Regulatory Authority over Minerals: A Case for Review

AMARENDRA DAS

This article critically appraises the incumbent regulatory mechanism in minerals and proposes a redrawal of the authority of central and state governments. It argues that for ensuring intra-generational and inter-generational equity the ownership rights over minerals should be vested with the state governments and the regulatory power with the central government. State governments should be provided with adequate elbowroom to mobilise revenue for the development of local communities in mining areas. Therefore, the present system of uniform royalty rates determined by the central government should be removed and states should be free to determine their royalty rates and other levies.

The basic problem in the management of mineral resources is that the global and local communities unevenly share its benefits and costs, respectively. Faulty mineral management policies at national and global level are to be held culpable for this. Inadequate transfer of benefits to the local communities keeps the mining areas as the most backward regions of the world. In India, states like Chhattisgarh, Jharkhand, Madhya Pradesh and Orissa, in spite of being endowed with rich mineral resources, have remained as the most backward regions. Although these states have formulated several legislations to mobilise additional revenues, the national law has inhibited this. Due to revenue constraints states fail to undertake special development programmes in mineral hinterlands. In this context, this paper critically appraises the incumbent regulatory mechanism over minerals and makes a case for redrawing the authority of central and state governments.

This paper is organised as follows. Section 1 briefly states the legal framework of India for the ownership and management of minerals. Section 2 gives a brief account of the institutional failure to safeguard the environment and interest of local communities. Section 3 explains the benefits of mining accruing to the state governments. Section 4 scrutinises the state initiatives to raise additional revenue, which are inhibited by the union legislation, under law and economics framework. Section 5 concludes with a proposal to amend the present regulatory mechanism.

1 Rights over Minerals

Apposite institutional mechanisms are central to ensure economic efficiency and equity in sharing the benefits of mineral resources. It has been argued elsewhere that for minimising the transaction cost in the flow of minerals and ensuring sustainable development, the ownership rights over minerals should be vested with the government.1

The Constitution of India confers the ownership rights over mines to state governments. However, the central government retains the regulatory authority over all major minerals defined in the Schedule A2 of the Industrial Policy Resolution (IPR) 1956. The regulatory power over minor minerals enlisted under Schedule B has been left with state governments. The jurisdictions of central and state governments over minerals have been clearly defined in the Mines and Minerals (Regulation and Development) (MMRD) Act 1957. The central government regulates the major minerals by controlling exploration, extraction and trade of minerals and determining the royalty rates.

Section 2 provides an account of the institutional failure to safeguard environment and the interests of local communities.

2 Institutional Failure

Environmental costs in the mining areas are enormous and accrue in many forms, namely, deforestation, loss of biodiversity, extinction of water bodies, pollution of water (groundwater and surface water), air and noise. Social costs of mining are witnessed through many ugly faces, namely, displacement of local communities, loss of livelihood, devastation of agricultural land, health problems, and other psychological trauma caused by the said reasons.

These costs seem to be overburdened for they fall on the most vulnerable sections of society. The Centre for Science and Environment (CSE 2008: 3) notes that in India almost all its minerals are in the same regions that hold its greatest forests and most abundant river systems. These lands are also largely inhabited by India’s poorest and most marginalised people – the scheduled tribes and scheduled castes – who depend on the very same forests and watersheds for their survival. Fernandes et al (1997) figure out that between 1950 and 1991, mining displaced the second highest number of people amounting to 25.5 lakh. Unfortunately, not even 25% of these displaced persons have been resettled.

Mining activities are regulated by a slew of environmental laws. Water (Prevention...
and Control of Pollution) Act 1974; Forest Conservation Act 1980; Air (Prevention and Control of Pollution) Act 1981 and Environment Protection Act 1986. As per the Environmental Impact Assessment (EIA) notification dated 27 January 1994, mining projects of major minerals of more than five hectares lease area require environmental clearance. After the Supreme Court judgment of 18 March 2004 (in the matter of writ petition (civil) 4677 of 1985, M C Mehta vs Union of India and Others) the said EIA notification was amended on 28 October 2004 to include all mining projects of more than five hectares.

Environmental clearance procedure has three components. First, an EIA study has to be submitted as part of the clearance procedure and there are special rules relating to the formulations and appraisal of the EIA. Second, a public hearing (PH) has to be conducted and the procedure for the same is laid down in detail. Third, an environmental management plan (EMP) has to be submitted and clearance for the same separately obtained. Under EIA, mining companies are expected to undertake a comprehensive assessment of the probable environmental impacts accruing in the mining areas and it provides for ceasing mining operation in environmentally sensitive areas. In order to incorporate the views of local people on the mining projects the policy provides for holding public hearing in the mining regions. Environmental plans provide the strategy to be adopted by the mining firms to mitigate the environmental damages such as forest degradation, pollution of air, water and noise.

Mining activities are, thus, regulated by the Pollution Control Board (for air and water), Ministry of Environment and Forest, Indian Bureau of Mines and the State Mines and Geology Department. However, due to poor monitoring and rent-seeking activities by these agencies, the present system has failed to safeguard the environment. Starting from the EIA to the adherence of EMP, mining companies seldom comply with the environmental regulations. While according clearance to mining projects even environmentally sensitive areas such as protected forests, national parks and wildlife sanctuaries are not spared. PHs before receiving the environmental clearance are reportedly undertaken secretly without the knowledge of local people. Compensatory afforestation programs remain confined to office documents. Similarly, enormous negligence is reflected in the management of overburdened dumps and other hazardous wastes. Mining firms are alleged to run the effluent treatment plants only during the irregular and prior informed visit of pollution regulation authorities. The degree of negligence by these regulating agencies is evidenced from the alleged environmental clearance accorded to the Vedanta Alumina for bauxite mining at Lanjigarh in the Kalahandi district of Orissa.3

Furthermore, the current provisions for mitigating the environmental and social damages in mining areas have not been adequate and reflect the apathy of bureaucracy to resolve these problems in a participatory approach. This is well reflected in the recommendation of the report of the Expert Committee on the “Road Map for Coal Sector Reforms”. The report states that:

…public consultation degenerates into Resettlement and Rehabilitation/ Land compensation/job related issues. …due to the “tolerant” attitude of State officials, the PH gets entangled in this and other local/State National political issues. Central government should issue …strict instructions that the PH should focus only on relevant environmental related issues… (Government of India 2007: 42).

Environmental and social damages are not mutually exclusive rather the former has serious bearing on the latter. Therefore, both issues need to be addressed together and in a participatory manner. Public consultation for integrated environmental and social impact assessment (ESIA) should be made mandatory while clearing the mining proposal.

Having discussed the institutional failure to mitigate environmental and social costs, now we move on to examine the benefits of mining accruing to states.

3 Benefits to States

Mineral-rich states derive a sizeable amount of revenue from mining. A major source among them is the royalty collected from mining firms. Besides, states collect dead rent from lessees who have not been operating their mines and thus not paying any royalty. States also receive some revenues from the initial application fee payable by a concession seeker, annual fee payable by reconnaissance permit (RP)/prospecting licence (PL) holder on the basis of the area held, surface rent, sales tax or value added tax (VAT), local area tax, and stamp duty. Some states, for example, Orissa and West Bengal, have also imposed a cess as well as a surcharge on minerals to mobilise additional revenue for special purposes. However, revenues from all these sources are meagre, even in comparison with the modest returns from royalty and dead rent. There is no systematic data on the total revenues collected by states from mining sources. Royalty being the major source of revenue from mining, this is presented in Table 1 which shows its contribution to the total revenue receipts (TTR) of the major states. Jharkhand receives the maximum amount of royalty (as per the data for 2004-05) from mining activities followed by Andhra Pradesh, Madhya Pradesh, Chhattisgarh and Orissa. In percentage terms, Jharkhand stands atop with 12.54% followed by Chhattisgarh, Orissa and Madhya Pradesh with share of 9.31%, 5.77% and 3.58%, respectively.

<table>
<thead>
<tr>
<th>States</th>
<th>2002-03 Royalty</th>
<th>2004-05 Royalty</th>
</tr>
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<tbody>
<tr>
<td>Andhra Pradesh</td>
<td>769.93</td>
<td>864.53</td>
</tr>
<tr>
<td>Assam</td>
<td>9.36</td>
<td>13.36</td>
</tr>
<tr>
<td>Chhattisgarh</td>
<td>552.36</td>
<td>694.61</td>
</tr>
<tr>
<td>Goa</td>
<td>14.81</td>
<td>17.44</td>
</tr>
<tr>
<td>Gujarat</td>
<td>172.63</td>
<td>238.95</td>
</tr>
<tr>
<td>Haryana</td>
<td>118.08</td>
<td>92.50</td>
</tr>
<tr>
<td>Jharkhand</td>
<td>797.65</td>
<td>916.20</td>
</tr>
<tr>
<td>Karnataka</td>
<td>83.89</td>
<td>210.94</td>
</tr>
<tr>
<td>Kerala</td>
<td>1.63</td>
<td>12.61</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>590.69</td>
<td>733.72</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>400.69</td>
<td>568.24</td>
</tr>
<tr>
<td>Orissa</td>
<td>440.57</td>
<td>663.61</td>
</tr>
<tr>
<td>Rajasthan</td>
<td>399.68</td>
<td>589.79</td>
</tr>
<tr>
<td>Tamil Nadu</td>
<td>297.34</td>
<td>324.82</td>
</tr>
<tr>
<td>Uttar Pradesh</td>
<td>262.42</td>
<td>291.94</td>
</tr>
<tr>
<td>Uttarakhand</td>
<td>22.55</td>
<td>35.60</td>
</tr>
</tbody>
</table>

Mining being a major economic activity in mineral-rich states it is imperative to look at its share in the annual value addition of state economies (net state domestic product, NSDP). Table 2 presents the share of mining and quarrying (M&Q) sector as a percentage of NSDP for 21 states from 1993-94 to 2004-05. In the year 2004-05 M&Q constituted 14.13% value addition in the state economy of Jharkhand. Other major states where M&Q constituted major share in the NSDP are Chhattisgarh, Meghalaya, Orissa, Assam, Goa and Madhya Pradesh with share of 10.17%, 7.95%, 7.05%, 6.86%, 5.75% and 4.72%, respectively. Compared to 1993-94, the share of M&Q in NSDP has been continuously showing a rising trend for states like Chhattisgarh, Orissa, Meghalaya, Madhya Pradesh and Assam. Although M&Q constitutes the highest share in the NSDP of Jharkhand, it showed a fluctuating trend during the period 1993-94 to 2004-05.

Unfortunately, mineral-rich states have remained as the most laggard states with low economic growth, per capita income and in other development indicators. Although states possess the ownership right over minerals and collect revenues on various accounts, central government holds the regulatory rein. Due to several reasons, state governments have not been able to realise the potential benefits from minerals, the most crucial being the revenue loss due to adoption of wrong criteria for collecting royalty and irregularity in its revision.

Usually royalty is collected on three criteria: (i) quantity based or usually tonnage based, (ii) ad valorem or percentage of value addition, and (iii) profit-based or percentage of revenue. Quantity-based royalty is collected on the basis of rupees per tonne of specific mineral. Although quantity-based royalty system is easy to implement it does not reflect the monetary value of minerals. Value-based royalty system, ad valorem, is fixed on the basis of value addition accrued to the mineral. A certain percentage of the value addition is collected as royalty. This is considered as a superior method. In profit-based system, royalty is collected as a percentage of profit (revenue minus cost). This system is believed to be non-distortionary of investment decisions. However, the estimation of royalty in the second and third systems involves difficulty due to lack of accurate data on the cost and sales price of the minerals. This also involves a cumbersome administrative process.

In India although the regime has been moving towards ad valorem rates, as many as 22 minerals still attract tonnage-based rates. This has been constrained due to the unavailability of accurate data on prices of minerals. The result has been lump sum revenue loss for states. This is well evident from the estimation of the High Level Committee on National Mineral Policy 2006 (Table 3). Here we present the revenue loss only from iron ore, which accounts for more than 50% of the value of major non-energy minerals produced. It is estimated that if the ad valorem rates were fixed at 7.5% for all grades of iron ore, the revenue from the production of 142 million tonnes would have been about Rs 1,600 crore, assuming Rs 1,500 per tonne as the average sale price or value. On the same assumption, the royalty revenue from iron ore would have been Rs 260 crore instead of Rs 42 crore in Chhattisgarh, Rs 180 crore instead of Rs 23 crore in Jharkhand, Rs 456 crore instead of Rs 72 crore in Orissa, and Rs 418 crore instead of Rs 79.75 crore in Karnataka. Therefore, the total revenue foregone due to the continuance of faulty mechanism for collecting royalty is a colossal sum.

The MMRD Act 1957 empowers the central government to determine rates of royalty for different minerals, which is uniformly applicable to all states. In order to minimise the uncertainty, royalty rates are revised once in three years. Central government sets up a study group comprising the representatives of state governments and mining industry to revise the royalty rate. Past experience shows that royalty rates are not revised timely and causes huge revenue loss to state exchequers.

### 4 State Initiatives

As pointed out earlier, the ownership right on minerals is vested with states and therefore the right to collect tax and raise revenue in various other ways remain in the State List Entry 23 relates to “regulation of mines and minerals development”. However, it is expressly subject to the provisions of the Union List with respect to regulation and development under the control of the union.

Entry 54 of the Union List provides for “regulation of mines and mineral development” to the extent to which such regulation and development under the control of the union is declared by Parliament that Entry 23 of List II has not been made subject to any specific entry of List I. This means that apart from Entry 54, there are other entries in List I, which may, to an extent, overlap and control the field of Entry 23 of List II. Parliament has enacted the MMRD Act 1957 to “provide for regulation of mines and development of minerals under the control of the union” in public interest.

Under this circumstance, states are not allowed to impose any other taxes on...
minerals. Mineral-rich states have formulated several legislations to collect extra revenue in the form of cess. However, they have hardly succeeded in this attempt. For example, the government of Orissa has in three legislations brought in 1962, 1992 and 2004 for collecting additional revenue from the mining companies and in all cases courts have struck them down. For realising resources, the government of Orissa imposed a tax on mineral bearing lands through the Orissa Cess Act, 1962. The said act was challenged in the Orissa High Court and subsequently in the apex court. The Orissa Cess Act, 1962 was struck down by the Supreme Court in 1991. Subsequently, the state of Orissa, for promotion of employment in rural areas and for implementation of rural production programme enacted a law – Orissa Rural Employment, Education and Production Act, 1992 (OREEP Act 1992). But the said act was also declared ultra vires by the Supreme Court in 1992. Again in the year 2004 the government of Orissa legislated Orissa Rural Infrastructure Socio-economic Development Tax Act that envisaged augmentation of revenue by imposing tax on mineral-bearing land. However, mining companies protested against this move and lodged a case in the Orissa High Court. The court held that the state legislature was not competent to enforce the act and scrapped the rules formulated under it. Most importantly, the bench directed for refund of any amount of tax collected under the act to the mine owners.

The state government had cited augmentation of additional resources for development of infrastructure, promotion of education, employment and socio-economic programmes in rural backward mining areas as the objective behind imposition of the tax on mineral-bearing land. The government had gone ahead with the move in the light of the Supreme Court judgment (State of West Bengal and Another vs Kesoram Industries Ltd) upholding the validity of levy of cess on mineral-bearing land by the West Bengal government in 2004. The Supreme Court in their judgment dated 15 January 2004 held that the power to tax or levy for augmenting revenue shall continue to be exercisable by the state legislature in spite of regulation or control having been assumed by another legislature, i.e., union.

### 4.1 Validity of Uniform Rates

The argument behind uniform royalty rate has been to provide equal scope for all states to develop their minerals. Opposing the states' right to impose any cess, surcharge and other charges the Department of Mines, government of India, presented the following arguments before the Sarakaria Commission.

Levy of various cesses, surcharges at different rates has an impact on the development of minerals. This affects uniformity and introduces uncertainty in mineral prices, some of whom may have to compete not only in the national market but also in international market. Cesses are usually levied as a percentage of royalty and therefore when levied at different rates in different States they distort the uniformity in royalty rates. Hence states need to exercise restraint on imposition of such levies, so as not to affect uniformity or competitiveness (Sarakaria 1995: 429).

The arguments of the central government however stand on weak economic theoretical foundations for the following reasons. Competitiveness of minerals is largely determined by productivity of mining, which is further determined by the quality of minerals, cost of production and adoption of modern technology. Uncertainty in the prices of minerals is not much influenced by the royalty rate but by market forces – demand and supply factors. So far as the development of minerals is concerned, apart from price many other factors play a vital role to attract private investment. For example, development of infrastructure and institutions play a crucial role to attract private investment. Investment requirement for the development of infrastructure is not uniform across states. Similarly, mining companies are sanctioned lease with huge tax incentives for setting up plants for further value addition. Therefore, it is evident that keeping the royalty uniform across states does not serve any purpose but prevents states from realising their full revenue potential. Given the property right of land vested with states they should be allowed to determine their royalty rates.

Leaving states to determine their own royalty rates will no way denude the regulatory power of the central government. The central government should regulate the exploration and extraction of minerals by keeping the rein to accord clearance for any project. In this context, an analysis of a few judicial interpretations of the MMDR Act 1957 and the rights of central and state governments would reinforce the arguments for states’ right to tax minerals.

The preamble to the Central Act 67 of 1957 mentions that this is “An Act to provide for the development and regulation of mines and minerals under the control of the Union” and tax and fee is not a subject dealt with by this act. The constitutional bench of the Supreme Court (Case No: Appeal (civil) 1532-1533 of 1993 between the State of West Bengal vs Kesoram Industries Ltd and others) has pointed out that:

a power to regulate, develop or control would not include within its ken a power to levy tax or fee except when it is only regulatory. Power to tax or levy for augmenting revenue shall continue to be exercisable by the Legislature in which it vests, i.e., the State Legislature in spite of regulation or control having been assumed by another legislature, i.e., the Union... In the garb of exercising the power to regulate, any fee or levy which has no connection with the cost or expenses of administering the regulation, cannot be imposed; only such levy can be justified as can be treated as part of regulatory measure.

The seven-judges bench in Union of India vs Harbhajan Singh Dhillon (1971) 2 SCC 779, ruled, by a majority of 4:3, that the power to legislate in respect of a matter does not carry with it a power to impose a tax under our constitutional scheme. Power to tax must be expressed, or else no power to tax. There is nothing like an implied power to tax.

The court further notes that there is a difference between “power to regulate and develop” and “power to tax”.

The primary purpose of taxation is to collect revenue. The government has general

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authority to raise a revenue and to choose the methods of doing so; it has also general authority over the regulation of relative rights, privileges and duties, and there is no rule of reason or policy in government which can require the legislature, when making laws with the one object in view, to exclude carefully from its attention the other. Nevertheless, cases of this nature are to be regarded as cases of taxation. If revenue is the primary purpose, the imposition is a tax. Only those cases where regulation is the primary purpose can be specially referred to the police power. If the primary purpose of the legislative body in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the public (Cooley: ibid: 98-99 as cited in the above case).

States should have enough autonomy and rights to mobilise revenue in their own sphere. The apex court, in the case of the Automobile Transport (Rajasthan) Ltd vs The State of Rajasthan and others (1963) 1 SCR 491, in a seven-judges bench, held that:

if it be held that every law made by the Legislature of a State which has repercussion on tariffs, licensing, marketing regulations, price-control, etc, must have the previous sanction of the President, then the Constitution sofar as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless. A reasonable tax or fee levied by State legislation cannot therefore be construed as trenching upon Union’s power and freedom to regulate and control mines and minerals (emphasis added).

The Constitution of India provides states the right to collect tax from its land. Therefore, a tax related to the land is permissible. However, here it should be kept in mind that the subject of tax is different from the measure of the levy. A financial levy must have a mode of assessment but the mode of assessment does not determine the character of a tax. To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any of the well-known modes of determining the value of the land such as annual or capital value of the land or its productivity. The methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land. The apex court in case no: Appeal (civil) 1532-1533 of 1993 held that merely because a tax on land or building is imposed by reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. No one can say that a tax under a particular entry must be levied only in a particular manner. The legislature is free to adopt such method of levy as it chooses. So long as the essential character of levy is not departed from within the four corners of the particular entry, the manner of levying the tax would not have any vitiating effect.

5 Conclusions
In fine, it is found that while the incumbent institutional structure provides enough scope for sharing the benefits of minerals at a global level, its costs (environmental and social) are disproportionately borne by the local communities. For the efficient management of natural resources and conservation of environment, a decentralised approach needs to be adopted by taking the local communities into confidence. In order to ensure the intra-generational and inter-generational equity the central government should retain the regulatory power. However, for the development of minerals and local communities, states should be given enough elbowroom to generate adequate revenue. Therefore, the present system of uniform royalty rate determined by the central government should go and states should be free to determine their royalty rates and other levies.

NOTES

1. See Das and Joe (2008).
2. Namely iron ore, coal and lignite, mineral oils, mining of iron ore, manganese ore, chrome-ore, gypsum, sulphur, gold and diamond, mining and processing of copper, lead, zinc, tin, molybdenum and wolfram and minerals specified in the Schedule to the Atomic Energy (Control of production and Use) Order, 1953 (MSME 2007).
3. See the Report by the Central Empowered Committee in IA No 1324 regarding the alumina refinery plant being set up by Vedanta Alumina at Lanjigarh in Kalahandi district, Orissa dated: 21 September 2005, available at www.cgnet.in/Min/CEC%20on%20Vedanta.doc

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