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“Reassessing the Environmental Rule of Law in India: Bridging Gaps for Survival”

Foreword by
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Introduction:

1. As a Supreme Court judge, it is my mandate to interpret the law and to ensure that it is smoothly implemented. One of the guiding lights in this endeavour, a fundamental principle upon which the massive edifice of our legal structure is based, is the idea of the rule of law [“RoL”]. The notion that we are a government of laws and not of men is as simple as it is profound. As Federalist Paper No. 51 famously observed, if men were angels, there would be no need for laws.¹ On one level, then, the rule of law is premised upon the recognition of human fallibility and the need for a higher authority to serve as a disciplining framework to regulate human conduct.

2. Home to 1.2 billion people brimming with hopes and aspirations, India continually finds herself faced with the pressing need to expand the footprint of development. Equally, as a country with a robust constitutional tradition, she needs to ensure that such development takes place in a fashion compatible with the existing Constitutional and legal framework. It is here that the environmental rule of law [“ERoL”] serves as a helpful framework of analysis and disciplining

¹ Alexander Hamilton/ James Madison, Federalist No. 51, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, February, 1788.



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force. In this foreword, I begin by sketching out the key fundamentals of the RoL. Thereafter, I will delineate the core attributes of the ERoL that emerge from judicial treatment and academic engagement with the topic. I will conclude by offering my thoughts on the key learnings that this concept offers for courts, in the cases that they will confront on environmental protection in the future.

What is the rule of law?

3. In order for us to understand what the ERoL is, we must first understand what we mean by the ERoL itself. In order to do this, we must distinguish the rule of law from the rule by law. As I noted in my judgment in *HIP Bus Stand Management and Development Authority*², the rule of law comprehends the setting up of a legal regime with clearly defined rules and principles of even application. At the core of the rule of law lies the idea of protecting liberty, equality and freedom. The law has to have substantive underpinnings. Specifically, it has to be consistent with constitutional norms. The RoL, therefore, comprises: “*substantive principles, processual guarantees and institutional safeguards that are designed to ensure responsive, accountable and sensitive governance.*”³ As Timothy Endicott, a leading scholar on the subject states, the RoL requires that laws must be:

“*[o]pen, clear, coherent, prospective, and stable.*”⁴

² *Himachal Pradesh Bus Stand Management and Development Authority versus The Central Empowered Committee and Ors.*, AIR 2021 SC 657.

³ Id at para 46.

⁴ Timothy Endicott, ‘The Impossibility of the Rule of Law’ (1999) 9 Oxford Journal of Legal Studies 1



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4. Rule by the law, on the other hand, pursues less ambitious objectives. It focuses on having in place a set of rules, irrespective of their quality or substantive character. As Professor Paul Craig points out, this is for the following reason: *“We may all agree that laws should be just, that their content should be morally sound and that rights should be protected within society. The problem is that if the rule of law is taken to encompass the necessity for ‘good laws’ in this sense then the concept ceases to have an independent function. There is a wealth of literature devoted to the discussion of the meaning of a just society, the nature of the rights which should subsist therein, and the appropriate boundaries of governmental action. Political theory has tackled questions such as these from time immemorial. To bring these issues within the rubric of the rule of law would therefore rob this concept of an independent function. Laws would be condemned or upheld as being in conformity with; or contrary to, the rule of law when the condemnation or praise would simply be reflective of attachment to a particular conception of rights, democracy or the just society.”*⁵ Differently stated, a value-laden conception of the RoL, under this school of thought, would make the concept an empty vessel into which one can pour their views as to what constitutes morally and ethically appropriate laws.

5. This difference between the formal and substantive conceptions of the RoL is brought into sharp focus when we consider differences in how the RoL is understood by two scholars of great repute, Joseph Raz and Ronald Dworkin. According to Raz, it is not the function of the RoL to embody values such as justice and dignity – a task that is best left to other theoretical constructs. In his conception, the RoL embodies two basic values: [a] people should be ruled by and obey the law

⁵ Paul Craig, ‘The Rule of Law’ Select Committee on Constitution (6th Report 2007), Appendix 5.



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and [b] the law should be capable of a guiding behaviour.⁶ This conception needs to be juxtaposed with the one offered by Dworkin. According to him, the RoL embodies moral and political rights.⁷

6. Lord Bingham, a renowned British judge, interpreted the rule of law as encompassing eight principles. These were the following: (i) accessibility, (ii) law not discretion, (iii) equality, (iv) exercise of power, (v) human rights, (vi) dispute resolution, (vii) fair trial, and (viii) compliance with international law.⁸ In its definition of the rule of law, the UN focuses on the following 3 elements. First, the equal application of laws to all. Second, that such laws must be: “*publicly promulgated, equally enforced and independently adjudicated*”. And, third, that they be consistent with international human rights norms and standards. The definition also refers to the following important elements: supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁹

7. In a recent judgment, the Supreme Court defined the rule of law in the following terms:

“Rule of Law inter alia posits four universal tenets. It is a system of laws, institutions, norms and community commitment that envisages-accountability of Government and private actors alike under the law; The laws must be just, clear, publicized and stable and applied evenly, protect fundamental rights and human

⁶ Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edition, OUP 2009).

⁷ ‘The Rule of Law’ Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/rule-of-law/>> accessed 28 March 2021. Also see Dhvani Mehta, *The Environmental Rule of Law in India*, 2017, University of Oxford, p. 56 and 57 [‘Mehta Thesis’].

⁸ Tom Bingham, *The rule of law* [2011], Penguin UK.

⁹ Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).



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rights; Open Government-meaning thereby the processes by which the laws are enacted, administered and enforced are accessible, fair and efficient; and Accessible justice-to include timely delivery of justice by competent, ethical, and independent representations and neutrals who are accessible, have adequate resources and mirror the traits of the communities they serve”¹⁰

What is the ERoL?

8. The term ERoL was coined by the Governing Council of the United Nations Environment Programme [“UNEP”] in 2013, in decision 27/9¹¹. It recognized how environmental law violations can threaten the principle of sustainable development and took note of the fashion in which the ERoL can counteract this trend. The values that the decision foregrounded were: ‘information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles.’¹²

9. As a manifestation of the RoL, the ERoL shares its core attributes mentioned above. It does more than this, however. It encapsulates a set of conceptual, procedural and substantive tools to structure the discourse on environmental protection. It foregrounds a multi– disciplinary analysis of the nature and consequences of carbon footprints. It seeks to broaden the conversation to capture all actors impacted by “*environmental degradation, climate change and the destruction of habitats.*” It locates disparate principles of environmental governance, such as sustainable development, the polluter

¹⁰ *Rajiv Suri v. Delhi Development Authority*, 2021 SCC OnLine SC 7, para 128.

¹¹ Decision 27/9: Advancing Justice, Governance and Law for Environmental Sustainability, UNEP/GC.27/17.

¹² Mehta Thesis, supra note 7, p. 42.



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pays principle and the public trust doctrine within a holistic universe, a reflection of the inseparable and intertwined nature of our world.¹³

10. It recognizes that we are all in this together. By building on experiential learnings, the concept seeks to *“formulate principles which must become the building pillars of environmental regulation in the present and future.”* It focuses on open, accountable and transparent decision making on concerns of the environment, in a manner that is participative and inclusive.¹⁴

11. The ERoL also brings into sharp focus the wide chasm between the professed ideals of our laws and their actual implementation. Even as it is cognizant of the massive progress that has taken place over time in erecting a robust framework of environmental governance, it recognizes that the existence of this framework is necessary, but not sufficient.¹⁵

12. As I noted in my judgment in *Hanuman Laxman Aroskar*, environmental governance that is founded on the rule of law is grounded in our Constitution. Specifically, the health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution. Proper structures for environmental decision making find expression in the

¹³ Supra note 2 at para 47.

¹⁴ *Ibid.*

¹⁵ *Hanuman Laxman Aroskar v. Union of India* (2019) 15 SCC 401, para 143.



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guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution.¹⁶

13. In its first global report on the ERoL, the UNEP stated as follows:

“If human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet. Environmental rule of law offers a framework for addressing the gap between environmental laws on the books and in practice and is key to achieving the Sustainable Development Goals... Successful implementation of environmental law depends on the ability to quickly and efficiently resolve environmental disputes and punish environmental violations. Providing environmental adjudicators and enforcers with the tools that allow them to respond to environmental matters flexibly, transparently, and meaningfully is a critical building block of environmental rule of law.”¹⁷

14. In my judgment in *HP Bus Stand*, I also explained why the ERoL is such an important framework of analysis for judges. Specifically, before the concept was developed, while there was no dearth of environmental laws and regulations in India, what was found lacking was a set of overarching judicially recognized principles that could inform environmental adjudication in a manner that was stable, certain and predictable. This consolidated framework was necessary to fill normative gaps and provide a strong jurisprudential and conceptual foundation for the

¹⁶ Id at para 156.

¹⁷ UNEP, 'Environmental Rule of Law First Global Report' (January 2019), pgs viii and 223.



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implementation and interpretation of existing environmental laws. I quoted Bruce Pardy, who describes the consequences of the absence of such a framework in the following terms:

“Instead of serving to protect citizens' environmental welfare, an indeterminate environmental law facilitates a utilitarian calculus that allows diffuse interests to be placed aside when they are judged to be less valuable than competing considerations.”¹⁸

15. There is another way in which the ERoL serves an important function. And that is in equipping judges with the ability to deal with fact situations in which the precise harm caused by the infraction of environmental law cannot be quantified. The ERoL does this by foregrounding the importance of judicial intervention to remedy an environmental law infraction, even when its precise harm remains unclear. In an article in the *Georgetown Environmental Law Review* (2020), Arnold Kreilhuber and Angela Kariuki explain the manner in which the environmental rule of law seeks to resolve this imbroglio:

“One of the main distinctions between environmental rule of law and other areas of law is the need to make decisions to protect human health and the environment in the face of uncertainty and data gaps. Instead of being paralyzed into inaction, careful documentation of the state of knowledge and uncertainties allows the regulated community, stakeholders, and other institutions to more fully understand why certain decisions were made.”¹⁹

16. In the light of these premises, we held that it was not possible for us to determine how many, if any, trees had been felled by the illegal construction of the hotel-cum-restaurant. Instead,

¹⁸ Bruce Pardy, 'Towards an Environmental Rule of Law', 17 *Asia Pacific Journal of Environmental Law* 163 (2014).

¹⁹ Arnold Kreilhuber and Angela Kariuki, 'Environmental Rule of Law in the Context of Sustainable Development', 32 *Georgetown Environmental Law Review* 591 (2020).



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we narrated, in painstaking detail, how the illegal construction had taken place, notwithstanding clear attempts to halt it. We also clearly noted the complicity of state authorities in the infraction of environmental law. In light of this evidence, we returned a finding that the ERoL had been breached.²⁰

17. We also tackled the indeterminacy of the concept in the following way. After recording clear evidence indicating infraction of the ERoL, we noted as follows:

“Whatever else the environmental rule of law may mean, it surely means that construction of this sort cannot receive our endorsement, no matter what its economic benefits may be. A lack of scientific certainty is no ground to imperil the environment.”²¹

18. We advanced a reading of the ERoL that was based on its use in a negative sense. While its positive attributes remain unclear, we deployed the concept in a case that clearly exhibited features of the breach of its most fundamental tenets. Differently put, the point we were trying to make in the above excerpt was that a combination of robust judicial common sense, coupled with the experience of adjudication, are often sufficient to equip a judge to determine when the ERoL has been violated. It is in this way that this seemingly indeterminate and amorphous concept can be positively pressed into service in concrete cases and controversies.

²⁰Supra note 2, para 53.

²¹ *Ibid.*



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19. In a consistent line of authority, the NGT has endorsed the principle of the EROl. To illustrate, in *Doaba Paryavaran Samiti versus State of U.P. and Ors.*²², the NGT dealt with industrial or other pollution in Kali, Nadi Krishni and Hindon Rivers, resulting in death and diseases. The Tribunal closed the proceedings with the expectation that the state would take measures for the restoration of the EROl. It outlined the measures to be taken in this regard, such as completing the interception and diversion of 113 untapped drains, the targeted STPs, with treated sewage utilization, appropriate treatment against recalcitrant industries, the maintenance of appropriate water equality in the aforesaid rivers and water supply to the relevant villages. In *In Re: Report received from State Level Monitoring Committee, Kerala, constituted by this Tribunal vide order dated 16.01.2019 in O.A. No. 606/2018*²³, concerned the disposal of solid waste management. The NGT noted its anguish with the non-implementation of its directions in the following terms:

“Long stories of all round failure of the administration are poor substitute for good governance required to enforce environmental rule of law for protection of public health and the environment... Failure to uphold environmental rule of law is no different from maintaining law and order and protecting the citizens against crimes [para 5]” In *Md. Hayath Udin versus Union of India and Ors.*²⁴, while dealing with an irrigation project to provide drinking water, the NGT noted that the EROl is not incompatible with development but is in fact a facet of it.

²² MANU/GT/0028/2021

²³ MANU/GT/0041/2021

²⁴ 2020(10) 1111855



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20. Editors and authors writing their articles for this volume need to be complimented for canvassing a diverse array of issues that implicate the EROl. For instance, Mrinalini Shinde's article makes two meaningful contributions. First, it provides a compelling account of the importance of reliance on comparative law in environmental adjudication. Second, it offers us an account of how different jurisdictions, with differing legal backgrounds and systems of government have tackled the ticklish issue of the legal personhood of rivers. Similarly, Keith Varghese and Shyama Kuraikose's article examines how far the NGT's orders in the Vizag gas leak case are consistent with the EROl. Further, Sujith Koonan and Harshita Singhal's article grapples with the challenges associated with the practical implementation of the polluter pays principle.

21. Let me close this foreword by sharing some concluding reflections on the EROl that emerge from the aforementioned analysis as well as my own engagement with the concept as a judge.

22. First, the judiciary has a vital role to play in upholding and applying the EROl. As Irene Villanueva Nemesio points out, this we must do *"by providing remedies to environmental harms and upholding constitutional rights to the environment."*²⁵ As Mehta points out, the judiciary ought to decide cases on the environment that are rooted in the legislative text. Equally, it must be cognizant of the interdisciplinary and polycentric nature of environmental adjudication and must approach the task with a sense of restraint and modesty.²⁶

²⁵ Irene Villanueva Nemesio, Strengthening Environmental Rule of Law: Enforcement, Combatting Corruption, and Encouraging Citizen Suits, 27 GEO. INT'L ENV'TL. L. REV. 321 (2015), at 325.

²⁶ Mehta Thesis, supra note 7, at p. 64.



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23. Second, the ERoL has the power to facilitate the transition from environmental law in law books into law in action. By viewing the ERoL as our North Star, we can ensure the effective implementation of the existing body of environmental law.

24. Third, the ERoL offers us a comprehensive and holistic framework that contextualizes, gives meaning to and anchors the myriad principles of environmental law and governance that have emerged in recent decades. It serves as a unifying force that weaves them together.

25. Finally, concerns about the amorphous character of the ERoL are valid. However, that does not mean that the doctrine has no practical value. Instead, all that it means is that we must apply it in a well-considered, carefully thought-out way, in cases and controversies that we feel call for its application.

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