# Environmental Rule of Law in India: A Transformative Principle or Old Wine in a New Bottle?

Himanshu Ahlawat* & Dr. Sujith Koonan**

## I. Introduction

The idea of 'environmental rule of law' (EROL) has appeared more frequently in the Supreme Court of India's judgements[1] related to environmental matters since 2019. At the same time, the Supreme Court's engagement with EROL did not trigger adequate academic engagement and critical analysis. Some of the available academic analysis of EROL predates the Supreme Court's recent engagement with the concept.[2] In this context, this paper provides an account of the evolution and emergence of EROL at the international level and in India followed by a critique of it in light of the Indian Supreme Court's engagement with it. The paper is divided into four sections; the first section introduces the concept of EROL and engages in its conceptual analysis, the second section analyses the Supreme Court judgements which invoke EROL, the third section engages in a critical analysis on the application of EROL in India and the final section provides conclusion. The paper seeks to introduce the concept of EROL in light of the Supreme Court judgements, while undertaking that exercise it adds clarity and context to the concept and touches upon the implications that follow from it. The paper highlights the limitations that arise out of the concept's application.

### A. Environmental Rule of Law: A Conceptual Analysis

Second half of the twentieth century, more specifically after the Stockholm Conference of 1972, has been a spatio-temporal epoch for societies to juxtapose their perspective on the environment within the framework of a modern

* Fellow, Vidhi Centre of Legal Policy, New Delhi.
** National Law University, Odisha, Cuttack.

1 Hanuman Laxman Aroskar v Union of India (2019) 15 SCC 401, Bengaluru Development Authority v Sudhakar Hegde (2020) 15 SCC 63, H.P. Bus-Stand Management and Development Authority v Central Empowered Committee (2021) 4 SCC 309, Citizens for Green Doon v Union of India 2020 SCC OnLine SC 1360.

2 See Dhvani Mehta, 'The Environmental Rule of Law in India' (DPhil thesis, University of Oxford 2017), <https://ora.ox.ac.uk/objects/uuid:730202ce-f2c4-4d2f-9575-938a728fe82a>.

legal system. Since then, environmental laws and institutions have dramatically grown across the globe.[3] In 1987, the United Nations World Commission on Environment and Development released the Brundtland Report which included the now widely recognized definition of 'sustainable development', which is defined as a conceptual framework envisaged for a 'socially inclusive and environmentally sustainable economic growth'.[4] The need for such an exercise arose out of the growing awareness about the environmental crises in the aftermath of industrialization. However, the ideological lenses for this theorisation and its praxis have largely been based on a view that understood nature as the *other* whose existence is separate from that of humans.[5] Unsurprisingly, this progress has been accompanied by a substantial gap between environmental laws in theory and their implementation and enforcement in practice. The implementation gap can be gauged by the statistic that 'of the 90 most important environmental goals and objectives, significant progress has to date only been made in four'.[6] The idea of EROL was introduced in order to bridge that implementation gap and provide a structural foundation to the overarching conceptual framework of sustainable development, which has been central to the development of environmental law and jurisprudence.

In 2013, the United Nations Environment Programme (UNEP) adopted Decision 27/9, on Advancing Justice, Governance and Law for Environmental Sustainability, which introduced the term 'environmental rule of law'. Subsequently, in 2015, an Issue Brief was released by the UNEP that elaborates the concept of EROL in the following terms:

> Environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.[7]

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3 UNEP, 'Environmental Rule of Law: First Global Report',1.

4 See Jeffrey D Sachs, *The Age of Sustainable Development* (2015).

5 French, D and Kotzé, LJ, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene' (2018) 7(1) Global Journal of Comparative Law, 7(1), 5-36.

6 Issue Brief, Environmental Rule of Law: Critical to Sustainable Development, <https://wedocs.unep.oRg/bitstream/handle/20.500.11822/10664/issue-brief-erol.pdf>.

7 Issue Brief, Environmental Rule of Law: Critical to Sustainable Development, <https://wedocs.unep.org/bitstream/handle/20.500.11822/10664/issue-brief-erol.pdf>.

The Issue brief does not explicitly define what EROL is, but it recommends an approach which provides a starting point to understand the concept. It explains the concept of EROL by focusing on what it does. In other words, the UNEP document describes the concept of EROL by focusing on its functions. The UNEP description of the EROL focuses on four key elements. First, the idea is built upon the premise that environmental governance needs reforms and EROL 'provides the basis' for those reforms. Governance is conceptualised as something which operates at multiple levels, involves multiple actors, includes structures and processes for policy and decision-making, while exercising responsibility and ensuring accountability.[8] Governance relies on the underlying structures of responsibility and accountability which in a legal system are intrinsically linked with rule of law and transparency.

Second element highlights one of the functional utilities of EROL, that is, it 'integrates critical environmental needs with essential elements of rule of law'. The term 'critical environmental needs' has not been explained both in the Issue Brief and its first global report on EROL. In a context when planetary boundaries have already been breached or about to be breached, the term 'critical environmental needs' requires a nuanced understanding that not only takes care of the needs of the human beings but also the inherent integrity of the ecosystem of the planet Earth. Critical environmental needs can, thus, be argued to mean those needs of the environment which if not tended to at the earliest, especially in light of growing signs of climate change, compromised biodiversity and ecological integrity of the planet, could lead to far reaching irreversible consequences. It essentially demands a special focus on the marginalised people and countries due to their enhanced vulnerability to various environmental crises.

At the same time, 'rule of law' is a widely-used principle. According to UNEP, the rule of law is a principle of governance in which all persons, institutions, and entities including the State are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.[9] There are certain elements of rule of law that are often highlighted and they are—clarity, certainty, predictability and stability.[10] EROL seems to do the job of importing an established principle to the context of environmental governance. It describes

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[8] Gitanjali N Gill and Gopichandran Ramachandran, 'Sustainability Transformations, Environmental Rule of Law and the Indian Judiciary: Connecting the Dots through Climate Change Litigation' (2021) 23 Environmental Law Review.

[9] UNEP Governing Council Dec. 27/9, Advancing Justice, Governance and Law for Environmental Sustainability, U.N. Doc. UNEP/GC.27/17 (March 12, 2013).

[10] While these elements seem straight-forward in general parlance but as Dhvani Mehta in her thesis *The Environmental Rule of Law in India* argues that environmental law has a distinct nature in terms of being interdisciplinary and polycentric which poses some threats to these elements of rule of law] Dhvani Mehta, 'The Environmental Rule of Law in India' (DPhil thesis, University of Oxford 2017), <https://ora.ox.ac.uk/objects/uuid:730202ce-f2c4-4d2f-9575-938a728fe82a> , 58.

'…when laws are widely understood, respected, and enforced and people and the planet enjoy the benefits of environmental protection'.[11] However, it needs to be noted that rule of law's wide invocation by both municipal and international legal institutions in various contexts has led to a mainstream assumption that rule of law always leads to positive impact wherever it is used. From its early inception in political theory to its extensive scholarship in legal theory, the concept remains a highly contested one.[12]

The third element is related to the link between EROL on the one hand and environmental rights and obligations on the other. This element depicts EROL as a 'foundation' for environmental rights and obligations. Further, it lays down a principle that environmental sustainability be given priority over other concerns and justifies this principle on the basis of the link between environmental sustainability and realisation of environmental rights and fulfilment of environmental obligations. EROL accords high priority to environmental sustainability and this element is supposed to be a key organising principle for all the agencies of the State while engaged in environmental governance. In other words, it advances a rights-based approach to environmental governance. Environmental sustainability is the idea of human civilization's coexistence with nature without depleting and degrading natural resources and nature's capacity to support life now and in future. Sustainability is thought of as a check and balance framework on economic models from an environmental health/needs perspective.[13]

The fourth element focuses on the consequences of not following EROL or consequences due to the absence of EROL. It underlines that environmental governance may become arbitrary in the absence of EROL. It further qualifies the term 'arbitrary' with an explanation that it includes 'discretionary, subjective and unpredictable' nature of environmental governance. This element seems to be an application of the essential ingredients of the principle of rule of law, i.e. clarity, certainty, predictability and stability.

## II. Environmental Rule of Law in India

EROL has been brought into the Indian legal system by the Supreme Court. There are four judgments of the Supreme Court of India that are directly relevant to EROL. This part of the paper analyses the judgments which have

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[11] Arnold Kreilhuber and Angela Kariuki, 'Environmental Rule of Law in the Context of Sustainable Development' (2020) 32 Georgetown Environmental Law Review 591, 593.

[12] Judith N Shklar In Allan Hutchinson & Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (1987)1-16, Margaret Radin, 'Reconsidering the Rule of Law' (1989) Boston University Law Review, 69(4), 781-822.

[13] For multiple ways in which sustainable development is understood refer to; Colin C Williams and Andrew C Millington, 'The Diverse and Contested Meanings of Sustainable Development' (2004) 170(2) The Geographical Journal.

utilised the concept of EROL. It may be interesting to note that all these were authored by Justice DY Chandrachud.

EROL was first applied by the Supreme Court in *Hanuman Laxman Aroskar v. Union of India*.[14] The case involved the Government of Goa's project for a new international airport at Mopa in Goa which was mooted by it in 1997, to which the Ministry of Environment, Forests and Climate Change (MoEF&CC) granted the Environmental Clearance (EC) but it ultimately came to be challenged before the Supreme Court in 2019. The Court found the state of Goa's 'patent and abject failure' in failing to disclose transparent information regarding wetlands, water resources, water bodies, biospheres, mountains and forests within the concerned area. The Environmental Impact Assessment (EIA) report for the concerned project failed to notice the existence of Ecologically Sensitive Zones (ESZs) within a distance of 10 kilometres from the project site. The Expert Appraisal Committee (EAC) also failed to conduct a proper public consultation in this case as was also observed by the Court that the project proponent failed to address other significant concerns in the manner required by the EIA Notification, 2006. The important objections and environmental concerns raised during the consultative process were reduced to a single issue of 'the need for employment opportunities' by the EAC. The Court found glaring inefficiencies in the conduct of both the project proponent and the EAC, noting that the analysis of the EIA Report is, 'to say the least, sketchy and perfunctory and discloses an abdication of its functions by the EAC'. The EAC relied on 'peculiar circumstances of the case' to recommend the grant of the EC to the MoEF & CC. The judgement notes that what these peculiar circumstances are is left for pure guesswork.

The Court emphasizes that 'a quest for environmental governance within a rule of law paradigm is fundamental to the outcome of this case'. Moreover, 'Environmental governance is founded on the need to promote environmental sustainability as a crucial enabling factor which ensures the health of our ecosystem'. Then it goes on to trace out the development of the concept from UNEP Issue Brief and First Environmental Rule of Law report, while also citing other environmental law and governance literature including IUCN World Declaration on Environmental Rule of Law which outlines the principles for developing and implementing solutions for ecologically sustainable development. Sustainable Development Goals and climate change statistics also find mention in this part. The Court remarks how these goals provide 'an agenda for human development: development in a manner which accords adequate protection to the environment'.

The judgement highlights all the factors necessary for maintaining a rule of law; it observes that rule of law requires a regime which has effective, accountable and transparent institutions. It also mentions the importance of public access

[14] *Hanuman Laxman Aroskar v Union of India* (2019) 15 SCC 401.

to information and responsive, inclusive, participatory and representative decision making in preserving the rule of law. Articles 14 and 21 of the Constitution also find a mention in the domestic context of environmental governance based on rule of law; how the health of the environment is key to preserving the right to life as a constitutionally recognized *value* under Article 21 and the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14.

But what is important to ask here is, does the Court include itself when it explains the necessities of rule of law or is it talking about what legislature and executive need to do? Because these issues are not limited to those institutions alone, they plague the judiciary as well, especially with its institutional structure and competence. The rule of law as it is and in the environmental context is a cultural phenomenon. The Court will not be doing justice if it just lays down necessary ingredients required for rule of law in abstract terms and not make changes in its own structure to reflect those values.

As for the outcome in this particular case, after observing the failure of due process commencing from non-disclosure of vital information by project proponent and glaring deficiencies in the EIA report, the Court noted 'neither the process of decision making nor the decision itself can pass legal muster'. But, in order to ensure 'wholesome balance' between environment and development needs, it directed the EAC to revisit conditions subject to which EC was granted. The EAC was directed to carry out a fresh but rapid EIA within a month. Considering the abject failure of due process and a rather hermeneutical exposition on EROL, ordering the conduct of a rapid EIA frustrates the whole purpose of both EIA and EROL.

An year after *Hanuman Laxman Aroskar,* EROL came up for discussion again in *Bengaluru Development Authority v. Sudhakar Hegde.*[15] This case involved the matter of granting EC to the appellant for the development of an eight lane Peripheral Ring Road(PRR) in Bangalore which was quashed by the National Green Tribunal (NGT) and hence the Supreme Court was approached. The two-judge bench observed that, 'there was no winner in environmental litigation, since both – development and protection of environment, is necessary'. The Court also clarified that the framework created by EROL has to balance both these considerations 'by creating transparent and accountable institutions, while allowing participatory democracy'. Justice DY Chandrachud, speaking for the Court, held that 'the adversarial system is, by nature, rights based and it is not uncommon to postulate a winning side and a losing side. But in matters of environment and development there is no trade-off between the two because the protection of the environment is an inherent component of development'. The judgement highlights

[15] *Bengaluru Development Authority v Sudhakar Hegde* (2020) 15 SCC 63.

that environment protection is premised, 'not only on the active role of Courts but also on robust institutional frameworks within which every stakeholder complies with its duty to ensure sustainable development'. It is important to point out that the Court itself is also a part of that institutional framework. Then the Court highlights how a framework of environmental governance committed to rule of law requires a regime which has effective, accountable and transparent institutions.

The Court said essentially the same thing in context of EROL and environmental governance in this judgement as has said in *Hanuman Laxaman*. In the present case, the Court's analysis indicated that there has been a failure of due process commencing from issuance of the Terms of Reference (ToR) and leading to the grant of EC for the PRR project. The appellant in this case relied on expired ToR and proceeded to prepare the final EIA report on the basis of outdated primary data. Moreover, the process for granting EC had various contradictions regarding the existence of forest land that was to be diverted for the project and the number of trees required to be felled. The Court observed that the State Expert Appraisal Committee (SEAC), the body responsible for recommending the grant of EC to MoEF & CC, 'failed in its fundamental duty of ensuring both the application of mind to the materials presented to it as well as the furnishing of reasons which it is mandated to do under the 2006 Notification'. This case had a similar nature of violations and discrepancies as the one analysed above and it saw the same outcome as well. The appellant was directed to conduct a fresh rapid *EIA* for the PRR project, in light of observations made in this judgement.

The next case which involved EROL is *H.P. Bus-Stand Management & Development Authority v Central Empowered Committee*.[16] The three-judge bench in this case held that, 'environmental rule of law was no panacea which allowed for a clear set of solutions in every case, since every case was unique and with differing levels of actual evidence'. But it does provide a framework for adjudication of cases in a predictable manner, while keeping the principles of sustainable development at its core. This case involved a developmental project of a bus stand and a parking space on forest land and for that very specific purpose EC was given. But soon after the construction began to make the project 'commercially viable' a hotel-cum-restaurant was illegally constructed in the bus stand complex, for which no permission was given by the MOEF. According to the Court, the appellant, 'on being granted permission to engage in construction for a specified purpose, unlawfully utilised that permission as the basis to construct a different structure which was not authorised'.

Justice DY Chandrachud, speaking for the Court, in context of environmental rule of law, held that to adjudicate disputes that arise over environmental

[16] *H.P. Bus-Stand Management and Development Authority v Central Empowered Committee* (2021) 4 SCC 309.

harm in accordance with the rule of law framework is rooted in its principled commitment to ensure fidelity to the legal framework. This demands regulation of environmental protection in a manner that transcends a case-by-case adjudication. Despite the existence of a foundation of environmental legislation, the lack of broad and judicially recognized principles that could inform environmental adjudication was realized. Through these principles, environmental adjudication could be informed in a stable, certain and predictable manner.

Justice Chandrachud also highlighted that usually the problem in environmental litigation is that the precise harm that has taken place is often not susceptible to concrete quantification. But the Court cannot be stupefied into inaction by not having access to complete details about the manner in which environmental violations occur or their implications. Instead, 'the framework, acknowledging the imperfect world that we inhabit, provides a roadmap to deal with environmental law violations, an absence of clear evidence of consequences notwithstanding'.

What is interesting about this case, however is, despite it being similar in its facts and circumstances to the *Hanuman Laxman* case in terms of both development projects being in blatant violation of the due process under environmental law, the outcome of this case is starkly different. Court directed the demolition of the illegal hotel-cum-restaurant structure within the bus stand complex and to use that space for bus stand and as parking space after the demolition is complete.

The most recent judgement which involved EROL is *Citizens for Green Doon & Ors. v. Union of India & Ors.*[17] The case involved the developmental project of the Chardham Mahamarg Vikas Pariyojna, which aims to widen roads of approximately 900 kms of national highways, 'in order to ensure safer, smoother and faster traffic movement'. These highways connect the holy Hindu shrines which have been labelled as the "Chote Char Dham" in the state of Uttarakhand. They are stated to be located in paraglacial zones, which are considered to be ecologically sensitive. The Ministry of Road Transport and Highways (MoRTH) of Government of India has divided the Project into 53 individual projects, the length of each project being less than 100 kms. An original application was first filed before the NGT challenging the construction on the ground that the development activity has a negative impact on the Himalayan ecosystem. It was alleged that EIA under the 2006 notification had not been conducted and to obviate the requirement of conducting an EIA, the project had been divided into smaller stretches. In its order dated 26 September 2018, the NGT observed that the bypasses and realignments to be made to the national highways, which cumulatively fall under the project, have been considered as stand-alone projects. And since the length of each of these projects is less than 100 kms, the NGT held that

[17] *Citizens for Green Doon v Union of India* 2020 SCC OnLine SC 1360.

the project did not require EIA approval or EC, under the 2006 notification. But given the fragile ecosystem within which the project is to be developed, the NGT directed the constitution of an 'Oversight Committee' to monitor environmental safeguards. The Oversight Committee was then modified by a two-judge bench of the Supreme Court, which instead constituted a 'High Powered Committee' (HPC). The ToR of the HPC was also revised to include the conduct of rapid *EIA* by MoRTH among other terms, and it was directed to submit its report of recommendations to the Court. Following which the Court directed MoRTH to implement the recommendation. The conclusions in the report were unanimous except for the issue relating to the width of the road. The Court upheld the view of the minority on the same issue, that of bringing the project in conformity with 2018 MoRTH circular which included suspension of all fresh hill cutting activities. However, MoRTH informed the state of Uttrakhand that the 2018 circular will only apply to the proposed 13 projects where work had not yet begun. The same was converted into subject-matter for this judgement. Various other applications were filed which also became the subject-matter in this judgement, including one by the Union of India, through the Ministry of Defence (MoD), seeking modification of Court's order and seeking permission for widening of national highways. According to the Union of India, since the 2018 notification, there has been a *material change in circumstances*, necessitating an improvement of roads to enable movement of troops and equipment to Army stations on the Indo-China border. The application urged that a double lane road having carriageway width of 7 metres is necessary to meet the Army's requirement. By an order dated 2 December 2020, the Court directed HPC to consider the issues raised, including the application by MoD, and submit a detailed report.

After the submissions, the Court delved into the Framework of Analysis for the current judgement. The Court's framework for analysis took into account the specific setting of the project, in the unique ecology of the Himalayas. Then the judgement delves into the principles of sustainable development and EROL and goes onto list the precedents for both the concepts in the Indian context. It is not necessary to repeat the framework employed by the Court for environmental law here because it, by and large, says the same things which have been dealt with in the three judgments analysed before this.

While saying that the principle of sustainable development is deep-rooted in Indian jurisprudence, the judgement acknowledges that, without a common standard being applied by Court in its analysis of the development projects, the principle may create arbitrary metrics and dilute its potential to drive sustained change. The Court advances the adoption of the standard of environmental rule of law a *cogent remedy*. While in other environmental cases the balance had to be struck between development and environmental considerations, what is unique to this case is the introduction of *national security* in that equation. On the issue of increasing the width of the road, regarding the three strategic

border roads (because of their proximity to the Indo-China border), the Union of India stressed on the necessity of developing those feeder roads, 'for the security of the nation'. The discussion of HPC in its report submitted to Court revolved around the road-width that should be adopted for the highways in this project. The Court's analysis of the road-width issue after considering the submissions of UoI through MoD and appellants, found that the Court in its exercise of judicial review, 'cannot second guess the infrastructural needs of the Armed Forces'. It also noted that the submission of appellants requires the Court to 'interrogate the policy choice of the establishment which is entrusted by law with the defense of the nation', which is impermissible.

The Court's analysis appears to be privileging "the object of fulfilling the security concerns of the nation" while deciding the manner in which national highways are to be developed amongst prevailing environmental concerns arising from the said project. Such a view could be gauged by highlighting how the Court first constituted a HPC and then remarked that it was empowered to assess the environmental and social impact of the project, but it was not competent to address the security needs of the nation. Moreover, the Court observed that, "balancing the interests of defence as against environmental considerations was outside the ambit of HPC". The Court's engagement with the national security dimension appears to be influencing how it looked at EROL; especially when we consider that the quest for reforming environmental governance through a rule of law perspective can be sidelined under certain circumstances.

It is to be noted that the HPC's report unanimously found glaring deficiencies regarding environmental norms in the construction of the project, even formulated remedial measures for the same and the Court agreed with the same findings. But since the Court was riddled with road-width issues in light of national security concerns in the present judgement, by its own admission environmental concerns took a back seat. The Court directed that the remedial measures and recommendations of the HPC have to be implemented by MoRTH and MoD, 'going forward'. But there are some important questions that the judgement does not answer or ask. If the construction was already underway and that was taken as a consideration during the adjudication, would that not frustrate the whole purpose of EROL? How could the NGT consider such a gigantic developmental project in such an ecologically sensitive area as multiple stand-alone projects thereby bypassing the need for conducting EIA and requiring an EC? Does the Court's mere ordering of conducting a *rapid-EIA* not frustrate the object of 2006 EIA notification? Does 'national security' exist in a vacuum, outside the ambit of environmental considerations? If not, then is it not arbitrary that the Union can bring the national security argument in environmental adjudication and not be questioned over it because it is a policy decision outside the ambit of the Court?

## III. Application of EROL in India: Critical Reflections

It is important to consider how the Court has understood the concept of EROL. Firstly, the Court introduced it in *Hanuman Laxman* case just before issuing directions and the opening lines; 'Fundamental to the outcome of this case is a quest for environmental governance within a rule of law paradigm' hint at a consequentialist approach being envisaged for the concept. Such an approach treats EROL as a means to an end instrument. More than achieving particular ends in the context of environmental governance, EROL has to fill the gaps in environmental jurisprudence by prioritising strong legal reasoning over the outcome of cases. The consequentialist approach has plagued the Indian judiciary since the post-emergency era when both the judiciary and the civil society started to cultivate the Court's image from the outcome of the judgments it delivered and not on the basis of the soundness of the legal reasoning employed in them. [18]Such an approach allows a Court to bypass its duty to give reasoned judgements and focus solely on the outcome of the case and how it is received by the public. This jurisprudential shift in Court's approach has also been highlighted by Anuj Bhuwania[19] in the context of public interest litigation in India which has under the rhetorical cloak of *indigenization* of the legal system led to a culture of legal informalism.[20] His book highlights the disastrous results of such an approach which ranged from labelling slums as 'encroachments', supervising their demolitions, ordering conversion of all public transport to CNG based, to basically micro-managing New Delhi's policy decisions leading to a power crisis in the capital. Such an approach when extended to EROL inverses the very purpose of the concept. EROL has been conceptualised to provide a structural framework for reforming environmental governance and such a framework cannot be envisaged solely from the outcome of a case. In other words, it is not just a means to an end.

Secondly, Court's application of the concept seems to have a problem of ambiguity and consistency, especially when we consider that the construction of hotel-cum-restaurant was deemed illegal in the HP Bus Stand case. But the legality of MoRTH's continued construction in light of the Court's previous order regarding road width and hill cutting not being followed was not questioned or determined. By giving the blanket argument of national security, the Court

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[18] The structural problem with such an approach is the dereliction of separation of powers and Court's transformation into a legislative court of governance, this problem has been highlighted by Tarunabh in his paper, Tarunabh Khaitan, 'Judges Vote to Recriminalise Homosexuality', [2015] 78 Mod L Rev 672-680.

[19] Anuj Bhuwania, *Courting the people: Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2016).

[20] Legal theory on informal justice, is constituted by the organised efforts to bridge and link the realm of formalis ed legal ideas and procedures with extra-legal forms of social ordering, often within a framework of attempting to modify the workings of power relations.. Robert Van Krieken, 'Legal Informalism, Power and Liberal Governance' (2001) 10 Social & Legal Studies.

bypassed the need to engage critically with it in the context of EROL. The usual problem against questioning the argument of national security is that it is taken as a threat to state's sovereignty. But fundamental to EROL is privileging the importance of critical environmental needs over crude anthropocentric concerns. Additionally, it is important to highlight that the Court might consider national security as a holier-than-thou concept which cannot be questioned and privilege the intention of the state.

Moreover, we need to consider the staggering issues/concerns around climate change raised by the Court in previous judgments while introducing the concept and expressing the necessity for a consistent framework in the context of environmental governance. If the EROL framework does not follow the logic of precedent its potential will not be realised and it might rather meet an ambiguous fate. This seems to be already hampering consistency in environmental governance. Inconsistency in judicial conduct weakens the rule of law which affects the legal culture of a society at large and is bound to weaken the environmental governance as well. While we do not oppose the decision of the Court in the *H.P. Bus-Stand Management* case, the question is how different cases whose facts and circumstances are of similar nature have different outcomes and still uphold EROL, especially when one of the precepts of EROL is predictability?

One of the factors that influences the judgements could be the class-bias in the act of judgement writing. Ciocchini & Khoury's paper on the judicial decision-making process argues that a Gramscian framework in this context 'teases out the internal contradictions of the judicial decision-making process by scrutinising how intra- and inter-class contradictions play out within a larger social context'.[21] They touch upon the class-bias inbuilt in the legal system that in effect works against the interests of the disadvantaged and the marginalised classes. Drawing upon this theory, the EROL also represents this class-bias and could work against marginalised people and nature. As highlighted earlier regarding PIL judgements about blaming the poor for urban pollution, this class-based worldview however is not always so blatant; in some scenarios it manifests itself on the basis of the scale of a project. For example, it is easy to order demolition of a hotel-cum restaurant on the basis of patent illegality but the same illegality is either not looked into in the context of larger projects or if looked into, isn't let to determine their fates. Another big factor that is likely to be influencing the outcome of judgements is who is supervising the projects. That can clearly be seen in the case of the *Char Dham* judgement; in that case both the scale of the project being huge and the supervising authority being Union of India has led to the blatant environmental violations during the course of the project not being determinative factors in the judgement.

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[21] Pablo Ciocchini and Stefanie Khoury, 'A Gramscian Approach to Studying the Judicial Decision-Making Process' (2017) 26 Critical Criminology.

## IV. Conclusion

EROL is a legal tool but it differs from other legal tools in terms of its nature and scope; it is a design framework for the development of cultural ontology robust enough to sustain transformative environmental governance. As we have noted earlier various sorts of *extra-legal* factors affect the judicial decision-making process in different branches of law, the same extends to environmental law. The reasons why environmental governance is being envisaged within a rule of law framework are those of bridging the gap between theory and practice of environmental law and providing environmental governance with the consistency it currently lacks. Such a framework is especially important in light of rapidly worsening environmental health and consequent violation of various fundamental rights of individuals. The costs that vulnerable sections of people and the environment itself have to bear in case of environmental disasters, are rather disproportionate and often of irreversible nature. EROL is envisaged as a transformatory principle as its major aim is to provide a basis for reforming environmental governance; because without EROL and the enforcement of legal rights and obligations, environmental governance is likely to be arbitrary. The discretionary, subjective and unpredictable nature of arbitrary governance can be overcome by propounding well-reasoned judgements consistently. Such an exercise is especially important for developing a robust environmental jurisprudence which can strengthen the rule of law framework and enforce legal rights and obligations without compromising the equity dimension which is fundamental to both environmental governance and sustainable development. At the same time, it is not sure if the evolution of EROL in India through the Supreme Court judgements discussed above provides a robust principle in terms of conceptual clarity and its consistent application in environmental disputes.