion made at the first blush over the attractiveness of a method like auction in disposal of natural resources." What sounds in retrospect almost prophetic, the Court added that if the *2G Case* is to be understood as having declared that auction is the only permissible means of disposal of all natural resources, "... it would lead to the quashing of a large number of laws that prescribe methods other than auction e.g. the MMDR Act." In *Natural Resources Allocation* the Court cautioned against declaring a Government policy unconstitutional, "...under the notion of having discovered some ideal norm." The Court held that "[t]here is no constitutional imperative in the matter of economic policies..." and that, "a fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment."

#### ***Ghost of the 2G Case***

In *2G Case* the Court insisted on auction as the preferred mode and in the *First Coal Block Allocation Judgment* it insisted on comparison of *inter se* merit of the applicants. Non-auctioning of coal blocks was not a viable argument and thus was not pursued. Unfortunately, the *inter se* examination of merit substituted itself in the place of auction and the Court adopted the same reasoning again.

Even though *Natural Resources Allocation* clearly held that the Court cannot substitute its own judgment in place of the government's, the *First Coal Block Allocation Judgment* ended up doing exactly that. The Court noted that in the 25<sup>th</sup> meeting of the Screening Committee, "[t]hirty applicants made presentations before the Committee. Many of these applicants were meritorious. The size of the coal blocks were large as compared to the requirement of the applicants." The Court here is not deciding whether coal block allocation was constitutionally valid on the touchstone of Article 14. It is rather asking the government to explain why coal blocks were allotted to certain applicants and not to others. And why? Because the Court seems to be of the view that the coal blocks should have ideally been allotted to other applicants. It is one thing to say that allotment to applicant X is bad because it is arbitrary, but it is a completely different thing to say that allotment applicant X is bad because Y might have made a better applicant.

There are certain decisions that the government has to take that are outside the purview of judicial review. Not because they should be, but because it is not possible to articulate a judicially manageable standard of review to evaluate such decisions in courts. This has been an accepted view in our constitutional jurisprudence for a long time and needs no elaborate exposition. But consider

the following observation by the Court: “*The Brahmadiha block was allotted to M/s Castron Technology in the 14<sup>th</sup> meeting. Committee noted that the mine did not fit in the criteria of captive block as per its latest guidelines, but decided to make the allocation in view of the fact that the reserves could either be permitted to be exploited by a private party or lost forever.*” It is not possible for any standard of review to test the validity of such a decision taken by the government. Decisions like these sometimes do turn out, with the benefit of hindsight, to be wrong. But hindsight is not a standard of review in constitutional matters.

### Conclusion

The Court in the *First Coal Block Allocation Judgment* took a view in favor of the idea that before allocating coal blocks the Screening Committee should have engaged in a comparative examination of *inter se* merits of the applicants. The Court also insisted that the Screening Committee should have carried out this examination in a certain way. Anything short of this and the government's decision is liable to be questioned and quashed on the ground of being arbitrary. The criticism here is not that the doctrine of arbitrariness should not have been used or that it always leads to negative consequences. It is a significant part of our constitutional law that prevents governmental excesses. But this doctrine has its darker sides that one must be cautious about at all times. The criticism here is that the Court did not heed this caution.

Part of the problem lies with the doctrine of arbitrariness itself and the other is with its not so thoughtful use. Even though doctrine of arbitrariness is a useful tool, let us admit that it is at best a blunt tool because it lacks clarity. In the *2G Case*, the Court, after discussing several precedents on the point declared the following as the content of doctrine of arbitrariness – “*The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of healthy competition and equitable treatment. It should conform to the norms which are rational and guided by public interest, etc.*” The standard used in the *First Coal Block Allocation Judgment* is similar. But this standard lacks coherence and has been criticized as lacking in clarity and meaning. The critique applies to the *First Coal Block Allocation Judgment* as well.

As to the question, whether a certain method of alienating natural resources is constitutional or not, the five judge bench in *Natural Resources Allocation* had pronounced authoritatively that the, “*...Court cannot conduct a comparative study of various methods of distribution of natural resources and suggest the most efficacious mode... The methodology pertaining to disposal of natural resources is clearly an economic policy... the Court lacks the necessary expertise to make them.*” It would have been

more appropriate for the Court to use the reasoning in *Natural Resource Allocation* in the *First Coal Block Allocation Judgment* as it would have better served the interests of justice for all stake-holders.

The potential negative fallout of quashing the coal block allocations on the power generation in India has been noted throughout the media, in India and abroad. One commentator estimates that as a result of the coal block cancellations by the Court around a third of the 1.2 billion Indians might have to go without electricity.<sup>1</sup> Another commentator has estimated its negative impact on the Indian import bill (US \$3 billion according to the undernoted estimate) and the banking and financial services sector in India (between US \$10-12 billion according to undernoted estimate).<sup>2</sup> The cancellation of 214 out of 218 coal blocks has been described in the financial press as a body blow to India Inc.<sup>3</sup> Quashing more than two decades worth of executive decisions is bound to have economic consequences. The courts around the world are now becoming increasingly open to the potential economic consequences of their decisions. Perhaps it is time for the courts in India to follow suit. Furthermore, when a judgment is expected to have substantial economic consequences, a more pragmatic course of action for the Court is to perhaps declare the judgment to have prospective application.

---

<sup>1</sup> See eg. Suchitra Mohanty & Krishna N. Das, *Supreme Court scraps nearly all coal blocks allotted since 1993*, REUTERS (September 24, 2014)

<sup>2</sup> See eg. Abhishek Vishnoi, *Supreme Court's coal block ruling may have wider economic impact*, REUTERS (August 26, 2014)

<sup>3</sup> *Coalgate verdict: Body blow, say affected firms*, BUSINESS STANDARD (September 25, 2014)

### About the Author

Khagesh Gautam [Stone Scholar, LL.M. (Columbia), LL.B. (Delhi)] is Assistant Professor and Assistant Director, Centre on Public Law and Jurisprudence at the Jindal Global Law School. Khagesh's work has been published in the *Vienna Journal of International Constitutional Law*, *International Tax Journal* and *Comparative Constitutional Law and Administrative Law Quarterly*, among others.

**About the Editors & Conveners of the Law and Policy Research Group**  
Ashish Bharadwaj, Assistant Professor, Jindal Global Law School  
Ph.D.(Max Planck Institute, Munich), LL.M. (Rotterdam, Hamburg, Manchester), M.Sc (Chennai), B.A. Hons. (Delhi)  
Saptarshi Mandal, Assistant Professor, Jindal Global Law School  
LL.M. (Central European University, Budapest), B.A. LL.B. Hons. (National University of Juridical Sciences, Kolkata)