(DE)REGULATING THE ENVIRONMENT?

An Analysis of Regulatory Changes Introduced during COVID-19 in India

V | D H | Centre for Legal Policy

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Executive Summary

This study is aimed at systematically examining the nature and scope of regulatory instruments ("**instruments**") such as orders, office memorandums ("**OMs**"), circulars, letters, and notifications, issued by the Ministry of Environment, Forest and Climate Change ("**MoEFCC**") under the Environment Protection Act, 1986 ("**EP Act**") during the COVID-19 pandemic. The duration selected for this study is 11th March 2020 to 22nd March 2022.

In the introductory chapter (Chapter 1), we discuss the background and objective of this study. Chapter 2 elaborates the powers available to the Central Government under the EP Act to regulate activities in the interest of environment. It also introduces the theoretical foundation of the two-pronged test applied in the study to analyse these instruments. First, under the administrative law lens, we assess whether the instrument is likely to violate the doctrine of *ultra vires* i.e., the instrument runs contrary to the EP Act or is introduced in excess of the power delegated under the Act. Under the same lens, we also assess whether the requirement of public consultation has been dispensed with by the Central Government. Second, under the principles of Environmental Rule of Law ("**EROL**"), we evaluate whether the instruments are regressive, i.e. they backtrack on environmental safeguards and rights protected under the law. Under EROL, we also examine whether these instruments weaken or affect the integrity of the independent bodies that administer environmental law in the country, and finally, whether this information on regulatory changes in environmental law regime is easily accessible to the public.

In Chapter 3, we have explained our research methodology and the various aspects adopted for this study, which include the sources of the information collected, the rationale for selecting the indicators used for analysing the instruments and limitations of the study. The results of our analysis are provided in Chapter 4. In Chapter 5, we discuss some selected case studies from the data to have a deeper dive on major concerns.

In Chapter 6, which is the concluding chapter, we summarise our findings and conclude that the government weakened the existing legal safeguards for environmental protection on several occasions during the pandemic. We also recommend that the Government of India must constitute an independent committee to review all amendments and office orders brought in the environmental laws during the study period and withdraw all such instruments which are found to be *ultra vires* and regressive. A summary of the key findings from this study is provided below.

Key Findings

- The analysis is based on 123 instruments containing gazette notifications (74), OMs (42), circulars/ letters/ orders (7), which were published by the MoEFCC during the period of the study. The text of these instruments was sourced from various government and non-government websites.

- One of every three instruments (39 of 123) are found to be amendments made to various Rules and Notifications under the EP Act, with majority of the changes made to the Environment Protection Rules, 1986 (14) and the Environment Impact Assessment Notification, 2006 (13). Nearly three-fourths of all such amendments are aimed at providing relaxations (12) and exemptions (6) to the statutory requirements prescribed under the pre-existing laws.

- 44% (54) of the instruments are related to developmental and industrial activities, followed by 39% (48) instruments affecting the functioning of various institutions and statutory bodies such as the State Level Environmental Impact Assessment Authority ("**SEIAA**"), Expert Appraisal

Committees ("**EACs**"), etc. Most of the remaining 21 instruments are related to regulation of ecosystems/natural resources such as the coastal areas, groundwater and waste management, etc.

- In 16 out of 74 gazette notifications, the government waived off the requirement of public notice for amending the EIA Notification, 2006 by invoking Rule 5(4) of the EP Rules. Therefore, in 41% (16 out of 39) of the amendments, public notice was dispensed with in public interest. The term 'public interest' used in Rule 5(4) of the EP Rules cannot be interpreted beyond the scope and mandate of the EP Act, particularly Rule 5 of the EP Rules which empowers the government to impose such prohibitions and restrictions only for the protection of environment in a particular area. Some of the amendments brought to the EIA Notification, 2006, using this exception, downgrade environmental protection measures imposed on polluting industries without assessing the potential environmental impact. This is against the mandate of the EP Act. Such amendments are not only *ultra vires* the EP Act but are also regressive in nature.

- In 22 of the 42 OMs, the government issued directions to authorities and agencies such as the Expert Appraisal Committee, while 4 offer relaxations to industries. Some of these OMs seek to amend the statutory procedures and create exceptions to the legislative mandates. Collectively, these constitute 21% (26) of the entire dataset (123) and 62% of all the OMs (42) issued during the study period. It is extremely problematic that substantial changes in the statutory provisions are being introduced through OMs as they are meant to be internal documents of the government used for inter and intra departmental communication of decisions. Since they are not mandatorily required to be in the public domain, they should not be used as instruments for issuing important environmental decisions. Instead, any such decision should be widely published as a notification in the official gazette of India.

- Overall, 18% (22) of all the instruments analysed are found to be *ultra vires* the EP Act, which includes 10 gazette notifications and 12 OMs.

- 30% (37) of all instruments are found to be regressive. This includes 24 gazette notifications and 13 OMs.

- 16% (20) of the instruments (which includes 12 OMs, 7 gazette notifications and a letter), affect the institutional integrity by disregarding statutory obligations, such as the mandate to consult EACs, dispensing the requirement of public consultations, etc.

1. Introduction

India is home to 7-8% species of the world which includes over 91,200 species of animals and 45,500 species of plants.[1] Further, about 24.6% of the country's area enjoys forest and tree cover.[2] The United Nation's ("**UN**") Intergovernmental Panel on Climate Change report[3] brought forth the dire consequences of climate change that potentially await India, which can put this vast biodiversity at risk, unless immediate remedial actions are taken. As the third largest emitter of greenhouse gases,[4] India currently faces the challenging task of boosting economic growth while balancing the interests of the environment. Maintaining this delicate balance has become especially complex in the wake of the COVID-19 pandemic. With the Gross Domestic Product witnessing a contraction of 7.3%, the worst since independence,[5] and unemployment rates at a staggering 7.91% in December 2021,[6] the government has had to introduce a slew of measures to stabilise the economy and put the country on the path of recovery.[7]

However, environmentalists have criticised the government for relaxing environmental norms to expedite industrial and infrastructural development during the pandemic.[8] Furthermore, it has been claimed that such relaxations circumvent the procedural mandates under the existing statutory

[1] Unit B, 'Main Details' <https://www.cbd.int/countries/profile/?country=in> accessed 15 November 2022

[2] 'Forest Survey Report 2021; Increase of 2,261 Sq. Km in the Total Forest and Tree Cover of the Country in Last Two Years.' <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1789635> accessed 15 November 2022

[3] Shaw R and others, 'Asia' in Hans-Otto Pörtner and others (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2022)

[4] 'Climate Change: What Emission Cuts Has India Promised?' *BBC News* (27 October 2021) <https://www.bbc.com/news/world-asia-india-58922398> accessed 17 November 2022

[5] Dhingra S and Ghatak M, 'India: The Economic Impact of Covid-19' (Centre for Economic Performance, LSE --) CEPCP619 <https://cep.lse.ac.uk/_new/publications/abstract.asp?index=9101> accessed 26 October 2022; 'Overview' (*World Bank*) <https://www.worldbank.org/en/country/india/overview> accessed 26 October 2022

[6] 'Long after COVID Lockdowns, India's Youth Struggle to Find Work | Coronavirus Pandemic News | Al Jazeera' <https://www.aljazeera.com/economy/2022/2/3/after-lockdowns-indias-youth-still-struggling-to-find-work> accessed 26 October 2022

[7] 'Steps Taken by Government to Ameliorate Impact of COVID-19 Pandemic on Indian Economy' <https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1696278> accessed 26 October 2022

[8] Meenakshi Kapoor and Krithika A. Dinesh, 'Throughout the Pandemic, Environmental Clearance Law Has Been Under the Chopping Block' <https://thewire.in/environment/throughout-the-pandemic-environmental-clearance-law-has-been-under-the-chopping-block> accessed 26 October 2022; Velho N, 'During Lockdown, MoEFCC Panels Cleared or Discussed 30 Projects in Biodiverse Forests' *The Hindu* (23 May 2020) <https://www.thehindu.com/sci-tech/energy-and-environment/during-lockdown-moefcc-panels-cleared-or-discussed-30-projects-in-biodiverse-forests/article31649606.ece> accessed 9 November 2022; Zargar BH and News, 'India's Modi Dismantles Environmental Safeguards' (*New Frame*, 30 July 2020) <https://www.newframe.com/indias-modi-dismantles-environmental-safeguards/> accessed 9 November 2022

provisions.[9] It is particularly interesting to note that a global environmental indicator has also lowered the rank of India's environmental performance to the lowest in 2022.[10]

This study is aimed at systematically verifying these claims by examining changes introduced to Indian environmental governance and regulatory framework during the first two years of the pandemic. We do so by introducing a novel two-pronged test wherein the legitimacy of these changes is scrutinised under the lens of established administrative and environmental law principles. To the best of the authors' knowledge, this is a first-of-its-kind study that attempts to link emerging environmental jurisprudence with well-established administrative law principles. Such research, albeit of a more general nature, has been carried out on an international scale[11] and with a pure academic focus,[12] but not specifically in the context of India.

The objectives of this report are as follows:

1. Collating and mapping the trajectory of changes in environmental law regime during the COVID-19 pandemic;

2. Identifying any procedural lapses in environmental law-making and administrative decision-making that may have occurred during the pandemic;

3. Formulating a new framework for assessing environmental decision-making through empirical methods;

4. Building literature to inform future law and policy;

5. Publishing a comprehensive database on executive orders issued under the Environment (Protection) Act, 1986.

The following chapter lays out the legal framework for introducing amendments in environmental decisions. Thereafter, we explain the methodology adopted to gather and analyse our data. We then proceed to share our findings followed by a detailed analysis of eight case studies that give a deeper picture of what the data reveals.

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[9] Kiran Pandey, 'Incremental Dilution of India's Environment Regulatory Regime for Benefit of Corporates?' (*NewsClick*, 26 April 2022) <https://www.newsclick.in/incremental-dilution-india-environment-regulatory-regime-benefit-corporates> accessed 9 November 2022

[10] 'India Must Redouble Sustainability Efforts: Environment Performance Index' <https://www.downtoearth.org.in/news/wildlife-biodiversity/india-must-redouble-sustainability-efforts-environment-performance-index-71603> accessed 31 October 2022
; 'Environmental Performance Index | Environmental Performance Index' <https://epi.yale.edu/epi-results/2022/component/epi> accessed 31 October 2022

[11] 'Global Conservation Rollbacks Tracker' <https://www.conservation.org/projects/global-conservation-rollbacks-tracker/> accessed 31 October 2022

[12] Fisher L, 'Thinking Collectively: Law and Scholarship in Precarious Times' (2020) 32 Journal of Environmental Law 339

2. Developing a Model for Analysing Executive Regulatory Action in Environmental Law Regime

The Environment (Protection) Act, 1986 ("**EP Act**") is the umbrella legislation that bestows upon the Central Government wide ranging powers to regulate human activities in the interest of the environment. This was passed in furtherance of India's commitment made at the UN's Conference on the Human Environment held at Stockholm in 1972.[13] It adopts a broad understanding of the term 'environment' and has the overarching objective of protection and improvement of the environment.[14] It is the primary legislation that establishes a command-and-control regime in the environmental domain in the country.[15] Since a large body of environmental regulatory framework in India comes from executive orders issued by the Central Government under the EP Act,[16] we restrict our study to these to allow room for a detailed and granular analysis.

I. Overview of Executive Orders Under the EP Act

The EP Act has three primary provisions under which the Central Government can issue orders or subordinate legislation for shaping the environmental regulatory framework of the country.

- Section 3 gives broad powers to the Central Government to take measures to protect and improve the environment. This includes the discretionary power to take measures for any such matter which it deems necessary to implement the Act. Significantly, major regulatory

[13] Report of the United Nations Conference on the Human Environment, 5-16 June, 1972, Stockholm, available at <https://www.un.org/en/conferences/environment/stockholm1972>; The Preamble to the Environment (Protection) Act, 1986 reads as follows: *An Act to provide for the protection and improvement of environment and for matters connected therewith: WHEREAS the decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment; AND WHEREAS it is considered necessary further to implement the decisions aforesaid in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property;*

[14] Section 2(a) of the Environment (Protection) Act, 1986 defines 'environment' to include 'water, air and land and the inter- relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property'

[15] Environmental Laws: Application and efficacy in the context of business & human rights (*Vidhi Centre for Legal Policy*) <https://www.undp.org/sites/g/files/zskgke326/files/migration/in/Vidhi-report_FINAL.pdf>accessed 16 November 2022; Turaga RMR and Sugathan A, 'Environmental Regulations in India' (*Oxford Research Encyclopaedia of Environmental Science*, 30 June 2020) <https://oxfordre.com/environmentalscience/view/10.1093/acrefore/9780199389414.001.0001/acrefore-9780199389414-e-417> accessed 15 November 2022

[16] n15

instruments such as the Environmental Impact Assessment Notification, 2006 ("**EIA Notification**") and the Coastal Regulation Zone ("**CRZ**") Notification 2019 have been issued in exercise of this power.

- Section 5 empowers the Central Government to issue directions to any person, officer, or authority.

- Under Section 6, the Central Government can notify rules to regulate environmental pollution. The rules made under this Act must be tabled before the Parliament,[17] which acts as a check against rules that are drafted in excess of the power delegated to the executive.

Since these powers are broad in nature, the Central Government may issue a wide range of orders under them. They may be *quasi-judicial*, that is, orders which adjudicate upon the rights of a few identified individuals.[18] For example, an order wherein Environmental Clearance is granted or rejected is a quasi-judicial order. They may be *administrative*, that is, orders issued for the day-to-day implementation of the law. This may include office orders, OMs, circulars, general communications etc. For example, an order asking a government department to upload documents on the website regularly would be an administrative order. Finally, they may be *legislative* which contribute to the corpus of the regulatory framework of an area. For example, an order wherein a rule is amended or by which new environmental standards are set for industries would constitute a legislative order.

Identifying the exact nature of an executive order can prove to be a difficult task especially if different types of orders are issued under the same statutory provision.[19] In this report, we have tried to analyse whether legislative changes are being introduced through administrative route. For any order to qualify as legislative order of the government, it must qualify the following characteristics:

- It is of general nature and applies to a class or a number of people[20]
- It is generally prospective, that is, it applies in the future[21]
- It needs to be published in the official gazette for wider accessibility[22]
- It must be within the scope of the primary legislation[23]
- It should ideally involve public consultation in the process of being formulated[24]

To analyse such cases, we are mainly relying on the principles of administrative law and Environmental Rule of Law, as explained in the following sections.

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[17] Environment Protection Act 1986, s 26

[18] 'Quasi-judicial' is the appellation applied when an administrative body discharges an adjudicatory/judicial function. When there is a contest (*lis*) between two contesting parties, and the authority adjudicates upon the rights of the parties, the authority acts in a quasi-judicial manner. 'Principles of Administrative Law 6th Edition' GP SIngh & Alok Aradhe

[19] 'M P Jain & S N Jain' *Principles of Administrative Law* (first published in 2010) 31

[20] n19, 31

[21] *Narinder Chand Hemraj v. Lt. Governor and Administrator H.P.*, (1971) 2 SCC 747

[22] n19, 29

[23] *Huzrat Syed Shah Mustarshid Ali Al Quadari v. Commr. of Wakfs*, AIR 1954 Cal 436.; *J.K. Industries Limited v. Union of India*, (2007) 13 SCC 673

[24] Pre-Legislative Consultation Policy <https://legislative.gov.in/sites/default/files/plcp.pdf> accessed 16 November 2022

II. Principles of Administrative Law

a) Doctrine of Ultra Vires

Ultra vires in Latin means "beyond the powers". It describes actions taken by government bodies or corporations that exceed the scope of power given to them by laws or corporate charters. When referring to the acts of government bodies (e.g., legislatures), a constitution is most often the measuring stick of the proper scope of power.[25] Since orders issued by the executive which have a legislative character do not undergo the usual parliamentary scrutiny, they must operate within the confines of the parent statute. They must satisfy the following two conditions:[26]

- They must not be contrary to the scheme of the parent statute, that is, they should not be contrary to the provisions and object of the statute under which they are issued.

- They must be within the scope of the power conferred upon the authority under the parent statute.

To put it simply in the context of the EP Act, the Central Government cannot make a direction, order or rule which goes against the provisions and the objectives of the EP Act. Further, the Central Government or any official can only issue such an order which it is specifically empowered to issue under the EP Act. In case any of the two conditions are not satisfied, then the order can be declared *ultra vires* when challenged before the court of law. [27]

b) Public Consultation

Public participation in decision making lends legitimacy to the actions of the state and assists the government in making more informed choices. Recognising this, the Ministry of Law & Justice introduced the Pre-Legislative Consultation Policy in 2014[28] wherein it was recommended that all departments of the government put up drafts of subordinate legislations for public consultation. The Policy prescribes that a period of at least thirty days be allowed to citizens to give their feedback and an explanatory note be attached to the draft for making the information more accessible.

Public consultation has also found a legislative backing in the different progressive laws in India. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and the EIA Notification, 2006 specifically include elements of mandatory public consultation.[29] Rule 5(3) of the Environment Protection Rules, 1986 ("**EP Rules**") requires the Central Government to give notice

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[25] 'Ultra Vires' (*LII / Legal Information Institute*) <https://www.law.cornell.edu/wex/ultra_vires> accessed 15 November 2022

[26] *Greater Bombay Municipal Corp v. Nagpal Printing Mills*, AIR 1988 SC 1009, paras 8,9: (1988) 2 SCC 466. See also *Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group*, 2006(3) SCC 434, para 201: AIR 2006 SC 1489. Also see, *LIC of India v. Retired LIC Officers Association*, (2008) 3 SCC 321, para 19, 20, 58: AIR 2008 SC 1485; *Municipal Corporation of Greater Bombay v. Bombay Tyres International Ltd.*, (1998) 4 SCC 100, para 7: AIR 1998 SC 1629.

[27] n26

[28] n24

[29] Environment Impact Assessment Notification 2006, <http://www.environmentwb.gov.in/pdf/EIA%20Notification,%202006.pdf>

of its intention to impose prohibition or restriction on industries. Any person who is aggrieved by such an imposition is allowed sixty days to submit written objections against the same. The importance of public consultation, especially in the domain of environmental regulation has repeatedly been emphasised by the courts and the National Green Tribunal ("**NGT**").[30]

III. Environmental Rule of Law ("EROL")

Environmental law and governance lie at the intersection of multiple disciplines and competing interests. This inherent complexity makes various international legal instruments relevant for understanding the recent developments in environmental law.

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'.[31] Subsequently, in 2015, an Issue Brief was released by the UNEP that elaborated 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…. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.[32]

It has also been highlighted in other legal instruments internationally.[33] The UNEP reemphasized the need for EROL as a common benchmark to ensure implementation of sustainable development in its First Global Report on the Environmental Rule of Law published in 2019.[34] In this report, the UNEP classifies the essential ingredients of EROL to be (a) fair, clear and implementable laws, (b) access to information, public participation, and access to justice, (c) accountability and integrity of institutions and decision makers, (d) clear and coordinated mandates and roles, across and within institutions, (e) accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, (f) recognition of the mutually reinforcing relationship between rights and the environmental rule of law, and (g) specific criteria for interpretation of environmental law.[35] Relaxations in the above-mentioned indicators

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[30] *Hanuman Laxman Aroskar v. Union of India*, (2019) 15 SCC 401; *Utkarsh Mandal v. Union of India* WP 9340/2009, High Court of Delhi; *Ossie Fernandes v. Ministry of Environment & Forests* (30.05.2012 - NGT); *Larsen and Toubro Limited vs. Sanghi Industries Limited and Ors.* (25.02.2022 - NGT): MANU/GT/0052/2022.

[31] The principle of EROL has been applied by the Supreme Court in four cases - *Hanuman Laxman Aroskar v. Union of India* [2018] Supreme Court of India, Civil Appeal No 12251, [2019]; *Bengaluru Development Authority v. Sudhakar Hegde* [2019] Supreme Court of India, Civil Appeal No 2566, [2020]; *H.P. Bus-Stand Management & Development Authority V. Central Empowered Committee* [2016] Civil Appeal Nos. 5231-32 Supreme Court of India, [2021]; *Citizens for Green Doon & Ors. v. Union of India & Ors* [2018] Supreme Court of India, Miscellaneous Application No 1925 of 2020, In Civil Appeal No 10930 [2021].

[32] Issue Brief, Environmental Rule of Law: Critical to Sustainable Development, <https://wedocs.unep.org/bitstream/handle/20.500.11822/10664/issue-brief-erol.pdf?sequence=1&isAllowed=y> accessed 16 November 2022

[33] Environment UN, 'Environmental Rule of Law: First Global Report' (*UNEP - UN Environment Programme*, 24 January 2019) <http://www.unep.org/resources/assessment/environmental-rule-law-first-global-report> accessed 15 November 2022; 'Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters "Aarhus Convention" | UNECE' <https://unece.org/environment-policy/public-participation/aarhus-convention/text> accessed 15 November 2022

[34] n33

[35] n33

weaken the institutional structures responsible for environmental governance. Thus, ambiguous laws, or frequent changes in environmental standards and their application by the government may disrupt EROL. Similarly, if the functioning of independent institutions which are responsible for ensuring the fulfilment of environmental rights and obligations is adversely affected, it would go against the principle of EROL.

There has been a recognized gap between the theory and practice of environmental law in general.[36] EROL draws upon these established tools of environmental law to integrate them into a holistic framework.

Principle of Non-Regression as an Element of EROL

The 'principle of non-regression' emerged in International Environmental Law and acts as a safeguard against any reduction or backtracking in the level of environmental protection afforded by a regulatory mechanism. [37] [38]

The EROL also includes this principle as an essential part of the human rights approach and suggest that '*in the absence of strong justifications, environmental laws and regulations should not be weakened, but only maintained and strengthened*'.[39] The UNEP under the overarching conceptual framework of EROL defines the principle of non-regression as:

"The principle of non-regression prohibits any recession of environmental law or existing levels of environmental protection and comprises its protective norms in the category of non-revocable and intangible legal rules, in the common interest of humanity."[40]

Thus, the rationale behind the principle of non-regression in the context of environmental law is to prevent dilution in an existing law. Regression is rarely explicit to avoid unfavourable public response, it is however, taking increasingly insidious forms.[41] On the pretext of simplification, regression can be clothed as a mere procedural change while curtailing the rights of the public.[42]

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[36] n33, page 1; n15

[37] See Rio Declaration Principle 10, Rio + 20 outcome document, global pact for the environment, paris agreement; See also Bryner N, 'Never Look Back: Non-Regression in Environmental Law' (28 February 2021) <https://papers.ssrn.com/abstract=3947359> accessed 17 November 2022; Non-regression in international environmental law: human rights doctrine and the promises of comparative international law. Vordermayer-Riemer M, *Non-Regression in International Environmental Law: Human Rights Doctrine and the Promises of Comparative International Law* (Intersentia 2020) <https://www.cambridge.org/core/books/nonregression-in-international-environmental-law/7B9218F39E43B0546F8051E547F47B33> accessed 17 November 2022; Mitchell AD and Munro J, 'No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law' (14 February 2019) <https://papers.ssrn.com/abstract=3338055> accessed 29 November 2022

[38] 'Advancing Environmental Law in the Pacific' (*IUCN*, 2022) <https://www.iucn.org/resources/file/advancing-environmental-law-pacific> accessed 16 November 2022

[39] n33

[40] 'Principle of Non-Regression | UNEP Law and Environment Assistance Platform' <https://leap.unep.org/knowledge/glossary/principle-non-regression> accessed 16 November 2022

[41] Prieur M, 'Non-regression in environmental law' [2012] S.A.P.I.EN.S. Surveys and Perspectives Integrating Environment and Society <https://journals.openedition.org/sapiens/1405> accessed 26 October 2022

[42] n41

Additionally, repealing or amending environmental rules and thus reducing the means of protection or rendering them ineffective is also a form of regression.[43]

The principle of non-regression was applied by the NGT in the Indian context in the case of *Society for Protection of Environment and Biodiversity (SPENBIO) v. Union of India.*[44] In this case, the applicant approached the tribunal regarding a notification issued by the Ministry of Environment, Forest and Climate Change ("**MoEFCC"**) which was exempting the requirement of environmental clearance ("**EC**") for building and construction projects if the States made appropriate changes to their building bye-laws and incorporating certain conditions in the approvals given to building and construction projects. The NGT relied on the principle of non-regression while suspending the particular notification.

Likewise, the principles of 'access to environmental information' and 'access to justice' have also gained prominence in International Environmental Law across the world.[45] Judiciary has been the primary carrier for applying these changes in India. Such an interaction of the judiciary with these changes mirrors this emphasis on various environmental principles – from public participation to non-regression[46] and EROL.[47]

[43] n41

[44] *Society for Protection of Environment and Biodiversity (SPENBIO) v. Union of India* (OA No. 677 of 2016, MA No. 148/2017).

[45] In the form of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018 ("Escazú Agreement") and the AARHUS Convention.

[46] See *Him Privesh Environment Protection Society V. State of Himachal Pradesh*, 2012 SCC Online HP 2690; *Society for Protection of Environment & Biodiversity Through the Convener v. Union of India*, 2017 SCC Online NGT 981

[47] See *Himachal Pradesh Bus Stand Management and Development Authority v. Central Empowered Committee*, (2021) 4 SCC 309; *Alembic Pharmaceuticals v. Rohit Prajapati*, 2020 SCC Online SC 347; *Society for Protection of Environment and Biodiversity v. Union of India*, 2017 SCC Online NGT 981; *Citizens for Green Doon v. Union of India*, 2021 SCC Online SC 1243.

3. Methodology

This report covers all executive orders pertaining to regulatory instruments issued under the EP Act beginning March 11, 2020[48] until March 22, 2022.[49] This cumulative period spanning more than two years afforded us the opportunity to arrive at a representative and detailed analysis of changes to environmental law and regulation in India.

I. Sourcing the Data

To locate the various sources i.e., subordinate legislations and executive directions, we undertook wide-ranging desk-based research covering government websites including eGazette,[50] the MoEFCC[51], Environmental Information System,[52] State Pollution Control Boards, and Central Pollution Control Board ("**CPCB**"). We also cross-referenced results gathered from these websites with news and non-governmental organisation portals, judicial orders from the NGT, High Courts, and the Supreme Court ("**SC**").

II. Overview of the Data

We found 123 regulatory instruments ("**instruments")** in the chosen period. These instruments broadly entailed subordinate legislation and executive directions.

III. Analysing the Data

We applied a two-pronged test to analyse the data. First, we tested the legitimacy of the orders based on established administrative law principles. This includes (a) the mandate to publish decisions for public consultation regarding a change (as stipulated under Rule 5(3) of EP Rules, 1986), and (b) the mandate to act within the powers granted by the legislature (the doctrine of *ultra vires*).

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[48] 'Archived: WHO Timeline - COVID-19' <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19> accessed 16 November 2022

[49] The date on which the Indian Ministry of Home Affairs issued a letter to the Chief Secretaries of all states clarifying that there was "*no further need to invoke the provisions of the DM Act for COVID containment measures*, indicating a substantial relaxation in COVID-19 related restriction put in place in the public sphere since March, 2020 <https://www.mha.gov.in/sites/default/files/ChiefSecretaries_23032022.pdf> accessed 16 November 2022

[50] 'E-Gazette Home' <https://egazette.nic.in/(S(yelxcueoxlewibtgoff14xhh))/default.aspx>

[51] Environment Clearance (Notifications) <https://parivesh.nic.in/Notifications.aspx?id=EC> accessed 16 November 2022; EIA Notification, 2006 and subsequent amendments <http://environmentclearance.nic.in/report/EIA_Notifications.aspx> accessed 16 November 2022; List of Office Memoranda and Circulars Issued on EIA <http://environmentclearance.nic.in/report/Office_Memoranda_Circulars.aspx> accessed 16 November 2022; Composition and Status of Constitution of SEIAA and SEAC <http://environmentclearance.nic.in/report/SEIAA_SEAC_constitution.aspx> accessed 16 November 2022

[52] 'Environmental Information System: Home' <http://envis.nic.in/> accessed 16 November 2022

Second, we applied the indicators of EROL as discussed in the previous section. We assessed whether (a) the change holds true the principle of non-regression, (b) whether the change weakens any established institutions, and (c) whether the environmental information was easily accessible.

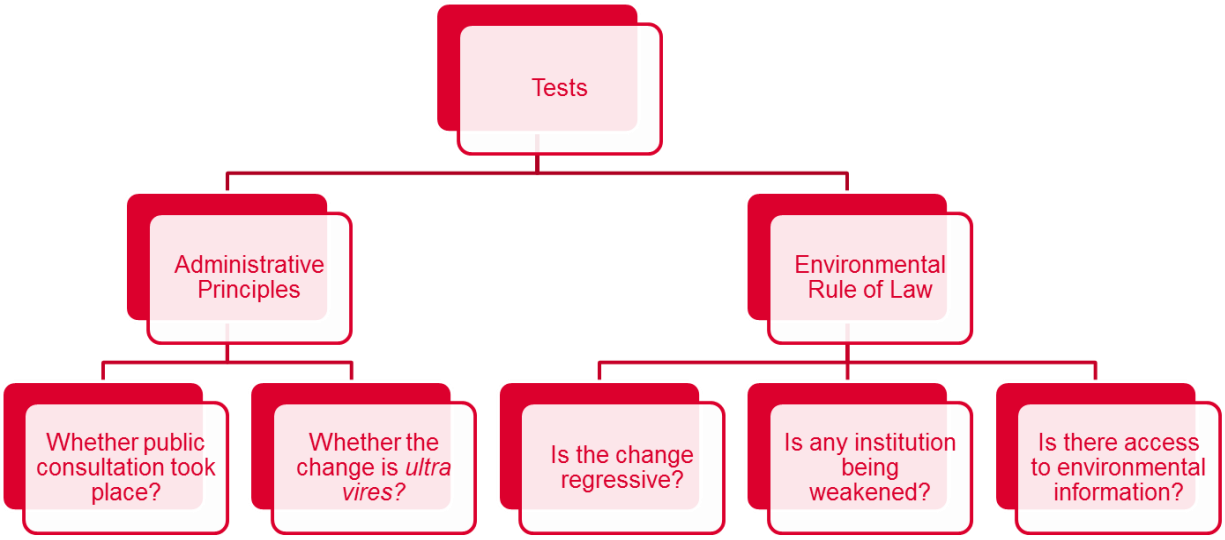

Figure 1: Principles and Criteria Used for the Analysis

IV. Limitations

We must flag that this methodology may suffer from two limitations. First, although we went through a multiple stage review process to ensure that the instruments issued during the period chosen are duly reflected in our analysis, we cannot be certain that the data is exhaustive. Second, while applying the above-mentioned test to the changes concerned, we made all efforts to have an objective standard prior to making any value-based judgments about the nature of the change in question. However, certain findings may have various subjective responses depending on the stakeholder concerned. As such, there is a possibility that our individual opinions and biases may have influenced our assessment. We have tried to mitigate this limitation by subjecting this report to a thorough peer-review process before publishing the same.

V. Publication of the Dataset

A consolidated list of all 123 instruments examined in this study is published online as a spreadsheet. It can be freely accessed by visiting https://bit.ly/data-epa .

4. Findings

As mentioned above, in the study period, we found a total of 123 instruments. Below we give a brief overview of the data to understand the complete picture of the overall effect of these instruments on the environmental law regime.

I. Type of Instrument

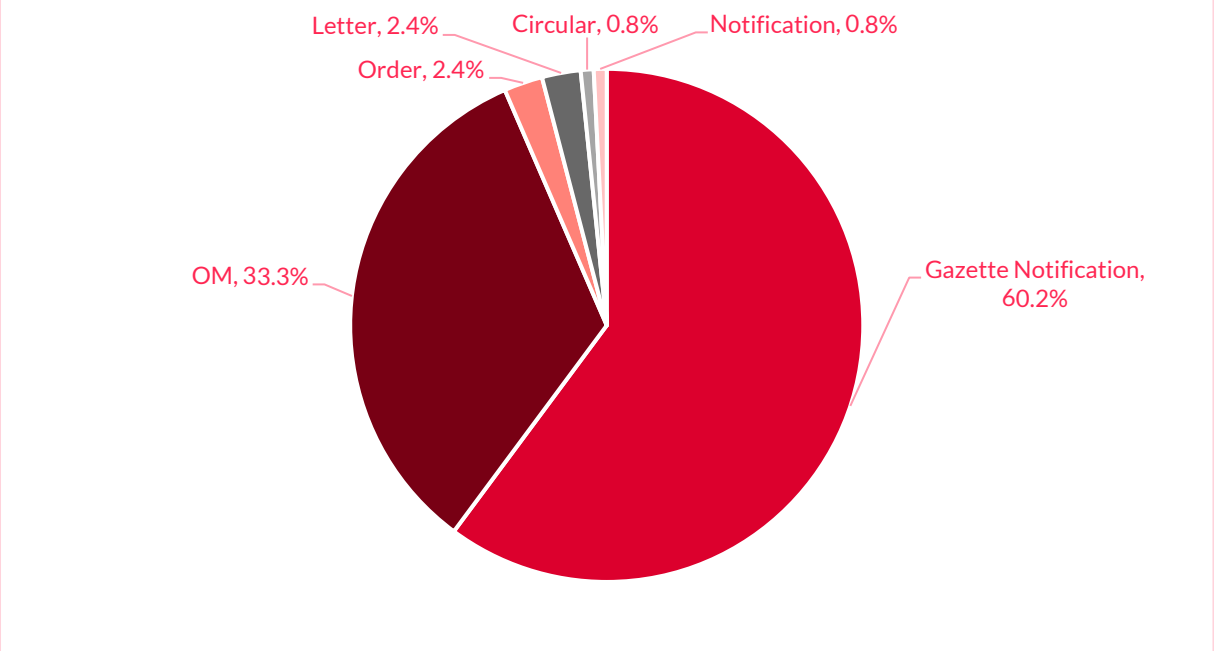

Chart 1: Types of Instruments

We observe that 60% (74) of the instruments were gazette notifications, 34% (42) of the instruments were OMs and the remaining 6% (7) of the instruments were circulars, letters and orders cumulatively. It is important to look at each type of instrument separately because they serve different purposes.

- A **Gazette Notification** is an official publication and an authorised legal document of the Government of India published weekly by the Department of Publication, Ministry of Housing and Urban Affairs generally used for promulgation of statutory rules and orders[53] and decisions of the Government which are of general nature and need to be widely known.[54]

- An **Office Memorandum ("OM")** is a document that is used for corresponding with other government departments. It is also used by Ministries and Departments for communicating to its employees.[55]

- **Circulars**, **letters**, and **orders** along with **OMs** are administrative forms of communication.[56]

[53] 'Central Secretariat Manual of Office Procedure 2019 (1)' 78 <https://darpg.gov.in/sites/default/files/CSMOP2019/mobile/index.html#p=91> accessed 16 November 2022
[54] n19, 29
[55] n53, 77
[56] n53

II. Sectors/Areas Affected

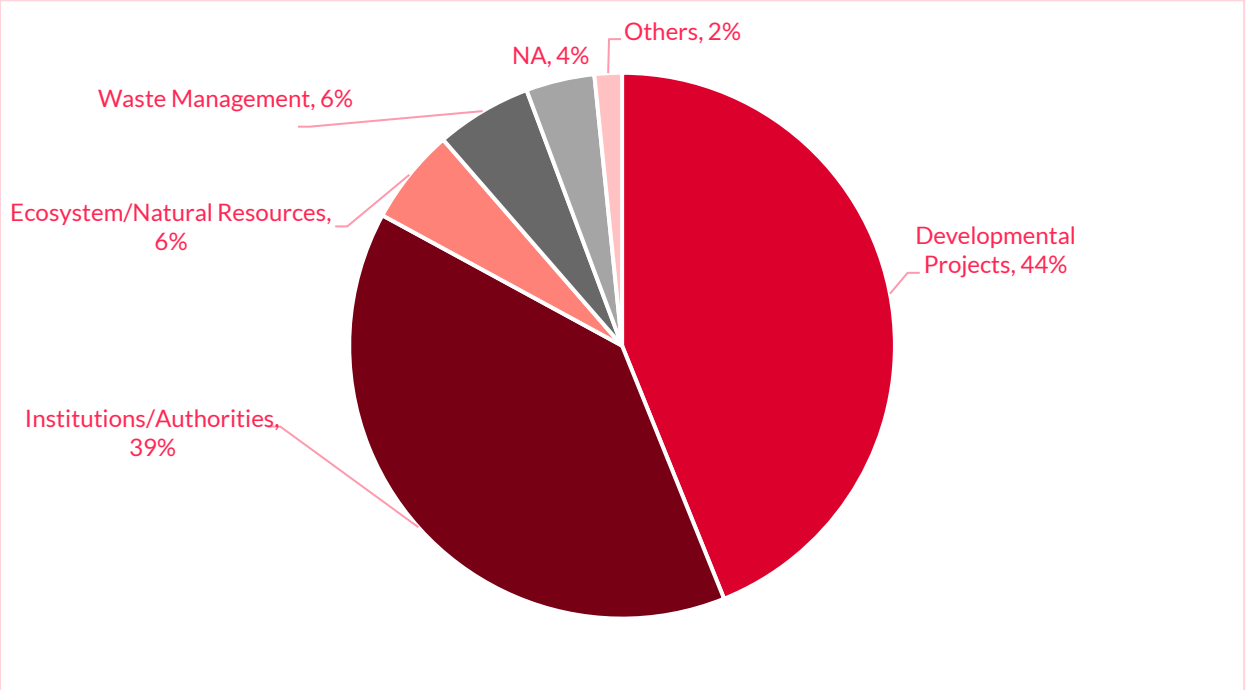

Chart 2: Sectors/Areas Affected

44% (54) of the instruments pertained to developmental projects which include various industrial activities such as pharmaceuticals, mines, and minerals, thermal, housing, brick kilns, paints, petroleum etc. It is followed by 39% (48) instruments pertaining to functioning of institutions and statutory bodies including the constitution of the State Level Environmental Impact Assessment Authority ("**SEIAAs"**), State Level Expert Appraisal Committees ("**SEAC**") and Expert Appraisal Committees ("**EACs**"), extension of their tenures and distribution of work etc. Of the remaining, most of the instruments were directly regulating the ecosystem/natural resources such as the coastal areas, groundwater 6% (7); and regulation of waste management 6% (7). Finally, approximately 2% (2) of the instruments which pertained to Polyvinyl chloride and reverse osmosis standards have been categorised cumulatively under 'others'. In the remaining 4% (5) of the instruments a 'categorical sector/area' was noted to be 'not applicable' due to difficulties in assigning one such category. An example of this is a notification constituting an Apex Committee for Implementation of Paris Agreement[57].

[57] Gazette Notification, MoEFCC, CG-DL-E-27112020-223382, 27 November 2020

III. Substance of the Instruments

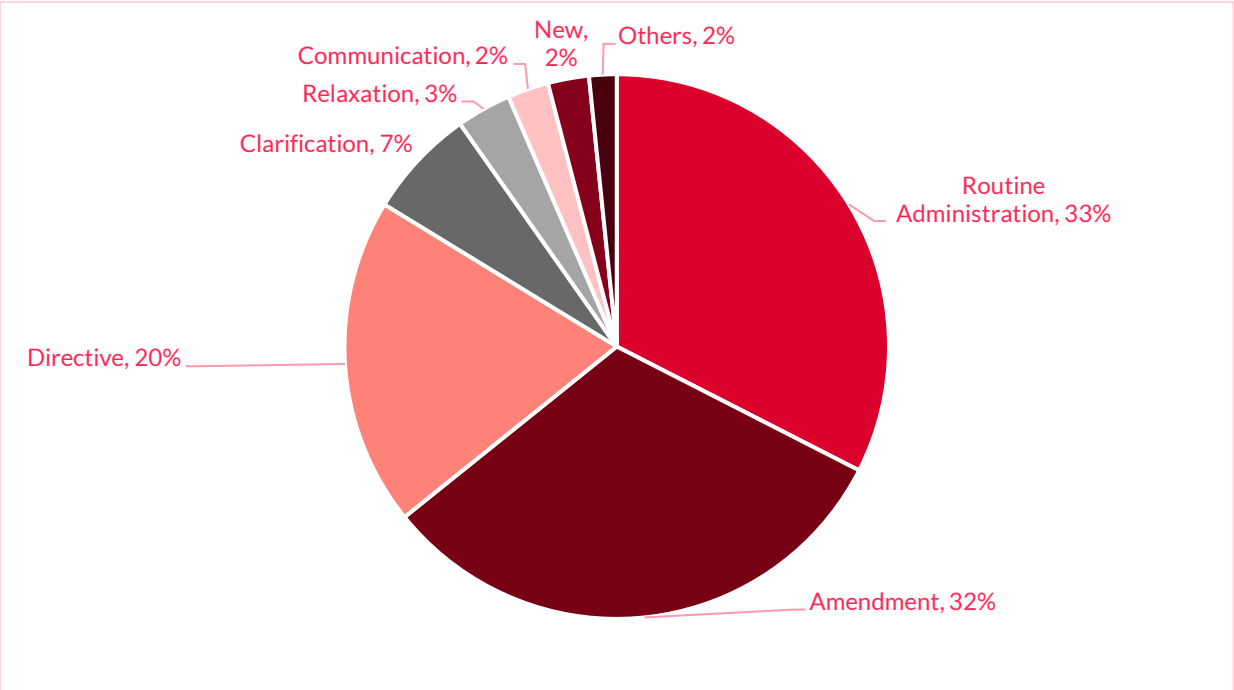

Chart 3: Substance of the Instruments

Out of all the instruments, 33% (40) pertained to routine administration, that is, day-to-day work (e.g., appointments of members to SEIAA, extension of tenures etc.). 32% (39) of the instruments were amendments, made to various rules and notifications like EP Rules, Solid Waste Management Rules, EIA Notification, CRZ Notification etc. We have given a detailed breakdown of the various amendments in the section below. 20% (24) of the instruments were directives which include instructions given to authorities and agencies such as the EAC and the CRZ Management Authority regarding discharging their functions. Further, 7% (8) were clarifications which are further elucidations of previously announced government decisions, e.g.: clarification by the government on measures to be taken by B2 category projects where public hearing was previously declared to be not necessary. 3% (4) were relaxations which are changes made in order to dilute procedures and compliances like extension of ECs, flexibility in coal or mineral production of capacity irrespective of calendar plan in EC. 2% (3) were communication of status quo or orders, e.g.: an OM informing all departments about recent SC orders. 2% (3) instruments were introduction of new laws and rules and 2% (2) instruments have been categorised as 'others' which includes rescinding previously released draft notifications and issuance of new guidelines.

IV. Rules and Laws Amended

Laws Amended	Number	Percentage (of all the amendments)
Environment (Protection) Rules, 1986	14	35.9%
EIA Notification, 2006	13	33.3%
Plastic Waste Management Rules, 2016	3	7.7%
Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016	3	7.7%
Island Coastal Regulation Zone (ICRZ) Notification, 2019	2	5.1%
Coastal Regulation Zone Notification, 2019	2	5.1%
Solid Waste Management Rules 2016	1	2.6%
S.O. 850(E) dated 17.3.2017	1	2.6%
Total	**39**	**100%**

Table 1: Rules and Laws Amended

Since a significant 32% (39) of all the instruments were amendments, we decided to deep dive into this category to understand where and why most of these changes were being made during the pandemic. We observe that about 36% (14) of the amendments were made to the EP Rules, 33% (13) to the EIA notification, 8% (3) to the Plastic Waste Management Rules, 8% (3) to the Hazardous and Other Waste Management Rules and 5% (2) to the Island Coastal Zone Regulation Notification 2019. The remaining 4 changes i.e., 5.2% were in the CRZ Notifications of 2019 and 2.6% each were in other miscellaneous laws such as the Solid Waste Management Rules, 2016.

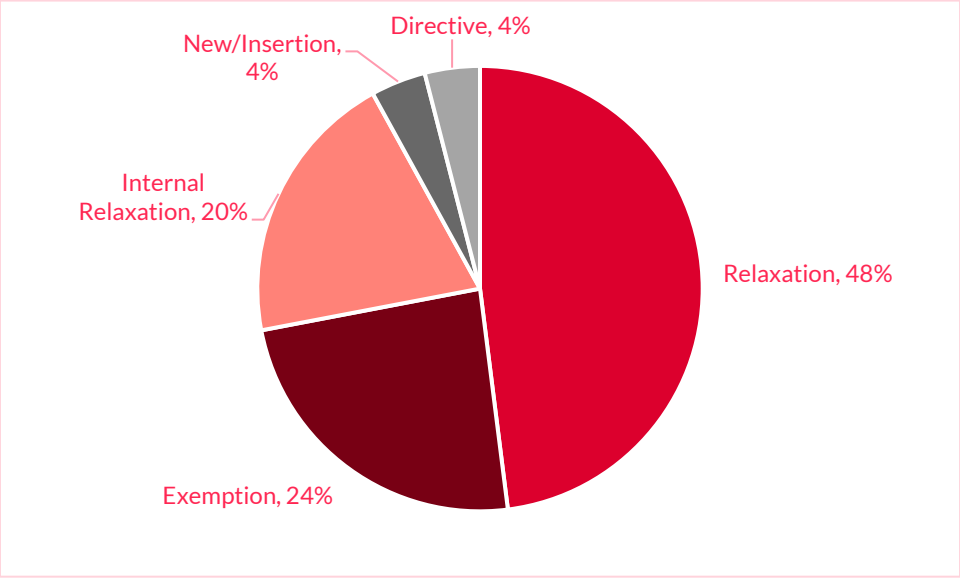

Chart 4: Nature of Amendments

We have also categorised the nature of the amendments. 48% (12) of the amendments are relaxations. 24% (6) of the amendments are exemptions. 20% (5) of them are internal relaxations, 4% (1) are new insertions and remaining 4% (1) are directive in nature.

It is important to highlight that within two years many of the changes were brought to the EP Rules and the EIA Notification, both of which are important instruments under the environmental law regime. EP Act is an enabling legislation under which the EP Rules are enacted, these rules give broad mechanisms

for regulating industries. EIA Notification is a legal document which lays down a regulatory framework for environment impact assessment. It is the cornerstone for ensuring that industrial developments do not adversely affect the environment and health of the ecosystems. Multiple changes in these legal instruments negatively impact the clarity, predictability, and stability in law. These tenets alongside certainty are the structural foundation of both rule of law and EROL.[58]

V. COVID-19 as Justification

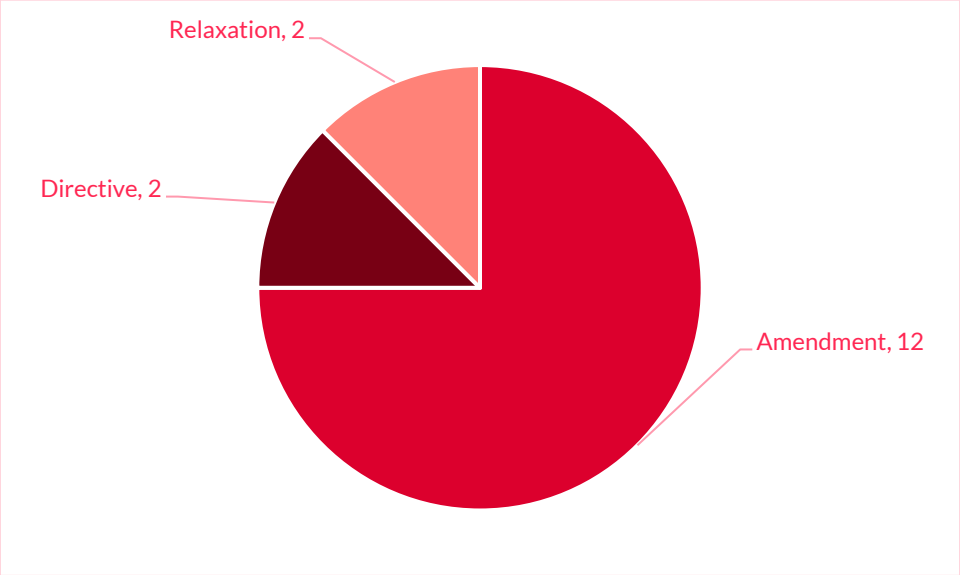

Chart 5: COVID-19 Related Changes

Out of the 123 instruments, 13% (16) were stated to be introduced because of COVID-19. Of these, 75% (12) were amendments to the EIA Notification and EP Rules, 2006. This included relaxations afforded to pharmaceutical companies and extension of validity of EC. 12.5% (2) were directives pertaining to procedure for holding public hearings and the remaining 12.5% (2) instruments were relaxations granted by way of OMs granting extension to ECs.

Some of these instruments have been discussed at greater length in the case studies I, II, III, IV in Chapter 5.

VI. Dispensation of Public Notice in Public Interest

Section 3 of the EP Act empowers the Central Government to take measures to protect and improve the environment. Under this section the Central Government has the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. In unequivocal terms, this section lays out that this power is to be used for protecting and improving the quality of the environment. The power under this section is of protectionist nature, which albeit enables the Central Government to take any measures it deems necessary, but that power is to be used for protecting the

[58] Himanshu Ahlawat & Sujith Koonan, 'Environmental Rule of Law: A Transformative Principle or Old Wine in a New Bottle?' (2022) Journal of Indian Law and Society

environment and not for relaxing environmental safeguards for any other reason. Moreover, under section 3(2)(v) the Central Government can take measures for restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Rule 5 of the EP Rules lays down the procedure for exercising power under section 3 of the EP Act. This caveat is critical to highlight because the majority of the changes under Rule 5 made by the Central Government during the study period are in the form of relaxing environmental safeguards, hence they run contrary to the objective of section 3 of the EP Act.

Under Rule 5(1) of the EP Rules, the Central Government can prohibit or restrict the location of industries and carrying on of processes and operations in an area. The procedure to be followed for this, however, entails that the Central Government must give prior notice of its intention of imposing such a prohibition or restriction.[59] This notice is to be published in the official gazette, and any person can submit their written objections within 60 days.[60] This rule ensures that there is an element of public participation in the exercise of the powers of the rule. There is an exception to this requirement under Rule 5 (4) of the EP Rules which empower the Central Government to dispense with the requirement of public notice if it considered it expedient in public interest. [61]

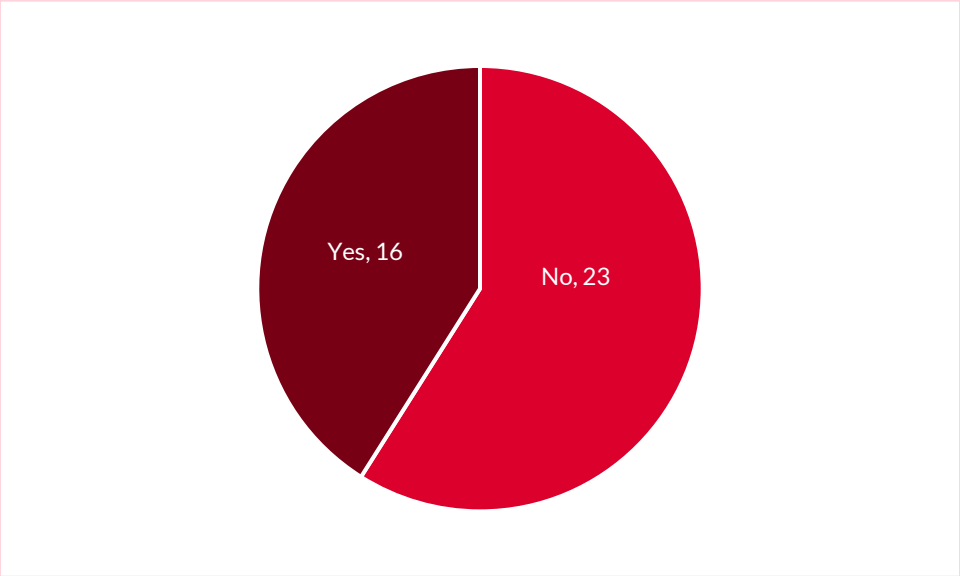

Chart 6: Amendments where Public Notice was Exempted

Our analysis indicates that, in 16 out of 74 gazette notifications, this exemption was invoked and the requirement for public notice was waived by the government in public interest. Interestingly, all 16 notifications introduce amendments to existing laws and notifications. Therefore, in 41% of the amendments (16 out of 39), public notice was dispensed with in public interest.

In this context, it becomes pertinent to examine whether in such 16 instances where public notice was dispensed with, there was an urgency merited for environmental protection. We observe that 5 out of 16 of these cases were amendments brought about because of COVID-19 as indicated in the

[59] EP Rules 1986, Rule 5(3)(a)
[60] EP Rules 1986, Rule 5(3)(c)
[61] Inserted by Rule 2 of the Environment (Protection) Amendment Rules, 1994 notified by G.S.R.320(E), dated 16.3.1994

notification itself. Of these, two pertained to extension of EC, two extended the tenure of SEAC and SEIAA, and one recategorized pharmaceutical projects as Category B2 projects under the EIA Notification, 2006.

In these cases, it is important to understand how the government interprets 'public interest' which appears to have been justified on the basis of the COVID-19 induced public emergencies. Any changes to subordinate legislation must interpret the meaning of the term 'public interest' within the scope and mandate of the parent act, that is the EP Act. The Bombay High Court (Goa Bench)[62] has categorically observed that the requirement of giving public notice embodies the principle of natural justice of *audi alteram partem*, that is, each party should be heard, and cannot be dispensed with ordinarily. It reiterated the earlier finding of the NGT that the 'public interest' in the context of Rule 5(4) has a direct nexus with environmental protection. This is evident in the following observation of the Court:

> *Thus, the direction which is* sought to be issued in exercise of the powers conferred by sub-rule 4 of Rule 5 of the said Rules has to be for the protection of the environment as well as the greater and urgent need to protect the environment for the good of the public at large by dispensing with the principles of natural justice.[63]

In the remaining 11 cases, where there is no mention of COVID-19, it is unclear what was the imminent public interest which necessitated the dispensation with the public notice requirement. Unless these changes were to be subjected to judicial review, wherein a detailed examination of the official records based on which these decisions have been taken was possible, it is difficult to conclusively state that public interest was indeed served by dispensing with the public notice. However, considering that in 8 of these cases, there was a clear case of relaxation of environmental norms or exemption to compliance to these norms, it can be argued that understanding the nexus between the exemption and environmental protection is difficult to establish. The power to exempt public notice should only be exercised to further the objectives of EP Act and not to introduce institutional or systemic changes.[64] Therefore, according to us all such notifications where the requirement of public notice was waived off with no relevance to environmental protection are *ultra vires*. Such amendments which downgrade the existing environmental protection measures also qualify to be regressive.

[62] *Kashinath Jairam Shetye and Ors. Vs. Union of India and Ors.*, 2021(6) BomCR323.

[63] n62

[64] Shibani Ghosh, *Indian Environmental Law: Key Concepts and Principles* (Oriental Black Swan, 2019) 75

VII. Problematic Law Making

Row Labels	Gazette Notification	OM	Order	Letter	Circular	Grand Total
Routine administration	29	9	2	-	-	**40**
Amendment	39	-	-	-	-	**39**
Directive	1	22	-	-	1	**24**
Clarification	-	5	1	2	-	**8**
Relaxation	-	4	-	-	-	**4**
Communication	-	2	-	1	-	**3**
New	3	-	-	-	-	**3**
Others	2	-	-	-	-	**2**
Grand Total	**74**	**42**	**3**	**3**	**1**	**123**

Table 2: Problematic Law Making

In our analysis, we observe that 22 of the OMs issue directions to authorities and agencies such as the EAC, while 4 offer relaxations to industries. Collectively, these constitute 21% of the entire dataset and 62% of all the OMs issued during the study period.

As mentioned earlier in Chapter 4 (I), OMs are used for inter and intra departmental communication of decisions.[65] Since they are not mandatorily required to be in the public domain, they should not be used as instruments for issuing important environmental decisions. Instead, any such decision which should be widely known should be published as a notification in the official gazette of India.[66] This is because a gazette notification has legal sanctity, lends authenticity to the decision of the government[67] and is available in Hindi in addition to English, thus being accessible to a wider public.

VIII. Ultra Vires

18% (22) of all the instruments analysed can be interpreted to be *ultra vires*.[68] As discussed previously in Chapter 2 (II), we selected two indicators to determine whether a change was *ultra vires* or not: a) if the change was contrary to the scheme of the EP Act; and b) if the change was made in excess of the powers delegated to the executive under the EP Act.

[65] n53, 77
[66] n19, 29
[67] 'Long Wait for Printed Gazette Notifications Over- Government Shifts to e-Publishing' <https://pib.gov.in/newsite/PrintRelease.aspx?relid=128570> accessed 16 November 2022
[68] See discussion in Chapter 2 at page 9 above

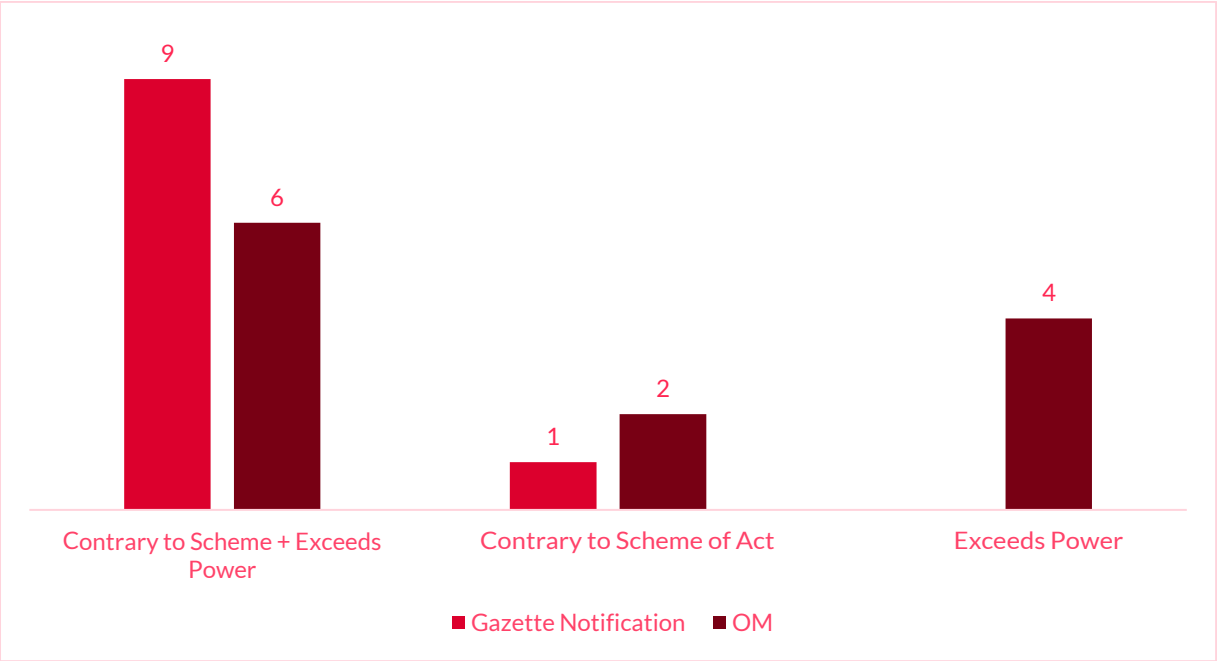

Chart 7: Indicators of Ultra Vires

We found that 3 of the changes fall in the first category. For example, an OM wherein the Central Government discourages the various SEIAAs from undertaking site visits would be contrary to the objectives and spirit of the EIA Notification, 2006. Another 4 of the changes fall into the second category. These pertain to OMs which in effect seek to amend the statutory procedure or create exceptions to legislative mandates. For example, giving a blanket extension to ECs, or permitting thermal plants to change coal source without amending the EC would fall into this category. Whereas 15 of the changes are *ultra vires* on both these grounds. For example, OMs by which post facto EC or CRZ clearance has been sought to be regularised would violate both the grounds. Similarly, a gazette notification which amends the EIA Notification to exempt the public hearing requirement would also fall into this category.

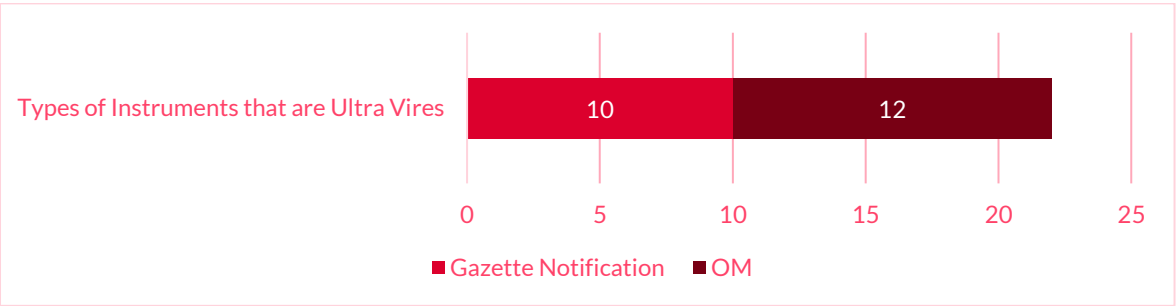

Chart 8: Types of Instruments that are Ultra Vires

In terms of the modes by which these changes were introduced, we observe that 10 gazette notifications and 12 OMs are *ultra vires*. Some of these instruments have been discussed at greater length in the case studies I, II, V- VIII in the Chapter 5.

IX. Non-Regression

Row Labels	Gazette Notification	OM	Total
Relaxation	11 (30%)	2 (5%)	13 (35%)
General Decision	5 (14%)	4 (11%)	9 (24%)
Exemption	6 (16%)	2 (5%)	8 (22%)
Exemption + Relaxation	0	4 (11%)	4 (11%)
Relaxation + General Decision	2 (5%)	1 (3%)	3 (8%)
Grand Total	**24 (65%)**	**13 (35%)**	**37 (100%)**

Table 3: Nature of Regression

We observe that 30% (37) of all the instruments violated the principle of non-regression which has been discussed in Chapter 2(III). It includes 24 Gazette Notifications and 13 OMs. Of these 37 instruments, 35% (13) afforded a relaxation in environmental norms and standards. We believe that since this is likely to affect the right to a safe environment of the affected people, these changes are regressive in nature. For example, relaxing emission standards for coal-based thermal power plants would amount to a regressive change in our data.

24% (9) of the changes involved a general decision or a blanket direction to industries, instead of making a case-to-case assessment before arriving at a decision. For example, extending the validity of all ECs because of COVID-19 would also amount to be a regressive change under the study.

22% (8) of the changes afforded some form of an exemption from established procedures. For example, the exemption to pharmaceutical industries from conducting a public consultation and requiring an EIA report would fall under this category. We believe that this directly affects the right of the people to raise their concerns and dilutes the scientific rigour in the EIA process.

Finally, about 11% (4) of the changes involved elements of both, exemption and relaxation, and 8% (3) changes involved both relaxation and general decisions.

Some of these instruments have been discussed at greater length in case studies I-III and V- VIII in the Chapter 5.

X. Institutional Integrity

Grounds	Gazette Notification	Letter	OM	Total
Exempting procedure	6 (30%)	0	2 (10%)	8 (40%)
Impinging Independence	0	1 (5%)	8 (40%)	9 (45%)
Exempting procedure + Grievance Redressal Mechanism	1 (5%)	0	2 (10%)	3 (15%)
Grand Total	**7 (35%)**	**1 (5%)**	**12 (60%)**	**20 (100%)**

Table 4: Weakening of Institutional Structures

As discussed earlier in Chapter 2(III), three of the essential ingredients of EROL which pertain to the institutional integrity are:

- Accountability and integrity of institutions and decision makers
- Clear and coordinated mandates and roles, across and within institutions
- Accessible, fair, impartial, timely, and responsive dispute resolution mechanisms

Any change that goes against these ingredients would weaken EROL in the country. In this regard, we observe that 16% (20) out of the 123 instruments affect institutional integrity in one way or another. This includes 12 OMs, 7 gazette notifications and a letter issued by the MoEFCC.

We found that 35% (7) of such instruments override the existing law to exempt a procedural mandate that had been entrusted upon an independent body. For example, extending EC and Terms of reference ("**TOR**") to industries, without consulting the EAC would go against the procedure stipulated under the EIA Notification. Such an exemption would create ambiguity on the standards to be imposed by the EAC. Another 45% (9) of such instruments impinge upon the independence of bodies created to perform specific functions. For example, a direction to the EAC to consider only certain information or impose conditions of only a certain nature, would impinge upon the independent functioning of the EAC which was stipulated under the EIA Notification, 2006. Further, 15% (3) of the changes exempted the procedure in such a manner, that it in a way adversely affected the statutory rights of people to participate in the environmental decision-making process. Specifically, dispensing with the public hearing requirement under the EIA Notification would fall into this category as these hearings act as a forum for the affected people to raise their concerns so that they may be accounted for while granting or rejecting the EC applications.

Some of these cases have been discussed at greater length in case studies I, VII and VIII in the Chapter 5.

XI. Accessibility of Information

The right to life under Article 21 includes the right to a clean environment.[69] In order to protect that right it is necessary to provide the information affecting an environmental situation.[70] Additionally, for transparency and accountability in environmental governance, effective and timely access to accurate environmental information is of vital importance.[71] In absence of access to such environmental information, public participation will be devoid of any substance. Additionally, the lack of effective public participation facilitates arbitrariness in environmental governance. Thus, access to environmental information was categorically recognised by the UNEP as a key component of EROL.[72]

For understanding regulatory trends, tracking changes in environmental norms and conducting studies like this, it is imperative that the concerned regulatory authority makes sincere efforts to disclose information relating to regulatory decisions and decision-making processes. It is one of the legal obligations imposed on the government.[73] However, we find that this duty was not being fulfilled in the following ways:

- **Absence of collated data**: As explained in the methodology section above, not all of the 123 instruments were available on one official website of the government. Instead, they had to be sourced from various government and private websites. The exercise was further problematized by the fact that the changes of similar nature were brought about using different instruments. Tracking the changes that are spread out between gazette notifications, OMs, circulars, letters etc. makes the exercise cumbersome thereby affecting the timely and effective access to environmental information.

- **High frequency of changes**: During the period of the study, various Rules and notifications were amended 39 times. It is important to highlight that these Rules and notifications are substantially important instruments in the environmental law regime. Multiple changes at high frequency in these legal instruments without a collated source make it especially difficult to track and keep up with the developments being brought out in the environmental law regime. It is perhaps reflective of an unstable regulatory regime.

- **Language barriers in communicating the change:** As highlighted earlier, about 34% of the changes of significant nature have been made using OMs. It is important to reiterate that OMs are inter and intra departmental communication instruments, using them to bring significant changes in the legal regime stifles the access to information regarding the changes made. Further they are not available in local languages as opposed to the gazette notifications, which at the very least, are also available in Hindi. This adds a further layer of non-accessibility.

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[69] *Subhash Kumar vs. State. of Bihar* (1991) 1 SCC 598.

[70] The right to access environmental information is developed as an outgrowth of the right to seek information more broadly - The Right to Information was enshrined in both article 19 of the 1948 Universal Declaration of Human Rights and article 19 of the 1966 International Covenant on Civil and Political Rights. In the Indian Context Right to Information is a legal right under the Right to Information Act 2005.

[71] n33, 98

[72] n33

[73] n33, 63

- **No explanation:** The Pre-Legislative Consultation Policy, 2014 released by Ministry of Law & Justice states that every draft delegated legislation should be accompanied by an explanatory note explaining key legal provisions in a simple language. This becomes even more important in case of environmental law wherein technical information is required to be understood by common people who are likely to be affected by the law. Without an explanation regarding the decisions being made, the information is devoid of any rationale for the decision. Additionally, the changes without any explanation hinder accountability in environmental governance. Access to effective information is vital for preventing arbitrariness and ensuring accountability.

5. Case Studies

I. Extension of ECs in Light of COVID-19

EIA is a critical legal instrument to assess impact of a project on the environment and people and to try to avoid/minimise the same.[74] An EC to any developmental activity is granted only after following all the procedures and steps outlined in the EIA Notification, 2006. This includes scoping by the EAC, preparation of EIA Report, public consultation, expert appraisal, and final grant or rejection of the EC by the government.

In the study period, we tracked 4 instances where the validity of ECs has been extended on pretext of COVID-19. An OM[75] extended validity of prior ECs expiring between 15th March 2020 and 30th April 2020, till 30th June 2020. As highlighted earlier OMs are communicative instruments, they ought not to be used to bring about substantial changes. Additionally, the above-mentioned OM was not published in any local language. However, it is important to highlight that bringing about substantial changes circumventing the established channels dilutes the procedural safeguards laid down to stop arbitrariness.

Similarly, another OM[76] extends the validity of the EC granted for construction of housing projects under the SWAMIH Investment Fund - I. The Fund was launched in 2019 with a corpus of Rs. 25,000 crores to complete the construction of 1,500 stalled housing projects comprising 4.58 lakh housing units across the country.[77] The OM states that the extension is being granted as a special case at the request of the Ministry of Finance. The procedure under law for seeking an extension of validity of the EC is to file an application with the concerned regulatory authority along with the Form - 1 and Supplementary Form 1A.[78] The regulatory authority may also consult the EAC or the SEAC while considering the application. In this case, it appears that the extension has been granted without any such application or form being submitted. Therefore, the MoEFCC has departed from the procedural mandate under the law simply by way of an OM. Similarly, extension of an EC for such a large-scale and geographically dispersed project without recording the potential environmental fallouts is against the mandate of the law.

On 27th November 2020 by way of a gazette notification,[79] the Central Government extended the validity of prior ECs whose validity was expiring in the Financial Year 2020-2021. Through the notification they were deemed to be extended till the 31st of March 2021. The rationale behind the

[74] 'Environmental Clearance - The Process' <https://www.cseindia.org/environmental-clearance---the-process-403> accessed 16 November 2022

[75] Office Memorandum, MoEFCC, F.No. 22-25/2020-IA.III, 25 March, 2020

[76] Office Memorandum, MoEFCC, F.No. 22-25/2020-IA.III, 6 July, 2020

[77] Press Trust of India, 'SWAMIH Investment Fund Gives Final Approval to 105 Proposals' *The Economic Times* (18 February 2022) <https://economictimes.indiatimes.com/industry/banking/finance/swamih-investment-fund-gives-final-approval-to-105-proposals/articleshow/89669032.cms?from=mdr> accessed 16 November 2022

[78] EIA Notification, Para 9

[79] Gazette Notification, MoEFCC, CG-DL-E-27112020-223373, 27 November 2020

extension of validity is to ensure uninterrupted operations of such projects or activities which have been stalled due to the lockdowns pertaining to COVID-19. In this case, there is a blanket extension given to all projects. Under the EIA Notification, the validity of an EC is for the period from which a prior EC is granted by the regulatory authority. The period of validity differs for different sectors.[80] The EIA Notification enables analysis of the effect of developmental activities on the environment before the project is actually implemented. Therefore, a blanket extension covering all the different projects requiring reissuance of EC in a financial year without assessing the potential environmental fallouts as iterated earlier is against the mandate of the law.

Similarly, on 18th January 2021, the Central Government by way of a gazette notification excluded the period from 1st April 2020 to 31st March 2021 for the purpose of calculation of the period of validity of TOR and ECs[81]. The TOR forms a fundamental part of the EIA process which prescribes project specific EIA studies to be conducted by the project proponents. It provides details of all the desired information required to be collected and analysed for a particular project or activity based on which an informed decision about awarding the EC is taken by the EACs. Similarly, in case of this notification, an exclusion of an entire financial year for the purpose of calculation of the period of validity of TOR and prior ECs goes against the objective of EIA. In order for COVID-19 to be a valid reason for a legal change, it has to have a rational nexus to the object sought to be achieved by the respective change. As there is no rational nexus between exclusion of a financial year from calculating validity of the period of TOR and prior ECs the exclusion is observed to be arbitrary.

It is important to reiterate that OMs are not law-making instruments. OMs used to bring about substantial changes in laws are *ultra vires* because of the very nature of OMs. Additionally, a blanket extension of ECs is regressive because it backtracks the procedural safeguards. Moreover, COVID-19 cannot be a veil to inverse the very objective of the EIA Notification, 2006 and backtrack on environmental safeguards.

II. Recategorization of Active Pharmaceutical Ingredients (API) Related Projects as B2 Projects Because of COVID - 19

Under the EIA Notification, applications for projects under category B (which are appraised at the State Level) go through a mandatory 'Screening' process where the SEAC scrutinise whether the particular project shall be categorised as B1 or B2 '*depending upon the nature and location specificity of the project*'.[82] Projects that are categorised as B2 are exempted from the requirement of EIA studies and public consultation.[83]

On 27th March 2020, by way of an amendment to the EIA Notification, the Central Government recategorized pharmaceutical projects from A projects to B2 projects effective till 30th September 2020 in the wake of the pandemic[84]. Subsequently, on 15th October 2020 by way of an amendment, this

[80] EIA Notification, Para 9

[81] Gazette Notification, MoEFCC, CG-DL-E-18012021-224513, 18 January 2021

[82] EIA Notification, Para 7(I)

[83] EIA Notification, Para 7 (I), (III)

[84] Gazette Notification, MoEFCC, CG-DL-E-28032020-218947, 27 March 2020

categorisation was extended till 30th March 2021.[85] On 16th July 2021 the Central Government by way of another amendment extended this categorization to 31st December 2021[86].

Not surprisingly, State Governments reportedly received over 100 project proposals for bulk drug production within two weeks from the date of the first notification.[87] According to CPCB's latest categorization of industries, the pharmaceutical industry falls under the red category, and it is one among the 17 categories of highly polluting industries.[88] Given that pharmaceutical industries are a major source of pollution, any relaxation to this industry should be given very carefully.[89] A case-to-case assessment should have been made by the government instead of a blanket relaxation to all pharmaceutical industries. Perhaps a more prudent approach would have been to list such industries which manufacture drugs related to COVID-19. Therefore, as per our assessment these notifications defeat the purpose of EIA are contrary to the objective of EPA.

Additionally, the MoEFCC by an OM dated 28 January 2021[90] directed that EAC and SEAC shall appraise APIs and Intermediates as a single category. The OM stated that this is being done in order to '*provide flexibility to the industry to change the raw material mix and/or product mix within the sanctioned pollution load*'. This is one of the changes being introduced by the government in a bid to improve ease of doing business in the pharma sector.[91] The EIA Notification, 2006 clearly requires an EC for any proposed change in product-mix in Category A and B1 projects.[92] Thus, the OM creates an exemption from the requirement to obtain a fresh EC for the pharma industry, without even assessing or acknowledging the possible environmental repercussions of such a decision.

We thus submit that changes brought to the EIA Notification through the aforesaid amendment and OMs are *ultra vires* to the EP Act and regressive.

III. Relaxations Considering COVID-19

On 16th June 2021,[93] the Central Government amended the EIA Notification to insert the following paragraph 4(iii):

[85] Gazette Notification, MoEFCC, CG-DL-E-16102020-222503, 15 October 2020

[86] Gazette Notification, MoEFCC, CG-DL-E-16072021-228338, 16 July 2021

[87] Press Trust of India, 'States Get over 100 Proposals for Bulk Drugs Production after MoEFCC Decentralises Green Nod Process' *the Economic Times* (16 April 2020) <https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/states-get-over-100-proposals-for-bulk-drugs-production-after-moef-decentralises-green-nod-process/articleshow/75175541.cms?from=mdr> accessed 16 November 2022

[88] Categorization of Industries, CPCB < https://cpcb.nic.in/uploads/Latest_Final_Directions.pdf> accessed 16 November

[89] Pharmaceutical Pollution in India: An Emerging Concern (*Toxic Links Org*) <http://toxicslink.org/docs/Pharmaceutical%20pollution%20in%20India%20An%20emerging%20concern.pdf> accessed 16 November 2022; Hyderabad's Pharmaceutical Pollution Crisis: Heavy metal and solvent contamination at factories in a major Indian drug manufacturing hub (*Changing Markets Foundation*) <https://changingmarkets.org/wp-content/uploads/2018/01/CM-HYDERABAD-s-PHARMACEUTICAL-POLLUTION-CRISIS-FINAL-WEB-SPREAD.pdf > accessed 16 November 2022

[90] Office Memorandum, MoEFCC, F.No. 22-33/2019-IA.III, 28 January 2021

[91] Unstarred Question No. 3635. To Be Answered On Wednesday, 17 March, 2021 <https://dpiit.gov.in/sites/default/files/lu3635.pdf> accessed 16 November 2022

[92] EIA Notification, 2006, Para 4, 7

[93] Gazette Notification, MoEFCC, CG-DL-E-16062021-227646, 16 June 2021

(iii a) "*Such Category 'B' projects, as notified by the Central Government on account of exigencies such as pandemics, natural disasters, or to promote environmentally friendly activities under National Programmes or Schemes or Missions, shall be considered at the Central level as Category 'B' projects.*"

The amendment also added the following category of projects in the Schedule of the EIA Notification, 2006:

5(g)(b) Expansion of sugar manufacturing units or distilleries for production of ethanol, having Prior Environment Clearance (EC) for existing unit, to be used completely for Ethanol Blended Petrol (EBP) Programme only, as per self-certification in form of an affidavit by the Project Proponent, shall be appraised as category 'B2' projects.

Provided that subsequently if it is found that the ethanol, produced based on the EC granted as per this dispensation, is not being used completely for EBP Programme, or if ethanol is not being produced, or if the said distillery is not fulfilling the requirements based on which the project has been appraised as category B2 project, the EC shall stand cancelled"

As per the notification, the change was introduced to speed up the government's commitment to achieve 20% blending of ethanol in petrol by 2025. It also explains that this dispensation is aimed at grain-based distilleries having Zero Liquid Discharge and setup to produce only ethanol for the purposes of Ethanol Blending Program. The notification also claims that said amendments are proposed taking into consideration overall environmental, social and economic benefits which includes lesser dependence on imported fossil fuel, lower emission of Green House Gases and other pollutants, and likely boost to the agricultural sector. [94] However, no such scientific studies were cited while making such claims.

As discussed in the preceding case study, projects that are categorised as B2 are exempted from the requirement of conducting EIA studies and public consultation. The underlying perspective for this relaxation as stated is that the EIA process was delaying the expansion of distilleries producing ethanol which has various economic, social and environmental benefits. In fact, the Notification overlooks the environmental and social impact of the manufacturing process itself. This Notification weakens the institutional structure by bypassing the need to go through the rigorous process of EIA, public scrutiny, and expert review which is mandatorily followed in case of sugar manufacturing units or distilleries.

Similarly, another Gazette Notification dated 10th September 2021 relaxed the effluent standards for Tanneries.[95] Tannery industry is listed under the red category[96] by the CPCB, it is one of the most polluting sectors due to the application of wide type chemicals during the conversion of animal skins into leather. Chromium salts, tannins, organic matter, among other products, are constantly released in tannery wastewater[97]. These pollutants offer environmental risks to aquatic life, human and

[94] n93

[95] Gazette Notification, MoEFCC, CG-DL-E-24092021-229917, 10 September 2021; See also CG-DL-E-24092021-229921, 10 September 2021

[96] Revised Classification of Industrial Sectors Under Red, Orange, Green and White Categories (February 29, 2016), Central Pollution Control Board <https://cpcb.nic.in/openpdffile.php?id=TGF0ZXN0RmlsZS9MYXRlc3RfMTE4X0ZpbmFsX0RpcmVjdGlvbnMucGRm> accessed 16 November 2022

[97] Bosnic, M., J. Buljan, and R. P. Daniels, "Pollutants in tannery effluents." *United Nations Industrial Development Organization* 26 (2000)

environment health at large[98]. According to the gazette notifications, the rationale for relaxation in effluent standards for the tanneries is on the pretext of difficulties faced by the industry due to COVID-19. It appears that the distinction between an industry facing difficulties due to COVID-19 and the effluent standards it has to adhere to for environmental protection has been overlooked in the favour of ease of doing business during the pandemic.

Both of the above notifications are regressive because they relax the previously laid down environmental standards and backtrack on the environment protection.

IV. Extension in Validity of Rules Because of COVID-19

A. Understanding the provision

Rule 5 of the EP Rules empowers the Central Government to impose prohibitions or restrictions on industries. For this purpose, it lays down the following procedure and timelines:

- The Central Government may give public notice of its intention to impose prohibitions or restrictions.[99]
- A person interested may submit written objections within 60 days from the date of notification.[100]
- The Central Government shall consider all the objections within 120 days from the date of notification.[101]
- The Central Government may impose the prohibition or restriction within 725 days (erstwhile 545 days) from the date of the notification.[102]

B. Description of the change

In the study period, we tracked five changes to Rule 5(3)(d) of the EP Rules which lays down the time periods within which the Central Government shall consider all the objections and may impose prohibition or restrictions on industries.

- 18 March 2020 - Period for imposition of prohibition or restriction increased from 545 days to **725 days.**[103]

- 22 September 2020 - Proviso inserted
  ''*Provided that for the purpose of this clause, the period of national lockdown from 25th March, 2020 to 31st May, 2020 on account of COVID-19 pandemic shall be excluded for the purpose of counting the number of days for publication of the final rule or order or notification.*'[104]
- 3 December 2020 - Proviso substituted to the following

[98] Tadesse, Geremew Liknaw, Tekalign Kasa Guya, and M. Walabu, "Impacts of tannery effluent on environments and human health: a review article." *Advances in Life Science and Technology* 54, no. 10 (2017)
[99] EP Rules 1986, Rule 5(3)(a)
[100] EP Rules 1986, Rule 5(3)(c)
[101] EP Rules 1986, Rule 5(3)(d)
[102] EP Rules 1986, Rule 5(3)(d)
[103] Gazette Notification, MoEFCC, CG-DL-E-18032020-218771, 18 March 2020
[104] Gazette Notification, MoEFCC, CG-DL-E-22092020-221875, 22 September 2020

"Provided that for the purpose of this clause, the validity of **notification or rule or order expiring in the Financial Year 2020-2021** shall stand extended up to 30th June 2021 on account of COVID-19 pandemic".[105]

- 16 June 2021 - Proviso substituted to the following
"*Provided that on account of COVID-19 pandemic, for the purpose of this clause, the period of validity of the notification expiring in the financial year 2020-2021 and 2021- 2022 shall be extended up to 31st December 2021 or six months from the end of the month when the relevant notification would have expired without any extension, whichever is later*".[106]

- 31 December 2021 - Proviso amended to replace 31st December 2021 to 30th June 2022.[107]

C. Why is the extension of timelines under Rule 5(3)(d) problematic?

By introducing the amendments, the Central government has increased the time available for imposing the actual restriction or prohibition to 725 days from the 545 days as prescribed under the Rules. Such amendment in extending the number of days in Rule 5(3)(d) is not new and previously amended several times.[108] Furthermore, excluding the lockdown period from the calculation of these 725 days, it has afforded itself 1535 days (725 + 828), which is 51 months (>4 years) to impose the said restrictions. It is understandable that these were exceptional circumstances and the government, and the industries were not working normally, and in many cases suspension of statutory rights may be justified. However, even during the lockdown period, fundamental rights continued to be available to the citizens. There can be no violation of the right to a safe environment under Article 21. In this case, the 4-year period taken by the government to impose restrictions on industries not only impinges upon the right of the people to participate in decision – making, but also threatens their right to enjoy a safe environment. This is particularly because, as stated above, the factors considered at the time of the deliberation on the need to impose restrictions would cease to be relevant at the time of the actual imposition.

It can be argued that such an arbitrary long extension of time makes the entire process envisaged under Rule 5 redundant by expanding the time period between raising of objections and the actual introduction of the regulatory change. The Central Government is only afforded 120 days to consider the objections and the period of 725 days (both calculated from the time of notification) is merely a timeframe to formally operationalise its decision. Further, Rule 5(1) enlists the factors that the government must consider while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas. For example, this includes the likely emission or discharge of environmental pollutants from an industry; topographical and climatic features of an area; biological diversity needed to be preserved, proximity to human settlements, etc. These factors are time sensitive, and it is probable that they will change after two years. The objections raised at the beginning of the process are likely to have become redundant or have lost context and relevance. And thus, for a truly meaningful participatory process, as envisaged under the EP Rules, fresh consideration would be required of the facts and circumstances.

During this extended time period, the window for the public to raise objections is closed. If there are changes in social, cultural, environmental or economic circumstances under which it was initially proposed to impose the prohibitions and restrictions and in which context the objections were raised and considered by the Central Government, then these would not be accounted for at the end of the

[105] Gazette Notification, MoEFCC, CG-DL-E-03122020-223458, 3 December 2020

[106] Gazette Notification, MoEFCC, CG-DL-E-16062021-227644

[107] Gazette Notification, MoEFCC, CG-DL-E-31122021-232289

[108] Amendment vide G.S.R. 636(E), dated 25.06.1992.- 180 days; vide G.S.R. 513 (e) dated 28.06.2012- 545 days

long time period when the restrictions or prohibitions are actually imposed. It would defeat the very purpose of public consultation. Further, the original intention of imposing prohibition or restriction on the location of industries can get defeated if the said activity continues to be unabated and lead to a *fait accompli* situation. This is particularly important as the restrictions on developmental activities around Wildlife Sanctuaries and National Parks are published through Ecosensitive Zones Notification following the process outlined in the Rule 5(3) of the EP Rules. Any delay in finalizing the notification may lead to irreversible change in landscape, with the potential to defeat the whole purpose of declaring such areas as Ecosensitive Zone.

Where the Central Government requires more time to arrive at a decision, it should, as a good practice in law, take an extension on a case-to-case basis, recording in writing the reasons and circumstances because of which an extension is required. This is like the approach adopted in other legislation like the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which is also a social legislation like the EP Act. Instead, the Central Government has given itself a blanket extension with no obligation to impose the restrictions in a timely manner. There is an absence of a logical nexus between this extension and the objective of the EP Act and the EP Rules.

V. Post-Facto EC Regularised

On 19th February 2021 and 7th July 2021, the MoEFCC issued two OMs[109] creating procedures permitting ex-post-facto CRZ clearance and EC respectively. Both cited the SC ruling in the *Alembic Pharmaceuticals v. Rohit Prajapati*,[110] where penalties were imposed on industries operating without valid environmental clearances were allowed to operate. The SC in the *Alembic case* cited its previous judgment in Lafarge *Umiam Mining Private Limited v. Union of India*[111] where ex post-facto environmental clearance was upheld by the apex court.

The OM dated 19 February 2021 pertaining to ex-post-facto CRZ clearance is aimed to bring projects and activities which have commenced construction without a valid CRZ clearance into compliance rather than '*leaving them unregulated and unchecked which will be more damaging to the environment*'. The OM prescribes a multi-step process involving the submission of required details of the particular project at the instance of the project proponent, to be assessed for environmental damages and remedial steps by the concerned Coastal Zone Management Authority ("**CZMA**").

The OM dated 7th July 2021 pertaining to EC cited an NGT ruling[112] requiring the development of a Standard Operating Procedure ("**SOP**") for addressing violation cases under the EP Act. The OM provided a detailed SOP for addressing violation cases under the EIA Notification, 2006. It also introduces a step-by-step process for regularising the projects that do not have a valid EC. It also prescribes a penalty for these violation cases.

The issue of ex-post facto clearances under environmental laws has been subject to much back and forth between the executive and judiciary. This is for the intrinsic question as to how a 'prior' EC can be granted after construction has already begun, and whether the legislature envisaged such a clearance in the first place. In *Alembic Pharmaceuticals case*, the SC held a 2002 circular[113] permitting such

[109] Office Memorandum, MoEFCC, F.No.19-27/2015-IA.III, 7 February, 2021; See also F. No. 22-21/2020-IA.III, 7 July, 2021.
[110] *Alembic Pharmaceuticals v. Rohit Prajapati*, 2020 SCC Online SC 347.
[111] *Lafarge Umiam Mining Private Limited v. Union of India*, (2011) 7 SCC 338.
[112] *Tanaji Balasaheb Gambire v. Union of India*, O.A 34/2020 WZ dated 24th May, 2021.
[113] Circular, MoEFCC, J-21011/8/98-IA. II, 14 May 2002

clearances to be unsustainable in law whilst classifying the concept of ex-post facto clearances as being '*in derogation of the fundamental principles of environmental jurisprudence*'.[114] However, in a its subsequent *Electrosteel Steels* ruling,[115] the SC refused to interfere with an ex-post facto clearance granted to an Integrated Steel Plant under the OM dated 7th July, 2021 and held that such clearance may be granted if the adverse consequences of not granting them outweigh the consequences of regularisation of operations of the industry concerned. The consequences the court was referring to be the economic fallouts and losses of livelihoods due to closure of the steel plant.[116] The decision in Electrosteel Steels case has later been reiterated by the SC in the case of Pahwa *Plastics Pvt. Ltd. And Anr. vs. Dastak Ngo and Ors.*[117]

The disconnect in SC opinions regarding ex-post facto clearances also extends to the NGT, with some rulings holding administrative orders permitting such clearances to be unlawful[118] and others directing the MoEFCC to develop processes for addressing violations of the EIA Notification, including ex-post facto clearances.[119] Similar disconnects extend to High Court decisions as well.[120]

Regardless of the validity of such ex-post facto clearances, it is extremely problematic that these substantial changes are being introduced to the scheme of the EP Act and the EIA Notification by way of OMs. The EP Act does not permit the Central Government to create such a parallel process for obtaining clearances by simply issuing OM and hence, these OMs are *ultra vires.* Further, since these OMs in a way afford a relaxation to the industries in a way not stipulated under the law, these OMs are also regressive to the environmental safeguards. Finally, the OMs impinge upon the independence of the CZMA and the EAC by directing that these violations should be appraised and regularised, when normally, these authorities may not have taken this course of action under the law.

VI. Relaxation of Standards

On 19th October 2020 the Central Government by way of a Gazette Notification[121] amended the EP Rules 1986 for the coal-based thermal power plant units installed after 1st January 2003, to 31st December 2016 in respect of Oxides of Nitrogen (**"NO_x"**) and relaxed the emission standards from "300 mg/Nm^3" to "450 mg/Nm^3". The notification gives no reason for the aforesaid relaxation. NOx are major pollutants in emissions from coal based thermal power plants. Increased levels of Nitrogen Oxides are major contributors in the formation of secondary particulate matter (**"PM"**) and ground-level ozone, both of which have adverse health and environmental impacts. Much of India's air pollution has been linked to the nitrogen pollution.[122] In light of such a critical position with respect to Nitrogen pollution,

[114] *Alembic Pharmaceuticals v. Rohit Prajapati*, 2020 SCC Online SC 347 [27].
[115] *Electrosteel Steels Limited v. Union of India*, 2021 SCC Online SC 1247.
[116] *Electrosteel Steels Limited v. Union of India*, 2021 SCC Online SC 1247 [84].
[117] Civil Appeal No. 4795 of 2021, judgement dated 24 March 2022
[118] *S.P Muthuraman v. Union of India*, 2015 SCC Online NGT 169.
[119] *Tanaji Balasaheb Gambire v. Union of India*, O.A 34/2020 WZ dated 24th May 2021.
[120] See *Fatima v. Union of India*, W.P (MD) 11757 of 2021 dated 15th July 2021, before the Madurai Bench of the Madras High Court and Puducherry Environment Protection Association v. Union of India, 2017 SCC Online Mad 7056.
[121] Gazette Notification, MoEFCC, CG-DL-E-22102020-222659, 19 October 2020
[122] S. Jayaraman K, 'India Global Hot Spot for Nitrogen Pollution, Say Experts' [2018] Nature India <https://www.nature.com/articles/nindia.2018.83> accessed 17 November 2022

relaxing emission standards without any explanation amounts to grave regression by relaxing the regulatory standards and backtracking the environmental protection.

Additionally, through one of the OMs dated 11th November 2020,[123] the MoEFCC has permitted thermal power plants to change their source of coal without seeking an amendment to their EC obtained under the EIA Notification, 2006. The order states that this decision has been made considering a Ministry of Power advisory regarding switching from imported to domestic coal in thermal plants. Under the EIA Notification, any such change would have to follow a proper procedure wherein the EAC would independently consider the request for the change and then accordingly decide whether or not to permit the amendment in EC.[124]

The EIA process envisaged by the legislature places considerable reliance on the precise manner in which any project or activity impacts the environment, requiring detailed disclosures covering a large gamut of potential impacts that can occur in the environment and 'change in product mix in existing projects'.[125] A change in coal source would entail wide-ranging changes to the environmental impact of a thermal plant, including the amount of area needed for catering on an exponentially higher fly ash generation. Such actions should only be taken by a legislative route. It is an established principle of administrative law that where any exemption is being given to a class of people, and not an individual person, it is an exercise of the legislative power by the executive.[126] Thus, introducing this change through an OM is ultra vires. The correct instrument for communicating such a decision would have been a gazette notification at the very least.

VII. Exemptions from Public Hearing

On 16th February 2021,[127] the MoEFCC issued an OM vitiating the requirement for public hearings under the EIA Notification, 2006, for those mining projects which had been granted an EC under the EIA Notification, 1994. On 20th October 2021, another OM[128] exempted the public hearing mandate for cases of proposed expansion up to 20% production capacity for Iron, Manganese, Bauxite and Limestone Mining Projects, that have a 5-star rating. The primary trigger for this OM has been the need to 'enhance production' requested for by the Ministry of Mines and 'other' stakeholders which have not been described. Further, through a Gazette Notification dated 18th March 2021[129], the MoEFCC amended the EIA Notification to permit the exemption of the public hearing for those projects where the 5-year EC has expired and the project proponents have applied for a fresh EC, provided that 50% of the construction of the project has been completed.

Under the EIA Notification, 2006, public consultation comprises two components - 1) a physical public hearing and, 2) written responses from stakeholders.[130] The OMs effectively restrict the requirement of public consultation to only the latter. Projects covered by the OM would satisfy the public consultation requirement by merely 'inviting suggestions/objections.' Doing away with the public

[123] Office Memorandum, MoEFCC, F.No. J-13012/8/2009-I.A. II, 11 November 2020
[124] EIA Notification 2006, Para 7(ii)
[125] EIA Notification 2006, Para 7(ii) and Form 1
[126] *State of UP V. Renusagar Power Co*, AIR 1988 SC 1737; Bakul Cashew Co. Ld. vs. S.T. Officer, Quilon AIR 1987 SC 2239, 2240.
[127] Office Memorandum, MoEFCC, F. No. 22-4/2020-IA.III, 16 February 2021
[128] Office Memorandum, MoEFCC, F.No.IA3-22/23/2021-IA.III [E167077], 20 October, 2021
[129] Gazette Notification, MoEFCC, CG-DL-E-18032021-225979, 18 March, 2021
[130] EIA Notification 2006, Para 7(III)(ii)

hearing requirement can be problematic as it would exclude a vast section of the public who may not be equipped to write, advocate or even know where to send in their responses.[131] A physical hearing is especially important in legacy cases to highlight long pending issues of non-compliance by lease owners, and seek environmental justice under the EIA Notification, 2006.[132] Further, exempting the public hearing requirement for projects where EC has expired would deprive people the opportunity to voice concerns in background of the new environment and socio-economic challenges which might have occurred over the years since the EC was granted.

Such an exception to existing law cannot be carved out using an administrative order like OM. In fact, any exception, be it by way of an OM or an amendment to the law, that negatively affects the participatory rights of the people and goes against the mandatory procedures laid down under the EIA Notification, 2006, must be deemed *ultra vires*, and regressive. Finally, by creating such an exception, the MoEFCC has directly interfered with the powers of the EAC to independently appraise the projects based on its merit. As such, these exemptions have contributed to the weakening of EROL.

VIII. Interference with the Independence of SEIAA and SEAC

On 17th January 2022, the MoEFCC issued an OM proposing a 'star-rating system' for SEIAA based on 'efficiency and timeliness in grant of EC'[133] The OM in effect seeks to reduce the time taken by each SEIAA to process proposals for grant of EC, incentivizing consideration of more proposals in each meeting. While the OM has generally viewed negatively by environmentalists,[134] we find it particularly problematic that the OM disincentivises site visits and seeking additional details in response to project proposals which are essential for comprehensive deliberation and verification of information provided in EIA reports. While the powers of scrutiny form the foundation of independence of SEIAAs and SEACs,[135] the importance of site visits in the EIA process has been highlighted in number of environmental judgments.[136] Thus, this OM not only impacts the independence of SEIAAs, expert bodies but also frustrate the mandate of 'detailed scrutiny'[137] of the EIA documents by the EACs/ SEACs.

[131] 'Centre Exempts Certain Mining Projects from Public Hearings' (*NewsClick*, 26 October 2021) <https://www.newsclick.in/Centre-Exempts-Certain-Mining-Projects-Public-Hearings> accessed 16 November 2022

[132] Mayank Aggarwal, 'Government Eases Public Hearing Rules for Legacy Mining Cases' (*Mongabay-India*, 19 March 2021) <https://india.mongabay.com/2021/03/government-eases-public-hearing-rules-for-legacy-mining-cases/> accessed 16 November 2022

[133] Office Memorandum, MoEFCC, F.No. IA3-22/45/2021-IA.III [170617], 17 January 2022

[134] Simrin Sirur, 'These Are the 7 Criteria Modi Govt Will Use for Ranking States on Environment Clearance' <https://theprint.in/theprint-essential/these-are-the-7-criteria-modi-govt-will-use-for-ranking-states-on-environment-clearance/808592/> accessed 17 November 2022

[135] *R. Veeramani v. Secretary, Public Works Department*, 2013 SCC Online NGT 11 [57], *Debadityo Sinha & Ors. v. Union of India & Ors.*, 2016 NGT Appeal No. 79 of 2014.

[136] *Utkarsh Mandal v. Union of India*, 2009 SCC Online Del 3836.

[137] EIA Notification 2006, Para 7 (IV) (i) EIA Notification, 2006

6. Concluding Remarks

In light of economic concerns arising from the pandemic the Government introduced measures to stabilise the economy. In this study, we systematically analysed the changes brought in the Indian environmental governance and regulatory framework during the first two years of the pandemic. We have tracked 123 regulatory instruments to identify the trends in the practices of the government and have deep dived into some of these through our eight case studies.

The foremost challenge that we, as researchers, faced while conducting this study was the absence of a readily available database of regulatory changes available in the public domain. We had to navigate various governmental and non-governmental websites to track these 123 instruments and despite this, it is difficult to be certain that this dataset is exhaustive. It can then only be imagined how difficult it would be for an ordinary citizen to keep abreast of the decisions of the government which directly or indirectly affect their rights.

As regards the 123 regulatory changes that we tracked, our findings confirm the assertions being made in the media regarding the direction of environmental regulations. The government has introduced a slew of changes while circumventing the due process of law. A number of substantive changes have been introduced by way of OMs, many of which are intended to afford relaxations and exemptions to industries. This is not only in excess of the powers delegated under the EP Act, but it also goes against the spirit of the Act, thus making these changes *ultra vires*. In several cases where an amendment to a delegated legislation has been introduced by a notification, the requirement of public notice has been dispensed with, without an adequate justification or establishing a nexus with environmental protection.

Finally, a number of these instruments weaken the EROL in the country by removing or relaxing environmental norms in the interest of economic growth. They have also reduced the independence of the agencies created under the EIA Notification, which is the spine of the environmental protection against industrial activities in the country.

While the pandemic appears to have been over, it is critical to review the efficacy of environmental laws and the problematic law-making process highlighted in this report. We hope that the findings of this report will inform the government and relevant actors to help building a strong environmental law framework based on the seven core elements of the EROL. We also recommend that the MoEFCC must constitute an independent committee to review all amendments and office orders brought in the environmental legislations and withdraw all such instruments which are found to be ultra vires and regressive. We hope that this study compels the government to remember its role as the trustee of natural resources and re-evaluate its approach to environmental governance in the country.

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