

SOUTH ASIAN ENVIRONMENTAL LAW REPORT

Volume 4 - 2024



"The source of this breathtaking, 116m-high fall is the Kirindi Ela (stream), which flows from its starting point 940m up the Kuttapitiya Mountain (In Ratnapura district, Sri Lanka)."

Centre for Environmental Law and Policy

SOUTH ASIAN ENVIRONMENTAL LAW REPORT

VOLUME 04

2024

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SOUTH ASIAN ENVIRONMENTAL LAW REPORT

VOLUME 4

Centre for Environmental Law and Policy



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PREFACE

The role of the judiciary in interpreting environmental laws has become increasingly prominent, with courts playing a central role in shaping policy and enforcing regulations. By prioritising environmental concerns, the judiciary has set vital precedents for future legal action and encouraged the implementation of more effective environmental governance across the South Asia region. The South Asian Environmental Law Report (SAELR) Volume 4 published by the Centre for Environmental Law and Policy of the University of Colombo highlights how judicial activism has fostered an ecocentric approach to environmental protection, ensuring that human development does not come at the expense of the environment.

This volume builds on the success and valuable insights from its predecessors, continuing to explore the intricate relationship between law, policy, and the environment in South Asia. Through detailed analyses of recent case law, judicial interpretations, and an examination of national and international legal standards, SAELR Volume 4 highlights the vital role of legal systems in shaping the region's responses to pressing environmental issues. With its rich diversity of ecosystems, climates, and populations, South Asia faces unique challenges - from climate change and natural resource depletion to pollution and biodiversity loss - that demand innovative legal approaches.

SAELR Volume 4 highlights several significant cases from Sri Lanka, India, and Bangladesh, each reflecting the complex interplay between environmental protection, legal governance, and the rights of local communities. These cases focus on a range of urgent topics, including wildlife conservation, the protection of wetlands and heritage sites, the rights of nature, and the impacts of climate change. The legal decisions explored in this report emphasise the importance of robust judicial intervention in ensuring that environmental protection is prioritised alongside development needs.

As we face the challenges of a rapidly changing climate, dwindling biodiversity, and growing urbanisation, this volume serves as a crucial resource for policymakers, legal practitioners, and concerned citizens alike. By offering insights into the evolving landscape of environmental law in South Asia, we hope this report will inspire a renewed commitment to environmental justice and the responsible stewardship of the region's natural heritage for generations to come.

Prof. Kokila Konasinghe

Editor-in-Chief

Founding Director of Centre for Environmental Law and Policy (CELP)

CASE SUMMARIES

Centre for Eco-Cultural Studies and Others v. Hon. Wimalaweera Dissanayake and Others CA (WRIT) 420/2021 CA(WRIT)423/2021, CA(WRIT)431/2021, CA(WRIT)433/2021

Sri Lanka – Environment – tamped elephants, – Fauna and Flora Protection [Well-being and Regularisation of Registration of Tamed Elephants] Regulations, No. 01 of 2021 – published in Gazette Extraordinary No. 214/41, Writ Application – seeking a Writ of Certiorari to quash the Order of the learned Magistrate of Colombo – Order of the Magistrate to release the elephants involved in the case to their registered owners/custodians according to the aforementioned impugned Regulations – Writ of Mandamus – directing the Department of Wildlife Conservation to seize the possession of the elephants who were ordered to be released as per the said Order of the Magistrate’s Court.

Ashik v. Bandula and Others (Supreme Court 2007 1 Sri Lr 191

Sri Lanka – Supreme Court – Noise Pollution – Penal Code and the National Environmental Act – religious practice – Public Nuisance – directions on the use of loudspeakers and other similar equipment that may cause excessive noise – colonial legislation.

Centre for Environmental Justice (Guarantee) Limited and Others v. Road Development Authority and Others CA (Writ) 97/2021

Sri Lanka – wetland reserve – construct an elevated highway – cutting across the Thalangama/Awerihena wetland – gazetted as an Environmental Protection Area (EPA) – Extraordinary Gazette Notification 1487/10 in 2007 – responsibility of the state to ensure the protection of designated EPA – the importance of utilising the Public Participation phase – Environmental Impact Assessment (EIA) reports – emergence of the concept of protection of the environment for future generations – environmental jurisprudence.

The State of Telangana and Others v. Mohd. Abdul Qasim Civil Appeal No. of 2024 [Arising Out of SLP (C) No. 6937 of 2021]

India – ecocentrism – rights of nature – climate change – survey error and claimed ownership of land designated as a “reserved” forest – The Supreme Court reinstated the 2018 decision - reaffirming the land's protected status as a forest – judicial activism in India – proactive role of the judiciary – environmental protection.

K.Ranjitsinh and Others v. Union of India and Others Writ Petition (Civil) No. 838 of 2019

India – right to be free from adverse effects of climate change – constitutional rights to life and equality – anthropocentric bias – potentially neglecting broader ecological considerations - human rights.

T.N. Godavarman Thirumulpad v. Union of India and Others I.A.Nos.1433 & 1477 of 2005 in Writ Petition (C) No. 202 of 1995. Judgment dated 13th February, 2012. Reported in 2012

(3) SCC 277, 2012 AIR(SCW) 1644, AIR 2012 SC 1254, 2012 (4) ALD 47, 2012 (4) LW 911, 2012 (2) SLT 446: CDJ 2012 SC 133

India – Asiatic Wild Buffalo (*Bubalus Bubalis*) – an endangered species – genetic purity of the Asiatic Wild Buffalo – relocation of villagers – Udanti Sanctuary – collaboration with research institutions for long-term management – ecocentric approach – need for sustained efforts – proper funding to prevent the extinction of the Asiatic Wild Buffalo – conservation.

Bangladesh Environmental Lawyers Association (BELA) v. The Chittagong City Corporation Represented by Its Mayor and Others High Court Division (Special Original Jurisdiction), Writ Petition No. 4871 of 2012

Bangladesh – protect the Bayezid Bostami Shrine – heritage site – Chittagong – critically endangered – Bostami Turtles – threatened by unauthorised construction near the shrine's pond – balancing environmental conservation – heritage protection – Public Interest Litigation – sustainable development principles – judicial approach.

CENTRE FOR ECO-CULTURAL STUDIES AND OTHERS

v.

HON. WIMALAWEERA DISSANAYAKE AND OTHERS

THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

CA/WRIT/420/2021

CA/WRIT/423/2021

CA/WRIT/431/2021

CA/WRIT/433/2021

BEFORE

Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

COUNSEL

Sanjeewa Jayawardena PC with Prashanthi Mahindaratna, Dilumi De Alwis and Lakmini Warusavithana for the Petitioners in CA/WRIT/420/2021.

Ravindranath Dabare with Savanthi Ponnampereuma and Kanchana Balachandra for the Petitioners in CA/WRIT/423/2021.

Uditha Egalahewa PC with NK Ashokbharan and Shenal Fernando for the Petitioners in CA/WRIT/431/2021.

Dr. Romesh De Silva PC with Niran Anketel, Harith de Mel and Hasini Rupasinghe for the Petitioners in CA/WRIT/433/2021.

Kanishka de Silva Balapatabendi DSG with Shemanti Dunuwille SC for 1st to 40th Respondents in CA/WRIT/420/2021, 1st to 8th Respondents in CA/WRIT/423/2021, 1st to 40th Respondents CA/WRIT/431/2021, 1st to 14th Respondents CA/WRIT/433/2021.

Asthika Devendra with Kaneel Maddumage and Kavindi Weerasekara for the 41st Respondent in CA/WRIT/420/2021, 11th Respondent in CA/WRIT/423/2021, 41st Respondent CA/WRIT/431/2021, 17th Respondent in CA/WRIT/433/2021.

Kuvera De Zoysa PC with Pasindu Parakrama for the 42nd and 43rd Respondents in CA/WRIT/420/2021, 18th and 20th Respondents in CA/WRIT/423/2021, 47th and 48th Respondents in CA/WRIT/431/2021, 24th & 26th Respondents in CA/WRIT/433/2021.

Saliya Peiris PC with Kaneel Maddumage and Kavindi Weerasekara for the 45th, 46th, 50th and 52nd Respondents CA/WRIT/420/2021, 10th, 13th and 15th Respondents CA/WRIT/423/2021, 45th and 46th Respondents in CA/WRIT/431/2021, 16th, 19th and 21st Respondents in CA/WRIT/433/2021.

Kaneel Maddumage for the 47th, 48th and 53rd Respondents in CA/WRIT/420/2021, 14th and 16th Respondents CA/WRIT/423/2021, 43rd and 44th Respondents in CA/WRIT/431/2021, 20th and 22nd Respondents in CA/WRIT/433/2021.

Manohara De Silva PC with Kaneel Maddumage for the 49th Respondent in CA/WRIT/420/2021, 17th Respondent CA/WRIT/423/2021, 42nd Respondent in CA/WRIT/431/2021, 23rd Respondent in CA/WRIT/433/2021.

DECIDED ON

31.05.2024

JUDGEMENT OF

Sobhitha Rajakaruna, J.

MATERIAL FACTS

The Petitioners in the Applications bearing numbers CA/WRIT/420/2021, CA/WRIT/423/2021 and CA/WRIT/431/2021 were seeking a mandate in the nature of a Writ of Certiorari to quash the Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021, published in Gazette Extraordinary No. 214/41 on 19.08.2021. The Petitioners in the Application bearing No. CA/WRIT/433/2021 were seeking a Writ of Certiorari to quash the Order of the learned Magistrate of Colombo dated 06.09.2021, by which the learned Magistrate had decided to release the elephants involved in the case to their registered owners/custodians according to the aforementioned impugned Regulations. Additionally, a Writ of Mandamus was sought directing the Department of Wildlife Conservation to seize the possession of the elephants who were ordered to be released as per the said Order of the Magistrate's Court. The Petitioners in the connected matters also challenge the said Orders of the learned Magistrate of Colombo as well as the Order of the learned Magistrate of Matale dated 06.09.2021.

MATTERS FOR DETERMINATION

- a) Whether Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021 published in Gazette Extraordinary No. 214/41 on 19.08.2021, is valid.
- b) Whether the decision of the Chief Magistrate's Court of Colombo in the case bearing No. B23073/01/15 on 06.09.2021 ('P14' in CA/WRIT/423/2021) and the decision of the Magistrate's Court of Matale in the case bearing No. B941/14 on 06.09.2021 ('P15' in CA/WRIT/423/2021) are valid.
- c) Whether the Department of Wildlife Conservation can be directed to seize possession of the elephants who were ordered to be released according to the said Order of the Magistrate's Court.

RELEVANT AREAS OF LAW

Constitution of Sri Lanka, 1978 – Fauna and Flora Protection Ordinance, No. 02 of 1937 – Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021 – Offences Against Public Property Act, No. 12 of 1982 – Code of Criminal Procedure Act, No. 15 of 1979

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

Several important propositions were established in this order. It held that regulations must be consistent with primary legislation and that the delegated authority empowered to make regulations cannot alter, amend, or override the provisions of the enabling statute. Furthermore, it established that the registration and licensing processes for captive elephants must comply with the FFPO. Additionally, Part I of the impugned Regulations was held to be valid because it protects the well-being of the tamed elephants in Sri Lanka.

DECISION OF THE COURT

The Court issued three Writs of Certiorari quashing Regulations 5(1), 5(2), 6(2), 7(1), 7(2) and 7(3) of the Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021, all decisions on registering or granting approval for the issuances of licences taken based on the above Regulations, and the decisions of the Chief Magistrate's Court of Colombo in the case bearing No. B23073/01/15 on 06.09.2021 and Magistrate's Court of Matale in the case bearing No. B941/14 on 06.09.2021 respectively. The Court also issued a Writ of Mandamus directing the Director General of Wildlife Conservation, the Criminal Investigations Department (CID), the Inspector General

of Police, and the Hon. Attorney General to take necessary steps to prosecute all individuals who illegally kept the elephants referred to in the Magistrate's Court of Colombo and Matale in Case Nos. B23073/01/15 and B941/14 respectively, and who have not been lawfully registered in terms of section 22A of FFPO. Additionally, the Court issued a Writ of Prohibition prohibiting the Director General of Wildlife Conservation from making any decision to hand over the custody of any elephants who were ordered to be released by the Orders of the Magistrate's Court of Colombo and Matale issued on 06.09.2021 in Case Nos. B23073/01/15 and B941/14 respectively, until a lawful order from an appropriate court of law is issued in that regard.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Bandahamy v. Senanayake (62 NLR 313)

Bombay Dyeing & Mfg. Co. Ltd. v. Bombay Environmental Action Group (2006) 3 SCC 434

Gulam Hussain Ali Asgar Shabbir and Others v. LOLC Finance PLC and Another
(CA/WRIT/181/2024)

International Spirits & Wines Association of India v. State of Haryana (2019) 20 SCC 284

Kelani Valley Plantations PLC (formerly Kelani Valley Plantations Limited) v. Chairman of the National Housing Development Authority Others (S.C. Appeal No. 70/2015)

Macfoy v. United Africa Company Limited [(1961) 3 All E.R. 1169 at 1172]

McCallum Brewing Company (Private) Limited v. Commissioner General of Excise and Another [C.A. Writ 469/2008, C.A.M. 18.12.2019]

Rajakulendran v. Wijesundera (1 Sriskantha's Law Reports 164)

CENTRE FOR ECO-CULTURAL STUDIES AND OTHERS

v.

HON. WIMALAWEERA DISSANAYAKE AND OTHERS

CA/WRIT/420/2021, CA/WRIT/423/2021, CA/WRIT/431/2021, CA/WRIT/433/2021

Dulki Seethawaka *

ABSTRACT

This review analyses the Court of Appeal's order in the collective cases CA/WRIT/420/2021, CA/WRIT/423/2021, CA/WRIT/431/2021, and CA/WRIT/433/2021. These cases challenged the validity of the Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021, and the subsequent Magistrate court orders based on these Regulations, which had directed the release of 14 elephants from State custody back to their owners. In the landmark order, the Court issued three Writs of Certiorari quashing Regulations 5(1), 5(2), 6(2), 7(1), 7(2) and 7(3), decisions related to the registration or approval of licences issued based on the Regulations, and the Magistrate court orders based on them. Furthermore, the Court directed the relevant authorities to take action against the individuals who illegally kept the elephants and prohibited the Director General of Wildlife Conservation from making any decisions to transfer the custody of the elephants based on the Magistrate court orders.

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1. INTRODUCTION

Elephants play an intrinsic role in Sri Lanka, associated with cultural, religious and economic practices. According to Rodrigo, there are 210 captive elephants in the country, of which 102 are housed in state owned- facilities, while the remainder are kept by private owners for work or as a symbol of status and prestige.¹ These captive elephants are often exposed to various human-induced cruelty, including being forcefully separated from their herds at a young age, deprived of adequate food, water, and exercises, forced to wear chains that restrict their movement, made to participate in events surrounded by loud noises and crowds, and compelled to carry people or caskets on their back.²

Sri Lankan elephants are strictly protected under the Fauna and Flora Protection Ordinance, No. 2 of 1937 (hereinafter FFPO), and captive elephants must be duly registered and licensed in accordance with its provisions. However, due to political pressure, many elephants are kept in captivity without adhering to the proper procedures. This review focuses on the Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021,³ which were published in the Gazette Extraordinary Notification No.241/41 on 19th August 2021.

2. THE LEGAL AND FACTUAL BACKGROUND

The issue began in 2015 when a policy was implemented stating that only individuals with valid licences could keep elephants.⁴ As a result, 38 elephants owned without the requisite licences were seized and handed over to the four national zoological gardens in Sri Lanka.⁵ However, on 19th August 2021, the Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations No. 01 of 2021 (hereinafter Regulations) were issued by the respective State Minister under section 22A of the FFPO. Subsequently, on 6th of September, 2021, the Chief Magistrate's Court of Colombo, in case No. B23073/01/15, and the Magistrate's Court of Matale, in case No. B941/14, issued orders to release 14 elephants

¹ Malaka Rodrigo, 'Outcry in Sri Lanka as suspected elephant kidnappers get to keep the animals' (*Mongabay*, 18 November 2021 <[² *ibid.*](https://news.mongabay.com/2021/11/outcry-in-sri-lanka-as-suspected-elephant-kidnappers-get-to-keep-the-animals/#:~:text=for%20captive%20elephants,Today%2C%20there%20are%2010%20elephants%20in%20captivity%20in%20Sri%20Lanka,for%20work%2C%20or%20for%20status.> accessed 8 August 2024.</p></div><div data-bbox=)

³ Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021.

⁴ Dulki Seethawaka, 'Tamed Giants in Chains' (*The Morning*, 07 April 2021) <<https://www.themorning.lk/articles/128865>> accessed 8 August 2024.

⁵ *ibid.*

to their previous owners.⁶ The Petitioners challenged the validity of the Regulations and the decisions of both the Chief Magistrate's Court of Colombo and the Magistrate's Court of Matale. Accordingly, four separate cases CA/WRIT/420/2021, CA/WRIT/423/2021, CA/WRIT/431/2021, and CA/WRIT/433/2021 were filed before the Court of Appeal, and the order was issued as a connected matter.

3. THE ORDER OF THE COURT

The Court issued three Writs of Certiorari quashing Regulations 5(1), 5(2), 6(2), 7(1), 7(2) and 7(3) of the Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021, all decisions related to the registration or approval for the issuance of licences based on these Regulations, and the decision of the Chief Magistrate's Court of Colombo in case No. B23073/01/15 on 06th September 2021 respectively. The Court also issued a Writ of Mandamus directing the Director General of Wildlife Conservation, the Criminal Investigations Department (CID), the Inspector General of Police and the Attorney General to take necessary steps to prosecute all individuals who illegally kept the elephants referred to in the Magistrate's Court of Colombo and Matale in Case Nos. B23073/01/15 and B941/14, respectively, who have not been lawfully registered under section 22A of FFPO. Additionally, the Court issued a Writ of Prohibition prohibiting the Director General of Wildlife Conservation from making any decisions to transfer the custody of any elephants ordered to be released by the Magistrate's Courts of Colombo and Matale on 06th September 2021 in Case Nos. B23073/01/15 and B941/14, respectively, until a lawful order from an appropriate court of law is issued in that regard.

4. ANALYSIS

The Regulations allowed for the registration of elephants for purposes such as historical cultural processions, tourism, tourist safari rides, towing vehicles, transporting timber, cinema shooting or any other similar activities. Consequently, it opened the door for the commercial use of elephants by so-called 'owners' who illegally possess elephants and calves without proper registration under the FFPO.⁷ In this order, the Court of Appeal considered several important factors, which are discussed as follows:

⁶ Rodrigo (n 1).

⁷ 'Historic judgement against the Regulation of tamed elephants in Sri Lanka – CA WRT 423/21 – Ejustice' (*Ejustice*, 04 June 2024) <<https://ejustice.lk/historic-judgment-against-the-regularization-of-tamed-elephants-in-sri-lanka/>> accessed 10 August 2024.

4.1. The Process of Registration and Licencing of Elephants

The registration of captive elephants in Sri Lanka is regulated by the FFPO and its subsequent amendments. The Court questioned the new processes for registering and licencing elephants as specified by the Regulations issued by the State Minister under the authority granted by Section 71 of the FFPO. The Court stated that, ‘it is mandatory that the regulations must be consistent with the primary legislation and the delegate, who is empowered to make regulations, cannot alter, amend or override the provisions of the enabling statute’.⁸ Hence, it is the responsibility of the Minister to ensure that the regulations are strictly limited to the scope and the authority granted by the FFPO.

The Petitioners argued that Regulation 5(2) is untenable in law because it contradicts Sections 22A (7), 22A (12) and 23 of the FFPO. According to Section 22A (1) of the Ordinance, owning or possessing an elephant without registering and obtaining a licence in accordance with the Ordinance is prohibited.⁹ If a person owns or possesses an elephant without proper registration and a license, it is deemed as a non-bailable offence punishable under Section 22A (7) of the FFPO. Additionally, Section 22A (12) of the FFPO states that an elephant that has not been duly registered shall be presumed to have been taken from the wild without lawful authority and, therefore, deemed public property. Section 23 of the FFPO specifies the applicable fines and penalties for such offences. Furthermore, the unlawful possession of an elephant is punishable under the Offences Against Public Property Act in conjunction with the FFPO.¹⁰

On the other hand, Regulation 5(2) of the impugned Regulation allows for the registration of an elephant that is in the custody of an owner but has not been registered as of the date of commencement of these regulations, according to the Form set out in Schedule III. Hence, Regulation 5(2) is contrary to Sections 22A (7), 22A (12) and 23 of the FFPO, which is the enabling statute.

The Court agreed that possessing an elephant unlawfully is an offence, that any unregistered elephant is presumed to have been taken from the wild unlawfully, and that such unregistered elephants are deemed public property. Most importantly, the Court questioned how the impugned Regulations have recognised a new class of elephants¹¹ via Regulation 5(2), and where the FFPO allows for the registration of an elephant if a person has become an owner

⁸ *Centre For Eco-Cultural Studies & Others v. Hon. Wimalaweera Dissanayake & Others*, CA/WRIT/420/2021, CA/WRIT/423/2021, CA/WRIT/431/2021, CA/WRIT/433/2021, 45.

⁹ Fauna and Flora Protection Ordinance, No. 2 of 1937, sec 22A.

¹⁰ *Centre For Eco-Cultural Studies & Others v. Hon. Wimalaweera Dissanayake & Others* (n 14) 46.

¹¹ *ibid* 47.

through a so-called *sannasa* (grant).¹² The Court also noted that there are allegations that the elephants in question were acquired through illegal poaching,¹³ and that the impugned Regulations provide an opportunity to legalise their illegal ownership, and avoid ongoing criminal prosecution for such ownership.¹⁴ These decisions made by the Court established the ‘rule of law’ by challenging regulations issued by ministers that are contradictory to the enabling statute.

4.2. Public Interest Litigation

The Respondents objected, claiming that some of the Petitioners in the instant Applications lack *locus standi* to maintain the Review Applications before the Court of Appeal. On the other hand, the Petitioners argued that they are pursuing a Public Interest Litigation (hereinafter PIL) which aims at ‘addressing issues that affect the larger community or societal interests and it generally intends to address matters that impact the public at large, such as environmental protection, human rights, and social justice’.¹⁵ The Court recognised that the application of PIL has enabled the judiciary to play an active role in shaping public policy and ensuring that government actions comply with constitutional and legal standards. Furthermore, the Court held that the Respondents failed to establish reasonable grounds for dismissing the Application based on standing.

4.3. Protection and Well-being of Tamed Elephants

The Respondents also argued that the Regulations were published because there were no available measures to protect tamed elephants in Sri Lanka. Tamed elephants were not protected by the previous set of regulations published in 1991, which had also not been approved by Parliament. The Court upheld this argument, as it only quashed Regulations 5(1), 5(2), 6(2), 7(1), 7(2) and 7(3) of the impugned Regulation. The Court also quashed the decisions of the Magistrate’s Courts in Colombo and Matale to return the elephants to their owners, who are, in fact, the individuals who kept them illegally without proper registration and licensing.

Additionally, the Court refers to a report compiled by retired Supreme Court Judge Nimal Edward Dissanayake, which points out that the increase in demand for elephants has resulted

¹² *ibid* 48.

¹³ *ibid* 49.

¹⁴ *ibid* 50.

¹⁵ *ibid* 41.

in a lucrative and cruel trade of elephants. This is an important observation because the Court recognised that tamed elephants are often not acquired legally but are instead forcefully separated from their herds. If the registration and licensing processes are simplified as provided by these Regulations, it will further endanger elephant calves in the wild.

5. CONCLUSION

In the contemporary world, animals continue to be exploited by humans who treat them as mere property. Although there are legal frameworks to protect animals, due to political, social and economic advantages, people often attempt to evade the legislative protection granted to them. This was observed with the issuance of the impugned Regulations, which aimed to simplify the processes of registration and licensing of elephants in contravention of the FFPO in Sri Lanka. However, the Court of Appeal recognised the supremacy of the enabling statute by quashing the specific regulations and upholding the rule of law.

This order will protect elephants from the illegal poaching trade in Sri Lanka and from ending up as captive elephants for their entire lives. However, until they are recognised as sentient beings with intrinsic value, captive elephants will be subject to cruelty and mistreatment by their custodians and mahouts. Therefore, it is essential to develop legislative frameworks in Sri Lanka to grant more protection for captive elephants. This will be a significant development toward building a compassionate society that acknowledges animals as part of a greater community and values their thriving in the wild among their kind.

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Fauna and Flora (Protection, Well-being and Regularisation of Registration of Tamed Elephants) Regulations, No. 01 of 2021

Fauna and Flora Protection Ordinance, No. 2 of 1937

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Seethawaka D, ‘Tamed Giants in Chains’ (*The Morning*, 07 April 2021) <<https://www.themorning.lk/articles/128865>>

ASHIK

v.

BANDULA AND OTHERS

(Noise Pollution Case)

SUPREME COURT, SRI LANKA

[2007] 1 Sri LR 191

BEFORE

Sarath N. Silva, C.J.

Tllakawardane, J.

Somawansa, J.

COUNSEL

Ikram Mohamed PC for the petitioners.

Ms. Indika Demuni de Silva - 2nd, 3rd, 4th respondents.

Ms. B.J. Tilakaratne, Deputy Solicitor General for Central Environmental Authority.

Uditha Egalahewa for 7th respondent.

DECIDED ON

09. 03. 2007

JUDGEMENT OF

Sarath N. Silva, C.J.

MATERIAL FACTS

This is a Fundamental Rights application where the Trustees of the Kapuwatte Mohideen Jumma Mosque of Weligama impleaded the action of the Assistant Superintendent of Police in charge of the area (hereinafter known as ‘the 2nd Respondent’) in not issuing a loudspeaker permit under section 80 of the Police Ordinance¹ to the extent permitted in previous years and

¹ The Court however cites section 81 of the Police Ordinance in its order. This seems to be a typo as section 81 only defines the term ‘public.’

in imposing restrictions on such use, as being in breach of their fundamental rights. The facts of the case can be divided into three inter-connected but seemingly separate sections. First, there are several complaints about the excessive noise emitted from loudspeakers of the said Mosque in its call to prayer. The Court has also allowed an intervenient petitioner who complains about a similar conduct of a mosque situated in a residential area in Colombo. Second, a dispute had arisen between three different mosques in the same area with regard to the use of loudspeakers which resulted in persons associated with those mosques lodging complaints against each other at the Weligama Police Station. The petitioners' claim about the Fundamental Rights violation is based on the allegation that the 2nd respondent who himself is a Muslim has given more favourable treatment to one mosque over the others. Third, the Court has given close attention to the standards which are required to be enforced by the Central Environmental Authority (hereinafter known as 'the CEA') in relation to noise pollution under sections 23P and 23R of the National Environmental Act No. 47 of 1980. Although the Court has granted considerable time – more than two years -for the CEA to draft regulations on noise pollution after having recognised the absence of applicable standards in this respect, it provides a sequel of events occurred during the proceedings of the case which only shows '*indecision, disputes, vacillation and on the whole a lack of collective will to take positive action*' by the CEA. It is in this factual backdrop that the legal issues of the case are examined.

MATTERS FOR DETERMINATION

The Court does not lay down the matters for determination expressly. However, the following matters can be inferred from the ratio of the judgment.

- a) Whether the Fundamental Rights of the petitioners have been violated by the action of the 2nd respondent in not issuing a loudspeaker permit under section 80 of the Police Ordinance to the extent permitted in previous years and in imposing restrictions on such use.
- b) Whether the noise pollution has an effect on the Fundamental Rights of the citizens. If so, what is the precise nature of that effect?
- c) Whether the conduct of the CEA in not publishing the standards on noise pollution as mandated by the provisions of the National Environmental Act infringes the equal protection of law guaranteed for people under Article 12(1) of the Constitution.
- d) Whether the Ministry of Religious Affairs should be added as a party to the case.
- e) Whether the Court has the jurisdiction to issue directions on noise pollution in place of the CEA.

RELEVANT AREAS OF THE LAW

Section 80 of the Police Ordinance No. 16 of 1865– Section 261 of the Penal Code No. 2 of 1883 – Sections 23P and 23R of the National Environment Act No. 47 of 1980– Art 3, Art 126, 126(4) and Art 12(1) of the Constitution of Sri Lanka, 1978 – Public Nuisance – Breach of fundamental rights – Sound Pollution – Standards – Directions by the Supreme Court.

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

- a) The impact of pollution is pervasive and its effect cannot be identified with the right of any particular person. Therefore, the Court proceeded with the case as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution.
- b) Sri Lanka is a secular State. In terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race, religion language and the like. Especially in the area of preserving the environment and the protection of public health, being of immediate concern in this case, there could be no exceptions to accommodate perceived religious propensities of one group or another.
- c) A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a "*public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity*" under section 261 of the Penal Code.
- d) People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by section 23P of the National Environmental Act No. 47 of 1980 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.

DECISION OF THE COURT

In view of the fact that the CEA has consistently failed to publish the relevant standards on noise pollution as required by the provisions of the National Environmental Act, the Court considered it to be just and equitable in the circumstances of the case to make its own directions in terms of Article 126(4) of the Constitution.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Marshall v Gunaratne Unnanse (1 NLR 179)

Church of God (full Gospel) in India v K.K.R.M.C. Welfare Association (AIR 2000 SC 2773)

In Re Noise Pollution (AIR 205 - SC 3136)

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978

Police Ordinance, No. 16 of 1865 (as amended)

Penal Code, No. 02 of 1883 (as amended)

The National Environment Act, No. 47 of 1980 (as amended)

ASHIK

v.

BANDULA AND OTHERS

(NOISE POLLUTION CASE)

[2007] 1 Sri LR 191

Ishan Arachchi*

ABSTRACT

This is a review of the Supreme Court decision in *Ashik v. Bandula and others* which is widely considered to be a significant milestone in Sri Lankan environmental jurisprudence. The Court utilises the judgement to comprehensively lay down the law governing noise pollution in Sri Lanka. Both the Penal Code and the National Environmental Act have been heavily relied on for that purpose. On one hand, the Court states that no religious practice can be exempted from the application of public nuisance law of the country in light of its secular character. On the other, due to the constant failure by the Central Environmental Authority to publish the standards governing noise pollution under the National Environmental Act, the just and equitable jurisdiction of the Supreme Court has been invoked to make a series of directions on the use of loudspeakers and other similar equipment that may cause excessive noise. The following analysis, however, questions the suitability of a colonial legislation like the Penal Code to regulate the noise pollution in a multicultural society. It also attempts to position the environmental law in a broader spectrum of legal theories which will elevate its standing as an isolated branch of law.

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1. INTRODUCTION

Noise pollution is an unavoidable but widely condemned occurrence in the West which sees the excessive noise as a threat not only to the environment but also to their way of life.¹ Consequently, the measures to curtail the same are rarely met with resistance. Yet, in the global south, any attempt to regulate noise pollution can be controversial due to their potential effect on traditional cultures which often involve activities generating loud noise.² Most of these cultures predate the modern standards on noise pollution and they have endured so long as integral and indispensable elements in one's life.³ However, the emission of noise by cultural activities in a society where there are multiplicity of cultures can be perceived as disturbance or annoyance to the members of that society who do not necessarily share the cultural value of the activity in question.⁴ Therefore, the constant tension between the regulation of excessive noise on one hand and both the deep affection and dire frustration simultaneously felt by people towards different cultures on the other is a common phenomenon in many societies in the global south. The decision in *Ashik v. Bandula and others* (hereinafter referred to as 'the Ashik case') must be analysed in this broader context. Although it attempts to resolve such tensions between culture and environmental regulation, the method used by the Court to perform that task can seriously be questioned. The primary legal instrument through which the Court addresses the issue of noise pollution is the Penal Code (hereinafter PC), a colonial legislation⁵ that encompasses the Western thinking on the culture and environment in the nineteenth century. While the relevant provisions of the PC do provide a particular way of regulating the noise

¹ In the United States for instance, the Noise Control Act, a legislation specifically designed to tackle the noise pollution was passed in 1972. It was soon joined by the Quiet Communities Act of 1978 which inter alia administered a nationwide Quiet Communities Program designed to assist local governments in controlling levels. Although the institutions under both these Acts were defunded in 1982, the sole purpose behind that was to transfer the primary responsibility of regulating noise to state and local governments.

² In India, research on this area has been developed to the extent that the excessive noise caused by certain specific cultural activities have been separately analysed. See Sanjay Marale, D.M. Mahajan, Ravindra Gavali and Yogesh Lolage, 'Comparative Analysis of Noise Pollution in Pilgrimage Places from Maharashtra, India' (2011) 4 *Enrich Environment* 103.; Mohd Nafees and Satyendra Nath, Noise pollution during local festival, Allahabad (2019) 25 *Ecology, Environment and Conservation* 310; R. Ramanathan and R. Renuka, Status and Implications of Noise Pollution in Temples of Tamilnadu-Srirangam Temple (2008) 7 *Nature Environment and Pollution Technology* 101.

³ Raka Shome, 'Thinking Culture and Cultural Studies—from/ of the Global South' (2019) 16 *Communication and Critical/Cultural Studies* 196.

⁴ With regard to African continent, see Jacob Kehinde Ayantayo, Religious Interpretations and Re-Interpretations of Space and Environment in Nigeria: Implications for Interreligious Conflicts (2009) 3 *The Journal of Pan African Studies* 116.

⁵ While the entire Sri Lankan territory was under the British occupation from 1815 to 1948, the PC was promulgated in 1883 when the colonial grip of the country's legal system was at its peak.

emitted by cultural activities, the following analysis assesses its suitability to a multicultural society like Sri Lanka.

2. THE LEGAL AND FACTUAL BACKGROUND

Both the factual and legal background of the case is rather unique and perhaps even confusing. It was initially filed as a Fundamental Rights application by the trustees of a mosque who implored the action of the 2nd respondent in not issuing a loudspeaker permit under section 80 of the Police Ordinance (hereinafter referred to as the PO) to the extent permitted in previous years and in imposing restrictions on such use as being in breach of their fundamental rights. Nonetheless, with the recognition that the case raises certain environmental problems that are common to the public in general, the Court decides to consider it as a public interest litigation and thereby allows certain intervenient petitioners to make submissions although they are not directly related to the petitioner or to their complaint. The precise problem which the Court seeks to address through this case is the noise pollution caused by certain religious activities. The 2nd respondent as well as the intervenient petitioner provides ample evidence of such incidents.⁶ Section 261 of the PC unambiguously prohibits public nuisance of any kind – irrespective of the convenience or advantage of that activity- and thus, can very well cover the excessive noise emitted by the religious activities so long as they cause disturbance to the people in the vicinity.⁷ The Court acknowledges this and cites several precedents from both Sri Lanka and India to argue that the public nuisance provisions of the PC do not make an exception for the religious activities.⁸ However, in pursuance of the public interest character of the case, the Court goes further than merely citing the statutory provisions and case law applicable to the particular facts of the case. It refers to provisions of the National Environmental Act such as sections 23P and 23R which require the CEA to publish standards on noise pollution and notes that the CEA has repeatedly failed to publish those standards in any meaningful manner although several postponements have been granted solely for that purpose.

⁶ *Ashik v Bandula and Others* [2007] 1 Sri LR 191, 193-195.

⁷ Section 261 of the PC provides that “*A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. A public nuisance is not excused on the ground that it causes some convenience or advantage.*”

⁸ These include *Marshall v Gunaratne Unnanse* 1 NLR 179; *Church of God (full Gospel) in India v K.K.R.M.C. Welfare Association* AIR 2000 SC 2773 and *In Re Noise Pollution* AIR 205 - SC 3136.

3. THE ORDER OF THE COURT

The Court holds that the equal protection of the law guaranteed for people under Article 12 (1) of the Constitution have been infringed by the failure of the CEA to publish standards on noise pollution as required by the relevant provisions of the National Environmental Act. Significantly, the Court thereafter invokes its just and equitable jurisdiction in terms of Article 126 of the Constitution and makes its own directions on noise pollution. According to those directions, all permits issued by the Police under section 80(1) of the PO cease to be effective and several guidelines have been laid down for the police when they issue such permits in the future. The specific issue on which the application was filed namely whether the Fundamental Rights of the petitioners have been violated by the conduct of the 2nd respondent in relation to the issuance of a loudspeaker permit under section 80 of the PO has not been answered by the Court. The reason for this seems to be the directions issued under Article 126 which as shown before made all the previous permits ineffective.⁹

4. ANALYSIS

The judgement in Ashik case is significant for two main reasons. First, it shows that environmental law is not a closeted area of law which can be assessed only with reference to the conventional principles of international environmental law¹⁰ but has wider socio-political implications. Second, most of the legal and policy arguments relied on by the Court are not unique to the facts of this case. Instead, they can be viewed as specific illustrations of certain theories that are commonly invoked either in environmental law or in the legal systems of the global south in general. Therefore, the analysis that follows seeks to position the Ashik case in this broad context.

4.1. Noise Pollution and Religious Activities

⁹ In my view however, the Court could have still decided this issue because the directions issued under Article 126 were not retrospective in operation. If the police exercised its discretion arbitrarily as per the *law at the time* in issuing permits under section 80 of the ordinance, the Court should have regarded it as a violation of Article 12 of the Constitution even in the absence of any standards on noise pollution under the National Environmental Act. Section 80 of the PO does not refer to National Environmental Act specifically and thus, the publication of standards on noise pollution under sections 23P and 23R of that Act is not a precondition for the exercise of discretion under section 80. This is further evident from subsection 6 which states that section 80 operates '*in addition*' to any other written law relating to the use or operation of the instruments referred to under that provision which necessarily implies that there is no immediately inherent connection between section 80 and any other law.

¹⁰ These include for example Sustainable development, Precautionary principle, Polluter pays principle and in South Asian context, the Public Trust Doctrine.

The main argument of the Court is that no religion in this country should be allowed to cause public nuisance through its practices because Sri Lanka is long considered to be a secular state before the law. Constitutional, statutory and judicial authorities are cited to substantiate this position. Chief Justice Silva first refers to Article 3 and states that “*in terms of terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like.*”¹¹ Thereafter, the focus of the Court is drawn to section 261 of the PC according to which “*a public nuisance is not excused on the ground that it causes some convenience or advantage.*” The terms, ‘convenience or advantage’ according to the Court includes “*a perceived convenience or advantage to some based on a religious practice*”¹² and therefore, the PC prohibits public nuisances of all kinds including those emanating from religious activities. This interpretation of section 261 of the PC is in line with the decision in *Marshall v Gunaratne Unnanse*¹³ where Chief Justice Bonsor stated that “*no religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance...*”¹⁴ On the basis of these authorities, the Supreme Court holds that Sri Lanka is a secular state and thus, no religion within it should be allowed to commit noise pollution through its practices and rituals.

4.2. Rationale underlying the judgment

Although the decision of the Court can certainly be challenged on several grounds,¹⁵ it was correct in law to rule that under section 261 of the PC, religious activities cannot emit excessive noise as a nuisance to the public. The final sentence of section 261 is a blanket prohibition on public nuisance which makes no exception for religious or other cultural affairs. Therefore, no religion can engage in a practice that causes annoyance or disturbance to the public. Nonetheless, the rationale underlying this provision can be scrutinised with reference to its suitability for a multicultural society like Sri Lanka.

4.2.1. The Colonial Influence on the Public Nuisance Law in Sri Lanka

¹¹ *ibid* 196.

¹² *ibid* 197.

¹³ 1 NLR 179.

¹⁴ *ibid* 180.

¹⁵ For example, the Court’s conclusion that Sri Lanka is a secular state and thus, no religion should be exempted from the standards governing noise pollution is doubtful in light of Article 9 of the Constitution which seems to be quite antithetical to the idea of secularism due to its explicit favouritism towards Buddhism. Quite surprisingly, the Court does not even refer to Article 9 despite its unavoidable relevance to any discussion on the secular character of Sri Lanka.

Section 261 of the PC reflects the conventional colonial approach to solving conflicts – actual or perceived – between different cultures in the global south. When there are different cultures within one colony which are or could be at odds with each other, the solution enforced by the colonial administrators was simply to restrict or in many cases prevent the role of culture in the public sphere.¹⁶ With the confinement of cultural phenomena like ethnicity, religion or caste, to one's private life, it was hoped that tensions between those cultures would reduce.¹⁷ This is precisely what section 261 does with regard to the noise caused by different cultural activities. The regulation of noise – and public nuisance in general -under Section 261 should then be situated within the overarching colonial attitude towards the role of culture. This is however not something accidental or specifically invented for the purposes of colonisation by the British. The underlying rationale of section 261 reflects the influence of a dominant philosophical theory in the West. The main aim of this theory is to neutralise the state vis-à-vis different moral and cultural perspectives.¹⁸ In other words, when the state is faced with competing conceptions of good life, it must step away from all of them so that no particular conception – and the people who follow it - will be advantaged or disadvantaged.¹⁹ While the contemporary justification of this supposed neutrality of the state can be found in the Anglo-American liberal tradition,²⁰ the roots of it go back to the enlightenment period in the 17th and the 18th centuries. The neutrality of the state can be fully realised only if the culture is removed from the public sphere altogether as any cultural activity in public inevitably involves the regulation of it by the state. The culture is then pushed to one's private space where he alone can control its effect on him. Section 261 of the PC is a product of this ideology that has dominated Western civilisation at least for the last five centuries.²¹ It prohibits the public

¹⁶ The prime example for this is the Section 29 of the Soulbury Constitution which prevented the Parliament from passing any law targeting a specific community. As Sir Ivor Jennings explains this provision was distinctively crafted to deal with the communal tensions in Sri Lanka. It did so by ruling out any role for the community in the state apparatus. (See W.I. Jennings, *The Constitution of Ceylon* (3rd edn, OUP 1953)).

¹⁷ In relation to India, the nineteenth century historian James Mill wrote in his book '*A History of British India*' that Muslims and Hindus have always been in conflict with each other and the justification for the British presence in India partly arose from the fact that it was only the British who could keep them separate and maintain the peace between the two communities. The means through which they achieved this project was the secularism. (James Mill, *The History of British India* (London: Baldwin, Cradock, Joy, 1826) (Vol. 1); See also Himanshu Roy, *Western Secularism and Colonial Legacy in India* (2006) 41 *Economic and Political Weekly* 158, 164-165; Romila Thapar, *Reporting History: Early India* (2012) 40 *Social Scientist* 31-32.

¹⁸ See Kerry O'Halloran, *State Neutrality: The Sacred, the Secular and Equality Law* (CUP 2021) 9-44.

¹⁹ János Kis, *State Neutrality* in András Sajó and Michel Rosenfeld (eds) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 318.

²⁰ John Rawls for example uses an imaginary thought experiment known as the original position to argue that the principles which govern a just society should do not presuppose identities like ethnicity, religion or culture. See John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 130-139.

²¹ Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press 1980) 93-95.

demonstration of all cultural activities as long as they cause annoyance to the public and thereby denies the state any say on such activities. The implications of section 261 for the Environmental law are indirect but enormously consequential. In the midst of the constant tension between the need to prevent excessive noise – either because it harms the environment or annoys the public – and the respect for one’s culture, section 261 establishes a unilateral solution. It uncompromisingly prefers the prevention of excessive noise over the respect for cultural attachments by banning all cultural activities as long as they annoy the public. Significantly, as it was shown, this choice was not made with particular concern for the environment or the public. Rather, it was an upshot of a political theory that dominated the Western conception of society at the time of colonisation-and of course even today. The environmental effects of section 261 were not considered in isolation but were subsumed and understood under this general theory.

4.2.2. ‘Noise Pollution’ in Multicultural Societies: A Posthumous Challenge to the Colonial Legacy

The neutrality of the state might have worked well for Western societies in light of their excessive individualism,²² intentional distance from the culture²³ and most importantly, the homogenous nature of society.²⁴ It is however question-begging whether that model would fit into the countries in the global South which reveal exactly the opposite of above qualities. They are bound by strong communal bonds, have a sense of loyalty – that even goes beyond mere closeness -towards their culture and are extremely heterogenous in terms of ethnicity, religion and language.²⁵ The colonial administrators did not take these peculiar circumstances of their colonies into account but simply applied what worked for them across the empire. This is quite evident from Lord Bingham’s judgment in *Regina v Rimmington*²⁶ where His Lordship reproduces section 268 of Indian Penal Code which is identical to section 261 of the PC of Sri Lanka and holds that it “*intended to summarise the English common law on public nuisance as then understood.*”²⁷

²² Charles Taylor, *The Ethics of Authenticity* (Harvard University Press 2018) 25.

²³ Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (3rd edn, University of Notre Dame Press 2007) 36-39 and 62.

²⁴ Samuel P. Huntington, *The West Unique, Not Universal* (1996) 75 *Foreign Affairs* 28-29.

²⁵ See Susan Visvanathan, *The Homogeneity of Fundamentalism: Christianity, British Colonialism and India in the Nineteenth Century* (2000) 16 *Studies in History* 221, 237.

²⁶ [2005] UKHL 63.

²⁷ *ibid* para 10.

Therefore, having considered the rationale of section 261 which is foreign in origin, the question arises as to whether the law should be revised to suit the circumstances of our society. The judgment in the Ashik case does not refer to the origin or rationale of section 261. Nonetheless, it justifies the law on heavily individualistic grounds that in many ways prompted the neutrality of the state in the West. The main argument of the Court that runs through the entire judgment is that the sound of religious activities that goes beyond the four corners of the respective religious places can annoy the people who do not belong to that religion. However, the indispensable character of a multicultural society is the tolerance towards the practices of people who do not belong to one's identity like ethnicity, religion or language. No citizen who possesses fidelity towards his culture can be meaningfully integrated into a multicultural society if we are to ban the public celebration of his culture under the pretense that it annoys or disturbs us. Certainly, the sound of other religious practices which do not appeal to us can annoy, disturb or even irritate us. But that is after all the price one has to pay when he lives in a multicultural society where all the cultures are respected. And that is what primarily distinguishes us from individualist and homogeneous societies in the West. Therefore, when we hear the call to prayer of a Mosque for ten minutes or chanting of Pirith in a temple for thirty minutes, to argue that we have become "*captive listeners*" of that religion as intervenient petitioner has done in this case is to deny our own identity as members of a multicultural society which we should take pride in being associated with. This is however not to say that all cultural practices should be allowed to function as they please without any restriction at all. Needless to say that there should be some regulation on where the line should be drawn between the respect for cultural diversity and the sphere of individual autonomy. The transition of a noise from a mere annoyance to an injury *could*²⁸ be one such limitation. However, what I have argued against is the blanket prohibition on the manifestation of one's culture in public as long as it supposedly annoys or disturbs others. This is as it was shown the natural effect of section 261 of the PC and the same has been reinforced by the directions of the Court in the Ashik case.

²⁸ However, as I have argued elsewhere, scientific conclusions that the noise can produce health hazards in some contexts do not provide a reason to prohibit or regulate it as the descriptive phenomena like scientific facts cannot logically enter into the domain of normativity represented by the reasons. A normative decision such as whether the excessive noise that may have an impact on the human health should be prohibited or regulated can depend only on the respective weight accorded to other norms like the respect for multiculturalism and the value of a healthy human life under which the scientific facts can play a secondary but complementary role showing the application of the norms in a given situation. (See Ishan Arachchi, Saving Law from Science: Naturalistic Fallacy and Scientism in Modern Environmental law (2024) 2 South Asian Journal of Environmental Law and Policy (forthcoming)).

5. CONCLUSION

Much of the above analysis may perhaps appear too queer for an Environmental Law Report. Most of the judicial decisions on environmental matters and the case reviews on them – including the ones published by this report – predominantly focus on traditional environmental law principles. The foregoing review of the Ashik case significantly differs from them and that difference is deliberate. In addition to the arguments revealed by the substance, the main purpose of this review is to debunk the status quo of environmental law as an isolated branch of law which can be assessed only by its own standards. Instead, the review of the Ashik case attempts to position environmental law in a broader policy framework which has moulded its response to the human conduct affecting the environment. In this case, the particular issue is the noise pollution caused by religious activities. However, the origin or rationale of the law that deals with this issue namely section 261 of the PC was not solely based on environmental concerns. It was a product of a larger Western philosophical project which demarcated the role of the state with regard to different cultures. While the resulting legal scheme did create a response to the noise pollution, the precise nature of that response was a consequence that naturally flew from the primary concern of the law with the relation between the state and culture rather than an endeavour to tackle that issue on its own. Therefore, the scrutiny of that overarching regime within which environmental law is situated must necessarily precede any critique of the environmental effects of that law.

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In Re Noise Pollution AIR 205 - SC 3136

Marshall v Gunaratne Unnanse 1 NLR 179

Penal Code No. 02 of 1883 (as amended)

Police Ordinance No. 16 of 1865 (as amended)

The Constitution of the Democratic Socialist Republic of Sri Lanka 1978

The National Environment Act No. 47 of 1980 (as amended)

The Noise Control Act of the United States 1972

The Quiet Communities Act of the United States 1978

The Soulbury Constitution of 1947

CENTER FOR ENVIRONMENTAL JUSTICE (GUARANTEE LIMITED) AND OTHERS

v.

ROAD DEVELOPMENT AUTHORITY AND OTHERS

COURT OF APPEAL OF SRI LANKA

WRIT APPLICATION 97/21

BEFORE

Sobhitha Rajakaruna J.

Dhammika Ganepola J.

COUNSEL

R. Dabare, N. Wickramasinghe, S. Ponnaperuma and Samadhi H. Premasiri for the Petitioners
Romesh De Silva, PC with Ruwanth Cooray for the 1st and 1A Respondents Suranga
Wimalasena SSC for the 2nd to 5th Respondents.

DECIDED ON

19. 01. 2022

JUDGEMENT OF

Sobhitha Rajakaruna J.

MATERIAL FACTS

The Respondents had proposed to construct an elevated highway consisting of four lanes from Urugodawatta to Athurugiriya, cutting across the Thalangama/Awerihena wetland which was gazetted as an Environmental Protection Area (EPA) by Extraordinary Gazette Notification 1487/10 in 2007. According to the Gazette Notification, the relevant minister had set out only six permitted activities in the Thalangama EPA: paddy cultivation, fishing, nature trails, construction of towers for bird observation, establishment of environmental education information centres and a sales outlet and the construction of a security post. The Petitioners claimed that the construction of a highway would pave the way to noise pollution and emissions which shall have a detrimental effect on the environment, hydrology and invaluable

biodiversity of the wetland, as also on the air quality and health of thousands of inhabitants living on either side of the Thalangama/Awerihena EPA as at present and generations to come.’The resulting petition consisted of over 160 signatures of distressed residents. Of particular concern was the fact that amendments had been made to Schedule III of the original 2007 Extraordinary Gazette by Gazette No. 2237/7 to permit the ‘construction, operation and maintenance of Four Lane Elevated Highway Construction Project from new Kelani Bridge in Athurugiriya and related constructions of such project’ insofar as the project ‘shall not have adverse impact on the Environmental Protection Area (emphasis added)’.

MATTERS FOR DETERMINATION

- a) Whether the Petitioners’ application has become futile due to the amendments made to Schedule III of the 2007 Extraordinary Gazette coming into effect permitting the construction of the proposed elevated highway.
- b) Whether the proceedings of the application would be directly challenging a policy decision.

RELEVANT AREAS OF THE LAW

Environmental Protection Area (EPA) under Extraordinary Gazette Notification 1487/10 and its amendment in Gazette Notification No. 2237/7 - Powers of the relevant minister under section 24C and 24D of the National Environmental Act, No.47 of 1980.

PROPOSITIONS OF THE LAW ESTABLISHED IN THE DECISION

- a) The Court concluded that the relevant minister, by the amendment to the original Extraordinary Gazette, had allowed it to investigate the potential environmental impact caused by the construction of the proposed elevated highway. Such investigation would not obstruct the relevant policy decision.
- b) The Court rejected the Respondents’ proposition that Petitioners’ application could be dismissed on the grounds that amendments had been made to the original Extraordinary Gazette to permit the construction of the elevated highway running through the Thalangama EPA.
- c) The Court noted that it was not sufficient to simply examine whether the proposed elevated highway would cause adverse impacts on the EPA. It was also necessary to determine if the persons in authority were properly involved in its construction, operation, and maintenance.

DECISION OF THE COURT

The Court deemed it clear that there was no ground to dismiss the Petitioners' application purely because of the amendments made to the 2007 Extraordinary Gazette after filing the instant application. The Petitioners had met the threshold requirement for the Court to issue formal notice of the application to the Respondents to be followed by the granting of interim relief.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Extraordinary Gazette Notification No. 1487/10 (05.03.2007)

National Environment Act, No. 47 of 1980

Extraordinary Gazette Notification No. 2237/7

CENTER FOR ENVIRONMENTAL JUSTICE (GUARANTEE LIMITED) AND OTHERS

v.

ROAD DEVELOPMENT AUTHORITY AND OTHERS

WRIT APPLICATION 97/21

Radhini Gawarammana*

ABSTRACT

The proposed construction of the four-lane elevated highway from Orugodawatte to Athurugiriya (hereinafter “the Thalangama Highway”) was conceived with great hopes to improve the country’s transport infrastructure, but not without controversy. The analysis of the case at hand considers the legitimacy of introducing legislation to amend Extraordinary Gazette No. 1487/10 of 2007 to allow the construction of the highway across the Thalangama Wetland, despite the area being delineated as an Environmental Protection Area (EPA) under the original gazette. This paper considers the matter considering three points. Firstly, the responsibility of the state to ensure the protection of designated EPA; secondly, the importance of utilising the Public Participation phase of formulating Environmental Impact Assessment (EIA) reports for authorities to arrive at an informed decision about the positive or negative outcomes of the proposed project; and finally, the emergence of the concept of protection of the environment for future generations in Sri Lankan environmental jurisprudence. This paper finds that the order of the Court of Appeal reveals a hopeful future not merely for the upholding of the rule of law in an administrative sense, but also in developing the rules of nature conservation in the Sri Lankan context.

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1. INTRODUCTION

In 2018, the Ramsar Convention¹ declared Colombo as South Asia's only wetland city, bringing the Thalangama area to international attention as one of the nation's most crucial environmental treasures.² Apart from serving as a natural flood barrier and waste filter to the bustling city of Colombo, the Thalangama wetland also nurtures generationally cultivated paddy fields with its multitude of water bodies, which are also home to both endemic and migrant bird species, insects, reptiles, amphibians, and small mammals.³ Its ecological importance can be easily gleaned from its beauty, which its locals have strived for years to protect. The proposed project introduced to the equation threatens to jeopardise this wealth of natural assets in the form of a 3.15 km elevated highway traversing through the wetland.

Environmental concerns of this scale are best approached by paying attention to the stories told by locals who live and breathe its consequences. In this case, it was the residents of the vicinity of the Thalangama Wetland region- who had bequeathed the land ancestrally for majorly agricultural purposes, who were first shaken with the abrupt 2021 amendment made to the Extraordinary Gazette which had thus far declared their home as an EPA.⁴ The new law would allow the 'construction, operation and maintenance of Four Lane Elevated Highway Construction Project from new Kelani Bridge to Athurugiriya and related constructions of such project' under the condition that 'construction, operation and maintenance of (the) Four Lane Elevated Highway Construction Project from New Kelani Bridge to Athurugiriya and related constructions of such project, shall not have adverse impact on the Environmental Protection Area'.⁵

It is well recognised in Sri Lankan law that, constitutionally, there is an imposed duty on every person to protect nature and the environment and conserve its riches.⁶ The new gazette unfortunately contained language that was undefined and thus porous. Nowhere in the legislation is it defined what 'construction, operation and maintenance' entail. The amendment assumes that the life cycle of the proposed highway, to put it crudely, begins with construction

¹ *Environmental Foundation (Guarantee) Limited v. CEA and others* CA/WRIT 21/2018.

² The Ramsar Convention on Wetlands (1971).

³ Nadeera Rajapakse, 'Urban Wetlands breathe life into Sri Lanka's capital city' (World Bank Blogs, 02 February 2021) <https://blogs.worldbank.org/en/endpovertyinsouthasia/urban-wetlands-breathe-life-sri-lankas-capital-city> accessed 24 November 2024.

⁴ Extraordinary Gazette Notification No. 1487/10 (05.03.2007).

⁵ Extraordinary Gazette Notification No. 2237/7.

⁶ Article 28 (f).

and ends with its maintenance. There is no mention of the great contribution of planning that could make or break a proposed project's environmental friendliness.⁷ Further, nowhere is the correlation between the said construction, operation and maintenance and 'adverse impact' on the EPA explained, nor is the 'adverse impact' defined. The amendment, although short, reveals three details about the environmental law regime of Sri Lanka that rightly causes dread amongst those in the direct line of fire of the proposed project. One- it is entirely possible for a generationally protected and internationally recognised wetland⁸ to be guarded by gazette one year and become exposed to destruction the next, all 'by virtue of the powers vested in (the relevant minister) by sections 24C and 24D of the National Environmental (NEA) Act, No. 47 of 1980.' Two, the concept of planning and its interrelationship with environmental law is not given due consideration in this regard. Used correctly, planning is a practice and a legal tool that can shed light on potential damage to the sustainability of protected areas caused by proposed projects. Three, the phraseology of 'adverse impacts' is akin to a blackhole. The change to ecosystems and surroundings caused by the construction of the Thalangama Highway could be communal in that all living beings and natural surroundings are impacted negatively, or particularly in that some are more seriously impacted than others. Moreover, the gazette fails to acknowledge that the 'adverse impacts' seen immediately are only the tip of the iceberg- left unchecked for longer periods of time, the harm caused by the construction of the Thalangama Highway may well be felt by generations born long after those who were alive when the amendment was enacted.

2. STATE RESPONSIBILITY

According to Article 28 (f) of the Constitution of Sri Lanka, it is the fundamental duty of every person to protect the natural environment of the island. The paramountcy of the rule of law is apparent in the case at hand, as much of the controversy and backlash regarding the project focused on the potential violation of Article 27 (14), 28 (d) and 28 (f) wherein the state, which has been entrusted to ensure environmental protection, had not completed its responsibility to its citizens. It is to be noted that many high-profile Sri Lankan environmental law cases are dovetailed as part of Public Interest litigation.⁹

⁷ Elizabeth Fisher and others 'Environmental Law: Text, Cases, & Materials' (2nd edn, Oxford University Press 2019) 693-696.

⁸ Extraordinary Gazette Notification No. 2237/7 dated 19.07.2021.

⁹ See generally *Public Interest Law Foundation v Central Environmental Authority & Another* 2001 3 SLR 330.

State Responsibility to ensure the protection of the Thalangama Wetland received a lot more urgency following the area's international recognition under the Ramsar Convention. It can be said that such responsibility is acknowledged by the Sri Lankan government by the very ratification of or accession to an international convention alluding to environmental protection.¹⁰ Prior to the 2021 amendment, state responsibility to protect the area took the form of recognising the wetland's economic benefits, thus allowing activities such as cultivation of paddy, nature trails, observation towers, environmental education information centres, sales outlets and security posts. The list of permitted activities, as clearly seen, is exhaustive. Further buttressing state responsibility towards environmental protection is the fact that these activities are only permitted subject to strong adherence to the requirements of Schedule III.¹¹

Sri Lanka's environmental jurisprudence has long since acknowledged that the primary responsibility of protecting, preserving, and conserving the country's natural surroundings and ensuring sustainable and moderate use of its natural resources is that of the Sri Lankan government. The petitioners looked to the decisions of landmark environmental judgments such as *Watte Gedara Wijebanda v Conservator General of Forest and Eight Others*¹², *Bulankulama and others v Secretary, Ministry of Industrial Development and others*¹³ and in *Ravindra Gunawardena Kariyawasam v Central Environmental Authority and 10 Others*.¹⁴

The constant invocation of the importance of State Responsibility is supported by the public's urging of their own responsibility as locals of the protected area and citizens of the country to safeguard the environment. This is most felt in the re-emergence of the discussion of the public participation phase in the Environmental Impact Assessment (EIA) report preparation procedure, discussed below.

3. PUBLIC PARTICIPATION

¹⁰ Assessment of Selected Classes of Fauna at Thalangama Wetland- The study identified 102 species of birds, 73 species of butterflies, 41 species of odonates, 10 species of amphibians and 16 mammals; many of which are endemic to Sri Lanka and endangered.

¹¹ Factoring in these flavours of State Responsibility embedded into the original 2007 Extraordinary Gazette, it appears that there is an absence of it in the amendment. The legislation is void of an explanation as to how a mere motorboat is not allowed for fishing activities in the wetland, but the construction of an elevated highway spanning 17.3 km is. Although the construction shall not have 'adverse impact' on the area, as discussed above, there is no further delving into what an 'adverse impact' may be.

¹² (SC Application No. 118/2004).

¹³ (2000, 3 SLR 243).

¹⁴ (SC FR Application No. 141/2015).

EIA as a legal tool was diffused into Sri Lankan law by a US government-funded initiative (USAID) in 1997.¹⁵ Since then, it has become cemented as an ultra-important step in environmental decision-making, most notably in the celebrated decisions of *Bulankulama and Heather Therese Mundy v Central Environmental Authority and Others*¹⁶. To fully comprehend why the stage of public participation, done properly, would have been pivotal to making a rational decision concerning construction on the EPA, one must first turn to the intention behind enacting an EIA regime. EIA is a procedure by which decisions about whether or not a project may commence are made by systematic evaluation of collected information regarding its potential environmental impacts.¹⁷ According to Yang and Percival, it is a key feature of ‘global environmental law’ without which domestic environmental law systems cannot function.¹⁸ The procedure has, ideally, five stages: screening, scoping, preparation of the environmental impact statement, public participation and the final decision.¹⁹ Three of these stages were directly transplanted into the Sri Lankan regime via amendments made to the NEA in 1988: screening, public participation and evaluation. Public participation thus became enshrined in Section 23BB (2).²⁰ Section 23BB (3) further provides the public a period of thirty days to make comments. The Thalangama saga is a perfect example of the public making use of these provisions despite inadequate action by the relevant authorities. Prior to approval of the project, residents of the EPA and its environs noted that no discussions were held with them with regards to the acquisition of their lands on which they had generationally engaged in agricultural and sustainable activities protecting the wetland and its biodiversity.²¹ A highly positive outcome of an otherwise disappointing account of public authority inaction is seen in the vast numbers of EPA residents seeking other platforms to voice their concerns. Despite the public participation phase of the EIA of the Thalangama highway project being conducted inefficiently, communities were mobilised by the collective idea that they have the right to be

¹⁵ Ranjith Appuhami and others, ‘Coercive Policy Diffusion in a Developing Country: The Case of Public-Private Partnerships in Sri Lanka’ (2011) 41(3) *Journal of Contemporary Asia* 431.

¹⁶ S.C. Appeal 58/2003, 59/2003, 60/2003.

¹⁷ Fisher and others (n 5) 694.

¹⁸ Tseming Yang and Robert Percival, ‘The Emergence of Global Environmental Law’ (2009), 36 *Ecology Law Quarterly* 615.

¹⁹ Fisher and others (n 5) 695.

²⁰ A project approving agency shall on receipt of an initial environmental examination report or an environmental impact assessment report, as the case may be, submitted to such project approving agency in compliance with the requirement imposed under subsection (1), by notice published in the Gazette and in one newspaper each in the Sinhala, Tamil and English languages, notify the place and times at which such report shall be available for inspection by the public, and invite the public to make its comments, if any, thereon.

²¹ Nishantha Hewage, “Highway to Disaster?” (Daily Mirror, 2017) <https://www.dailymirror.lk/print/news-features/Highway-to-disaster-/131-206031> accessed March 14, 2024.

heard regardless. Thus, they made use of other channels such as roadside protests, speaking to journalists, publicising their worries on social media and coalition with the CEA.²²

4. PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS

The concept of sustaining nature and its resources for the benefit of unborn generations as their common benefit is not entirely new to Sri Lankan jurisprudence, most notably gaining traction in *Bulankulama*. In their writ petition, the petitioners noted that the respondents,

being the guardians of the Environmental Protection areas declared under the National Environmental Act No. 47 of 1980 (as amended) are holding such powers in public trust and are accountable not only to the present citizenry of the Republic but to the unborn future generations for its protection and preservation.²³

It is remarkable that, while the idea of ‘future generational’ interests in environmental matters is yet to majorly feature in black letter law, it is very much a cause for concern among the public as well as the Sri Lankan judiciary. The court in the order at hand considered the fact that the petitioners had mentioned that,

a highway will also pave the way to noise pollution and emissions which shall have a detrimental effect on the environment, hydrology and invaluable biodiversity of the wetland, as also on the air quality and health of thousands of inhabitants living on either side of the Thalangama/Awerihena EPA as at present and generations to come.²⁴

Although there is limited exploration of the concept in the judgment itself, it is encouraging to note that it is survived by the public in its petition. Time will tell if the concept of ‘future generations’ may become a mainstay in environmental litigation in Sri Lanka.

5. CONCLUSION

This review has argued that the order made supporting the petitioners’ concerns regarding recent amendments made to Extraordinary Gazette Notification No. 1487/10 (05.03.2007) is an important addition to emerging local jurisprudence on three matters: state responsibility and environmental protection, the importance of public participation in EIA as a decision-making tool and the emergence of the concept of protecting the environment for future generations. It

²² Yumiko Perera, “Thalangama Elevated Highway Project: A Sour Point on Many Fronts” (The Morning, 2021) <<https://www.themorning.lk/articles/148544>> accessed March 14, 2024.

²³ CA Writ 21/18 [25].

²⁴ CA Writ Application No. 97/21 [26].

is also a cautionary tale about amendments made with ulterior motives and questionable legality- communities that have long lived in and sustained an environmentally protected area will not go down without a fight when their side of the story is not properly reflected in such decisions. The unwavering assertiveness of the residents of the wetland and its surroundings presents a great example of community mobilisation and collective sensitivity not only to the preservation of environmentally protected areas but also to its education and awareness.

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Yang T and Percival R, 'The Emergence of Global Environmental Law' (2009), 36 *Ecology Law Quarterly*

THE STATE OF TELANGANA AND OTHERS

v.

MOHD. ABDUL QASIM

SUPREME COURT OF INDIA

Civil Appeal No. of 2024 [Arising Out of SLP (C) No. 6937 of 2021]

BEFORE

M. M. Sundresh, J.

S. V. N. Bhatti, J.

COUNSEL

Learned Additional Solicitor General Ms. Aishwarya Bhati for the Appellants

Learned Senior Counsel Mr. Neeraj Kishan Kaul, Mr. L Narsimha Reddy for the Respondents

DECIDED ON

18.04.2024

JUDGEMENT OF

M. M. Sundresh, J.

MATERIAL FACTS

A survey and settlement of land in Kompally, completed in 1960. Respondent No. 1 (the original plaintiff) applied for rectification of a survey error, claiming ownership of 106.34 acres of land. In 1971, the state government declared this land as reserved forest under the A.P. Forest Act. The plaintiff's application to correct the survey error was rejected in 1975, and the case was remitted for further review. By the time the issue was reassessed in 1981, the land had been officially designated as reserved forest, a status that was later upheld by the High Court of Judicature at Hyderabad for the State of Telangana in 2018. Nonetheless, as a result of a flawed inquiry, the High Court reversed its position in 2021 and supported the plaintiff through an impugned order in the purported exercise of the power of review. Accordingly, the crux of

this case revolves around the appellant, the State of Telangana, contesting the High Court's review judgement, deeming it a gross abdication of its duty to preserve reserved forests.

MATTERS FOR DETERMINATION

- a) Whether the District Collector had authority to manage or alter reserved forest land
- b) Whether the High Court clearly exceeded its jurisdiction in review
- c) Whether there is an error apparent on the face of record of the judgement initially declared by the High Court

RELEVANT AREAS OF LAW

Sections 2,4,7,8,9,10,13,15,16 of The Andhra Pradesh Forest Act, 1967 - Section 376 and 378 of the Code of Civil Procedure, 1859 - Section 623 of the Code of Civil Procedure 1877 - Section 114 and Order XLVII Rule 1 of the Code of Civil Procedure, 1908 - Article 48A, Article 51A(g), Articles 14, 19 and 21 of the Constitution of India, 1950 - Part III and Part IV of the Constitution - Section 2 of the Environment (Protection) Act, 1986 - Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 F - Precautionary Principle - Sustainable Development - Intergenerational Equity.

PREPOSITIONS OF LAW ESTABLISHED IN THE DECISION

In reaching its judgement, the Supreme Court of India made several key arguments. It stressed that the special power of review conferred to the High Court in instances where there is an error apparent on the face of the record of the judgement pronounced, should not be confused with the powers that an appellate court would have in appeal jurisdiction. Furthermore, it highlighted that evidence cannot be reappreciated in review. The Supreme Court also stressed the necessity of interpreting Directive Principles of State Policy such as Article 48A and 51A in light of Article 21 of the Constitution of India, to advance environmental justice. The decision also acknowledges rights of nature and the need to uphold ecocentrism and environmental rule of law. Additionally, the decision also acknowledged rights of nature and the need to uphold ecocentrism and environmental rule of law.

DECISION OF THE COURT

In this judgement the Supreme Court ruled that the High Court exceeded its jurisdiction in review by acting as an appellate court through the rehearing of the case. It determined that although State officials are bound to protect and preserve the forests, they have relinquished

their duty. The Supreme Court also determined that the High Court should not have placed reliance upon evidence produced after the decree and that it exceeded its authority by erroneously gifting the forest land to a private person who could not prove his title.

Accordingly, the Supreme Court allowed the appeal by setting aside the impugned judgment and restoring the judgement rendered in A.S. No. 145 of 1994. Finally, it issued directions to impose a cost of Rs. 5,00,000/- each on appellants and respondents to be paid to the National Legal Services Authority (NALSA).

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Chhajju Ram v. Neki, 1922 SCC OnLine PC 11

H.P. Bus-Stand Management & Development Authority v. Central Empowered Committee, (2021) 4 SCC 309

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Pradeep Krishen v. Union of India, (1996) 8 SCC 599

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Shri Ram Sahu v. Vinod Kumar Rawat, (2021) 13 SCC 1

State of W.B. v. Kamal Sengupta, (2008) 8 SCC 612

T.N. Godavarman Thirumulpad (87) v. Union of India, (2006) 1 SCC 1

T.N. Godavarman Thirumulpad v. Union of India, (2012) 3 SCC

THE STATE OF TELANGANA AND OTHERS

v.

MOHD. ABDUL QASIM

Civil Appeal No. of 2024 [Arising Out of SLP (C) No. 6937 of 2021]

M. Jayani Christina*

ABSTRACT

This review examines the Indian Supreme Court's judgement in *The State of Telangana v Mohd. Abdul Qasim* (April 2024), which focuses on environmental law concepts such as ecocentrism, rights of nature and climate change. The matter concerns a land survey and settlement in Kompally, completed in 1960, which became contentious when the plaintiff sought to rectify a survey error and claimed ownership of land designated as a “reserved” forest. Initially, the High Court upheld the forest designation in 2018. Yet, a flawed inquiry in 2019 led the state to reverse its position and support the plaintiff. In response, the High Court issued an impugned order in the purported exercise of the power of review, by overturning its 2018 ruling in 2021. The Supreme Court found that the High Court's reliance on inadmissible evidence was erroneous, leading to the annulment of the 2021 judgement. The Supreme Court reinstated the 2018 decision, reaffirming the land's protected status as a forest. This ruling illustrates judicial activism in India, highlighting the proactive role of the judiciary in environmental protection.

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1. INTRODUCTION

India's forest and tree cover serves as a major mode of carbon mitigation for India and the world.¹ Forests function as a carbon dioxide sink and their conservation is indispensable to ensure clean air in the atmosphere and to regulate temperature. The depletion of forests not only results in severe droughts, with significantly reduced rainfall, but also affects pollination processes, which in turn disrupt the food chain and lead to the widespread extinction of numerous species.² This underscores the essential function of forests in maintaining ecological balance and supporting biodiversity.³ Thus, the protection and conservation of forests is a duty cast on the Indian State and citizenry alike.⁴ This review focuses on a landmark judgement delivered by the Indian Supreme Court for the furtherance of environmental justice by ensuring the protection of a reserved forest. An in-depth examination of a judgement of this nature extends beyond the limitations of this brief review. Instead, the focus has been placed on delineating the factual components of the case and analysing the judgement in light of its rationale, environmental concepts and its ecological and socio-political ramifications.

2. THE LEGAL AND FACTUAL BACKGROUND

This 2024 judgement traces its origins to an application filed by the 1st Respondent (the original plaintiff) under Section 87 of the Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 F. (hereinafter "A.P. Land Revenue Act, 1317 F."). The application sought correction of a survey, concluded in 1960, and claimed ownership of 106.34 acres of land in the Village of Kompally.⁵ In 1971, Gazette No. 85-B published in the Andhra Pradesh Gazette, under Section 15 of the A.P. Forest Act, designated the contested land as reserved forest, based on the premise that it was classified as forest land in prior revenue department proceedings dated November 17, 1960.⁶

Despite a definitive ruling identifying the suit property as forest land, a state agency adopted contradictory positions, which were later rectified by an affidavit submitted to this Court. The respondents' inconsistent stance led to the impugned decision being rendered in their favour,

¹ *The State of Telangana v Mohd. Abdul Qasim*, Civil Appeal No. of 2024 [Arising Out of SLP (C) No. 6937 of 2021] at p.38.

² *Telangana* (n 1) 36-37.

³ *ibid* 36.

⁴ *ibid* 25.

⁵ *ibid* 51.

⁶ *ibid* 51.

overturning the concurrent judgments of two lower courts that were based on factual and legal evaluations.

In this case, the petitioner (The State of Telangana) sought Special Leave to Appeal against a final judgement and order issued by the High Court for the State of Telangana in Hyderabad on March 19, 2021. Ultimately, the Supreme Court upheld the appeal, reaffirming the land's reserved forest status. The Court emphasised that state officials have a duty to protect and preserve forests, a responsibility which the District Collector had notably failed to fulfil. The Supreme Court criticised the High Court for erroneously overturning its 2018 decision in 2021 and erroneously 'gifting' the land to a private individual who could not substantiate his claim. The Court found the High Court's reliance on inadmissible evidence to be both factually and legally flawed.⁷

3. THE ORDER OF THE COURT

In 2024, by adopting an ecocentric approach, the Supreme Court dismissed the 2021 High Court judgement and reinstated the 2018 decision, redeclaring the land to be a reserved forest. The 2018 ruling by the Telangana High Court had concluded that the plaintiff could not establish legal title to the land, ensuring that the forest remains designated as protected land under Section 15 of the A.P. Forest Act. The Supreme Court imposed a cost of Rs. 5,00,000/- each on the appellants and the respondents to be paid to the National Legal Services Authority (NALSA) within a period of two months from the date of the judgement.⁸ The Supreme Court also directed that the appellant State is authorised to investigate any lapses by officers who filed collusive affidavits before the competent court and to hold accountable those responsible for submitting incorrect affidavits. Additionally, the Court ordered the closure of Contempt Case No. 624 of 2021 pending before the High Court. All other pending applications were directed to be closed as well.⁹

4. ANALYSIS

This case is remarkable as it underscored the significance of forest protection in the context of climate change and advocated for a shift from an anthropocentric to an ecocentric approach. It stressed that ecocentrism, which is life-centred and nature-centred, is all inclusive, as it

⁷ *ibid* 58.

⁸ *ibid* 60.

⁹ *ibid* 60.

encompasses both human and non-human interests. The Court also asserted that respect for human rights should be complemented by an acknowledgment and respect for the rights of nature.¹⁰ In its analysis, this review focuses on the reasoning of the judiciary, the Supreme Court's reliance on directive principles of state policy and fundamental rights, and how the court acknowledged the necessity of a paradigm shifting from an anthropocentric to an ecocentric approach. It also explores how the court advanced sustainable development and environmental rule of law to strengthen environmental protection.

4.1. Reasoning of the Judiciary

In examining the Supreme Court's determination in this case, several key issues were addressed. First, the Court considered whether the District Collector possessed the authority to manage or alter reserved forest land. This question was pivotal in determining the extent of the administrative powers granted to the District Collector in relation to the land in question. Second, the Court assessed whether there was an apparent error on the face of the record of the judgement that would justify invoking review jurisdiction. This inquiry focused on whether the original judgement contained clear and identifiable errors that warranted a reassessment. Third, the Supreme Court evaluated whether the High Court had overstepped its jurisdiction in its review process. Finally, the Court deliberated on the issue of whether the plaintiff held title to the land, a crucial factor in establishing the legal right to the property in dispute. Each of these considerations was essential in resolving the broader legal questions presented in the case.

The Supreme Court found a distinct lack of jurisdiction on two grounds: in respect to an attempt made to evade the decree and acting without jurisdiction. The Court determined that the District Collector lacked jurisdiction over the land, particularly under Sections 15 and 16 of the A.P. Forest Act. It determined that the land belonged to the Forest Department, and the District Collector had no authority to manage or alter this reserved forest land.¹¹

Further, the Supreme Court observed that the High Court clearly exceeded its jurisdiction in review, by re-hearing the case and acting as an appellate court. Although Article 226 of the Constitution of India¹² allows the High Court from exercising its inherent power of review to prevent miscarriages of justice or to correct grave errors it has made, it does not extend to re-

¹⁰ *ibid* 33.

¹¹ *ibid* 55.

¹² The Constitution of India, 1950.

evaluating decisions solely on their merits, which falls under the appellate jurisdiction.¹³ In this case, no such grave error existed, as the High Court had already identified the land to be a reserved forest and that the plaintiff miserably failed to prove title to it.¹⁴ It is clear that the review by the High Court was conducted akin to an appeal by considering new evidence that arose post the filing of the case.¹⁵

Moreover, the Supreme Court emphasised that in order to invoke the review jurisdiction of the High Court, there should have been an error on the face of record of the judgement that the High Court had declared in 2018. However, since no such error was present, the High Court's review was unjustified, serving merely as an attempt to rehear the case and issue a fresh decision.¹⁶ Likewise, the Supreme Court reiterated that review petitions are limited in scope and cannot be used as "an appeal in disguise".¹⁷

4.2. Relevance of Directive Principles of State Policy and Fundamental Rights

The rationale adopted by the Supreme Court in arriving at its final judgement, showcases how it has relied on the Constitutional protection granted to forests through Directive Principles of State Policy. Specifically, Article 48A of the Constitution of India, imposes a clear mandate upon the State, while Article 51A(g) correspondingly casts a duty upon a citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife.¹⁸ The Supreme Court ruled that in order to uphold the protection of forests, various species and nature, these two provisions should be interpreted in light of Articles 14, 19 and 21 of the Constitution of India.¹⁹ Most importantly, the Court has upheld fundamental rights enshrined under Articles 14²⁰ and 21²¹ of the Constitution in order to protect life, the environment and to prevent pollution of nature.²² Forests must be protected in order to guarantee the right that people have

¹³ *Telangana* (n 1) 18.

¹⁴ *ibid* 53.

¹⁵ *ibid* 2.

¹⁶ *ibid* 20.

¹⁷ *ibid* 20.

¹⁸ *ibid* 25.

¹⁹ *Telangana* (n 1) 25; *Sachidanand Pandey v. State of W.B.*, (1987) 2 SCC 295; *Pradeep Krishen v. Union of India*, (1996) 8 SCC 599; *M.C. Mehta v. Kamal Nath*, (2000) 6 SCC 213.

²⁰ The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

²¹ Article 21 of the Constitution enshrines the protection of life and personal liberty. Accordingly, Article 21, confers a fundamental right on the individuals to live in a pollution-free environment.

²² *Telangana* (n 1) 27. Further, by citing *Pradeep Krishen v. Union of India*, (1996) 8 SCC 599, the Court also highlights that these two Articles must guide the interpretation of laws and lead to protect and improve the natural environment and to safeguard the forest and wildlife of the country. See also *Telangana* (n 1) 27-28.

to live in a pollution-free environment. In fact, forests play a crucial role in the ecosystem by mitigating pollution and maintaining environmental quality.

The protection of forests is essential to ensure water availability to all living organisms, as forests create aquifers. If forests are not safeguarded, that would affect the right to equality of people guaranteed by Article 14 of the Constitution of India, especially because the underprivileged would be the ones to have a limited access to resources. Hence, the protection of forests is not just for the protection of nature but also for the protection of mankind, because man's survival and sustenance are dependent upon mother nature.²³ Accordingly, the State should be a trustee that safeguards forests for the collective well-being of humanity.²⁴ In this manner, the judgement underscores the necessity of proactive measures in environmental stewardship to uphold the fundamental rights of individuals and to foster a sustainable and healthy environment for current and future generations.

4.3. Need to shift from an Anthropocentric to an Ecocentric Approach

As explained in the previous segment, the Supreme Court has aimed to elevate the significance of environmental protection to the level of fundamental rights. This exemplifies how in this judgement the Supreme Court is showcasing a transition from an anthropocentric approach to an ecocentric one.

Referring to *Godavarman Thirumulpad v. Union of India*,²⁵ The Supreme Court highlighted that environmental justice can only be achieved by the adaptation of an ecocentric perspective. As in anthropocentrism what is prioritised is human interests, natural resources and entities are regarded as valuable only in their utility to humans. In contrast to anthropocentrism, ecocentrism views nature as central, with humans as integral parts, and recognises the intrinsic value of non-human entities. In fact, ecocentrism is inclusive, life-centred and nature-centred, encompassing both humans and non-humans.²⁶

Moreover, the Supreme Court highlights that forest sustainability is an integral part of forest management.²⁷ One perspective on sustaining forests is to maintain a naturally functioning forest ecosystem. Hence, both forest owners and society as a whole have to commit to manage

²³ *Telangana* (n 1) 30.

²⁴ *ibid* 44.

²⁵ *T.N. Godavarman Thirumulpad v. Union of India*, (2012) 3 SCC 277.

²⁶ *Telangana* (n 1) 33.

²⁷ *Godavarman Thirumulpad (87) v. Union of India*, (2006) 1 SCC 1.

forests for future generations. This highlights the principle of intergenerational equity. For this purpose, forests should be kept intact to develop and process without significant human intervention.²⁸

4.4. Sustainable Development

The Brundtland Report of 1987 defines sustainable development as the meeting of the needs of the present generation without jeopardising those of future generations.²⁹ Sustainable development is imperative to recognise that future generations have an equal right to both a developed and an environmentally secure society. Thus, ensuring sustainability in development is not only a present obligation but also a commitment to safeguarding the rights of future generations to a viable and healthy environment.³⁰ The Supreme Court highlights that while ecocentrism has to be upheld, this does not mean that development should be disregarded. What is required is striking a balance between the necessity of development with that of environmental preservation.³¹

In light of the case of *Municipal Corpn. of Greater Mumbai v. Ankita Sinha*,³² the Court highlights that it is necessary to apply the principle of sustainable development to facilitate Environmental Justice and Environmental Equity, when trying to achieve economic advancements,³³ as it posits controlled development. Hence, by applying the substance of the doctrine of sustainable development and the precautionary principle, the judgement emphasises that though development is necessary, it should not be facilitated at the cost of the environment. Instead, necessary development should be executed with due regard to the fundamental rights and values.³⁴

4.5. Environmental Rule of Law

The judgement rendered by the Supreme Court stresses upon the concept of environmental rule of law. Environmental rule of law integrates critical environmental needs with indispensable elements of the rule of law, thereby establishing a framework for reforming environmental

²⁸ *Telangana* (n 1) 35.

²⁹ United Nations Report of the World Commission on Environment and Development: Our Common Future (1987).

³⁰ *ibid* 43-44.

³¹ *ibid* 41.

³² *Municipal Corpn. of Greater Mumbai v. Ankita Sinha*, (2022) 13 SCC 401.

³³ *ibid* 30.

³⁴ *ibid* 47.

governance. By linking environmental sustainability with fundamental rights and obligations, it underscores the importance of integrating ethical norms and universal moral values into legal structures, to pave the way for a robust foundation for defining and upholding environmental rights and obligations.³⁵ Nevertheless, in the absence of a well-established environmental rule of law and the rigorous enforcement of these rights and duties, environmental governance risks becoming arbitrary - characterised by discretion, subjectivity, and unpredictability.³⁶

Environmental rule of law seeks to provide for a multidisciplinary approach where science, policy-making and economic considerations are amalgamated for achieving environmental protection effectively, through a shared understanding of these fields.³⁷ It endeavours to integrate the interconnections within the natural environment, thereby framing the issue of survival as a collective challenge faced by human societies globally. This approach also aims to leverage insights garnered from past empirical knowledge to establish foundational principles that would underpin contemporary and future environmental regulation.³⁸ The institutionalisation of such regulatory frameworks would be crucial in the prevention of environmental degradation, destruction of habitats and mitigation of carbon footprints and climate change.³⁹

5. CONCLUSION

In conclusion, *The State of Telangana v Mohd. Abdul Qasim* buttresses the judiciary's pivotal role in protecting the environment, with a particular emphasis on the preservation of forest cover, which is essential in sustaining diverse forms of life on Earth. The judgement emphasises that considering that climate change is an inherently transboundary challenge, forests have to be safeguarded due to their crucial functions in regulating carbon emissions, conserving water and soil, and restoring habitats. In order to protect forests, the Supreme Court highlights the importance of transitioning from an anthropocentric perspective to an ecological one. Overall, forests act as a shield to reduce environmental pollution, and thus, both the State and its citizens are entrusted with the responsibility of acting as stewards of forests and the earth.

³⁵ *ibid* 46.

³⁶ *ibid* 46.

³⁷ *ibid* 47.

³⁸ *ibid* 48.

³⁹ *ibid* 47.

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United Nations Report of the World Commission on Environment and Development: Our Common Future (1987)

M.K. RANJITSINH & OTHERS

v.

UNION OF INDIA & OTHERS

SUPREME COURT OF INDIA

Writ Petition (Civil) No. 838 of 2019

BEFORE

Dr Dhananjaya Y. Chandrachud, J

J. B. Pardiwala, J

Manoj Misra, J

COUNSEL

Shyam Divan, Senior Counsel for the Petitioners

R Venkataramani, Attorney General for India, Tushar Mehta, Solicitor General of India, and

Aishwarya Bhati, Additional Solicitor General for the Respondents

DECIDED ON

21.03.2024

JUDGEMENT OF

Dr Dhananjaya Y Chandrachud, J.

MATERIAL FACTS

This judgement arose when The Ministry of Environment, Forests, and Climate Change, along with the Ministry of Power, and the Ministry of New and Renewable Energy ('MNRE'), invoked the writ jurisdiction of the Supreme Court of India under Article 32 of the Constitution of India, seeking directions for the preservation of two critically endangered bird species,¹ the Great Indian Bustard (GIB) and the Lesser Florican.

¹ The two birds are classified as critically endangered bird species under the IUCN Red List of Threatened Species; See, <<https://www.iucnredlist.org>> accessed 13 July 2024.

In their petition, the petitioners requested a modification of a previous judgement dated 19th April 2021, wherein the Supreme Court had imposed a blanket restriction on the installation of overhead transmission lines across a large swath of territory that serves as a potential habitat for GIB, mandated the conversion of these lines to underground ones within a period of one year, and appointed a committee to assess the feasibility of laying high-voltage underground power lines. Additionally, in that judgement, the Court had directed that bird diverters be installed on existing overhead power lines in priority and potential GIB habitats, until a decision was made regarding their conversion to underground lines.

The grounds on which the petitioners sought modification of the aforesaid April 19 judgement included, among other points, their concern that its practical implementation could have adverse implications for India's power sector. They contended that adopting underground power lines could hinder India's efforts to combat the effects of climate change by transition to non-fossil fuel sources, potentially impeding the country's ability to meet its commitments under the 2015 Paris Agreement within the United Nations Framework Convention on Climate Change (UNFCCC).

MATTER FOR DETERMINATION

(a) The matter for determination encompassed two primary issues; first, modifying the directions issued in the earlier judgement dated 19 April 2019, and second, striking a delicate balance between preserving the GIB and upholding India's commitment to combating climate change through the just transition from fossil fuels to renewable energy sources. As highlighted by the Court itself, the issue was not simply a binary choice between conservation and development. Rather, it involved navigating the intricate relationship between protecting a critically endangered bird species and addressing the global challenge of climate change. The aim was to ensure that both objectives could be pursued simultaneously without compromising either.

RELEVANT AREAS OF LAW

Article 14 of the Constitution of India (Right to Equality) - Article 21 of the Constitution of India (Right to Life) - Directive Principles of State Policy - Climate Change – Right to a Healthy Environment – Right to be Free from the Adverse Effects of Climate Change – Article 48A (Duty of the State to protect and improve the environment and to safeguard forests and wildlife) – Article 51A (Duty of every citizen to protect and improve the natural environment) – Sustainable Development

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

The Constitution of India does not guarantee specific environmental rights, nor is there a single comprehensive legislation in India addressing climate change and related concerns. That, however, has not deterred the Supreme Court from recognising the right to a clean environment, and acknowledging the threat posed by climate change.

As far as Indian constitutional jurisprudence is concerned, Article 21, which guarantees the fundamental right to life, has typically served as the entry point in recognising the right to a clean environment and the right to health. In expanding the ambit of Article 21, the courts have often enjoined fundamental rights with the state's obligations under the Directives Principles of State Policy, notably Article 48A (Duty of the State to protect and improve the environment and to safeguard forests and wildlife) and Article 51A (Duty of every citizen to protect and improve the natural environment). However, in this judgement, the Supreme Court went a step further by formulating the constitutional right to be free from the adverse effects of climate change as a distinct right and anchoring it between Article 21 (the right to life) and Article 14 (the right to equality). The Court concluded that the right against the adverse effects of climate change and the right to a clean environment are "two sides of the same coin".

DECISION OF THE COURT

In its judgement dated 21. 03. 2024, the Court ruled that the order issued on 19 April 2021 requires appropriate modification. The Court observed that the blanket directive to convert both high voltage and low voltage power lines to underground installations, as previously mandated, has no basis and necessitates recalibration. In the opinion of the Court, this was a task best entrusted to experts in the field rather than being decided conclusively by the Court.

Additionally, the Court established an Expert Committee tasked with various responsibilities, including assessing the feasibility of installing both overhead and underground electric lines, and identifying strategies for the protection and long-term survival of the GIB.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Apparel Export Promotion Council v A.K. Chopra (1999) 1 SCC 759

Bombay Dyeing & Mfg. Co. Ltd. (3) v Bombay Environmental Action Group (2006) 3 SCC 434

Entertainment Network (India) Ltd. v Super Cassette Industries Ltd. (2008) 13 SCC 30

Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment
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Virender Gaur v State of Haryana (1995) 2 SCC 577

M.K. RANJITSINH AND OTHERS

v.

UNION OF INDIA AND OTHERS

Writ Petition (Civil) No. 838 of 2019

Natasha Wijeyesekera¹

ABSTRACT

On 21st March 2024, the Supreme Court of India (SCI) delivered its ruling in *Ranjitsinh v Union of India* recognising the right to be free from adverse effects of climate change as a distinct right, linking it to the constitutional rights to life and equality. While the decision has been critiqued for its anthropocentric bias and for potentially neglecting broader ecological considerations, it nonetheless established a firm constitutional foundation for addressing human rights in the context of climate change. The following piece offers a commentary on the above judgement, highlighting certain avenues of thought that the Court may have overlooked.

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1. INTRODUCTION

The Great Indian Bustard (GIB), scientifically known as *Ardeotis Nigriceps*, is native to Southern and Western India, primarily inhabiting grasslands or arid regions. The majority of its remaining population is concentrated in the states of Rajasthan and Gujarat, both of which are prime areas for solar power generation. The GIB is currently on the verge of extinction due to various factors, including climate change and the presence of overhead transmission lines. The species' limited frontal vision makes it particularly vulnerable to collisions with power lines, as they are unable to detect them from a distance. Classified as a critically endangered species by the International Union for Conservation of Nature (IUCN) since 2011—a status reaffirmed in the 2018 assessment—the GIB's population has been rapidly declining due to a combination of factors, including habitat loss, degradation, hunting, and direct disturbances.

In a significant development, on 19th April 2021, the SCI delivered a judgement issuing interim orders regarding the conservation of GIBs. These directions included a blanket restriction on the installation of overhead transmission lines across potential GIB habitats covering an area of approximately 99,000 square kilometres, and a mandate to convert existing overhead lines to underground ones within one year.

In light of the rapidly dwindling GIB populations and the existential threat they face, The Ministry of Environment, Forests, and Climate Change, along with several other parties invoked the writ jurisdiction of the Supreme Court, seeking modifications to the judgement dated 19th April 2021.

The key contention of the petitioners was that the practical implementation of the April 19th ruling could have adverse implications for India's power sector. They asserted that transitioning to underground power lines might hinder India's efforts to combat climate change by transitioning to non-fossil fuel sources, potentially hampering the country's ability to fulfil its commitments under the 2015 Paris Agreement within the United Nations Framework Convention on Climate Change (UNFCCC). This situation highlighted the tension between a developing economy's pursuit of net neutrality, and the potential ecological costs of this transition.

As the Court aptly noted, the central legal issue at hand was not a binary choice between conservation and economic growth, but rather a *dynamic interplay between protecting a*

*critically endangered bird species and addressing the pressing global challenge of climate change.*²

2. THE LEGAL AND FACTUAL BACKGROUND

As highlighted in the Case Report, the Constitution of India does not guarantee specific environmental rights, nor does India have a comprehensive single legislation addressing climate change and related concerns. Nevertheless, within this narrow ambit, the SCI has interpreted the fundamental rights Chapter to re-define and substantially expand the substance and scope of environmental justice.³ Notably, Article 21, which guarantees the fundamental right to life, has been creatively interpreted to recognise the right to a clean environment. In widening the ambit of Article 21, the Courts have often linked fundamental rights with the state's obligations under the Directives Principles of State Policy, particularly Article 48A (which mandates the State to protect and improve the environment and safeguard forests and wildlife) and Article 51A (which places a duty on every citizen to protect and improve the natural environment).

3. THE ORDER OF THE COURT

In its judgement dated 21st March 2024, the Court ruled that the April 2021 order requires appropriate modification. The Court observed that the blanket directive to convert both high voltage and low voltage power lines to underground installations lacked a solid basis and needed recalibration. The Court expressed the view that this matter was better suited to the expertise of professionals in the field, rather than being conclusively determined by the Court.

4. ANALYSIS

The key takeaway from the decision was the Court's explicit recognition (at paras 19 and 24) of the fundamental right of the people of India to be free from the adverse effects of climate change, grounded in Article 21 (the right to life) and Article 14 (the right to equality). The Court noted that while there are various government policies and regulations addressing climate change, a comprehensive legislative framework is lacking. However, this does not necessarily imply that the Indian Constitution lacks a right to be free from the adverse effects

¹ *M.K. Ranjitsinh v Union of India* (2019) Writ Petition (Civil) No. 838, 39 (Chandrachud J).

² *M.C. Mehta v Kamal Nath* (2000) 6 SCC 213; *Virender Gaur v. State of Haryana* (1995) 2 SCC 577; *Karnataka Industrial Areas Development Board v C. Kenchappa* (2006) 6 SCC 371; *Bombay Dyeing & Mfg. Co. Ltd. (3) v Bombay Environmental Action Group* (2006) 3 SCC 434.

of climate change. The Court inferred this right from the Constitution's emphasis on environmental protection and the natural world, specifically referencing Article 48A ('the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country') and Article 51A(g) ('the fundamental duty of every citizen of India to protect and improve the natural environment, including forests, lakes, rivers, and wildlife, and to show compassion for living creatures'), even though these provisions are non-justiciable.

In arriving at its decision, the Court took note of several decisions which acknowledged the adverse effects of climate change and termed it as a 'major threat' to the environment. For instance, citing the 1995 case of *Virender Gaur v. State of Haryana*,⁴ which recognised a 'right to a clean environment' (also flowing from Article 21), the Court in *Ranjitsinh* postulated that since the right to a clean environment and the right to be free from the adverse effects of climate change are effectively two sides of the same coin, the Court had not previously been able to articulate the latter as a distinct right. By 2024, the Court deemed it necessary to *explicitly* articulate the right to be free from the adverse effects of climate change due to its increasing severity.⁵ This approach of the SCI is reminiscent of how the Supreme Court of the United States, since the 1965 case of *Griswold v. Connecticut*,⁶ identified peripheral or 'penumbral' rights within the broader guarantees of the Bill of Rights. While these penumbral rights—such as the right to livelihood, health, education, shelter, food, water, medical care, and environment—are not explicitly mentioned in the Constitution, they are viewed as complementary to, and a logical extension of, the right to life.⁷ The significance of this ruling is heightened by the fact that it comes from the world's most populous country, which faces substantial and direct impacts of climate change.⁸

During its ruling, the Court also delved deeply into climate change in the Indian context. For instance, embracing a recognition-based approach to climate justice, the Court highlighted the heightened vulnerability of specific groups including indigenous, tribal, and forest-dwelling

³ (1995) 2 SCC 577.

⁴ Aman Mehta, 'Breathing Life into the Right to Life: The Indian Supreme Court and the Right to be Free from the Adverse Effects of Climate Change' (*IACL-AIDC Blog*, 30 April 2024) <<https://blog-iacl-aidc.org/2024-posts/2024/4/30/breathing-life-into-the-right-to-life-the-indian-supreme-court-and-the-right-to-be-free-from-the-adverse-effects-of-climate-change>> accessed 5 August 2024.

⁵ 381 U.S. 479 (1965).

⁶ Mehta (n 4).

⁷ Parul Kumar and Abhayraj Naik, 'India's New Constitutional Climate Right Examining the Significance of M.K. Ranjitsinh and Others v. Union of India and Others for Climate Litigation in India' (*VerfBlog*, 25 April 2024) <<https://verfassungsblog.de/indias-new-constitutional-climate-right/>> accessed 5 August 2024.

communities, women, low-income households, and residents of specific geographical areas such as the Lakshadweep islands and forest regions. It also stressed on India's international obligations to mitigate climate change effects and examined climate litigation trends worldwide including the Netherlands and New Zealand. Given its comprehensive coverage on climate change legislation, international norms and comparative litigation, the judgment will undoubtedly serve as instructive reading for law students and practitioners alike.

Despite the recognition of a new right, the Court rightly acknowledged its limitations in forming opinions on environmental matters, emphasising that such decisions are best left to experts with specialised knowledge and skills. Consequently, the Court deemed it appropriate to constitute an Expert Committee tasked with assessing the feasibility of constructing overhead and underground electric lines and identifying measures for the protection and long-term survival of the GIB. Here the Court does not assume the role of an expert. Instead, it adopts an approach which ensures that conservation efforts are evidence-based and tailored to the unique circumstances of each location, thereby ensuring sustainable conservation objectives.

While the judgement undoubtedly marks a positive development in India's Constitutional and Environmental Law jurisprudence, it has not been without criticism. A significant critique of the judgment is its pronounced anthropocentric bias, demonstrating a lack of sensitivity to the court's own existing jurisprudence on ecocentric law and the legal recognition of entities beyond humans, particularly the endangered GIB, central to this Petition.⁹ A more robust juridical basis for the case could have been established through a discussion of the rights of the GIB, referencing landmark cases such as *Animal Welfare Board of India v Nagaraja and Others*,¹⁰ where the SCI recognised the entire animal kingdom of India, including avian and aquatic species, as a legal entity with distinct personae and corresponding rights. Furthermore, in its enthusiastic championing of solar energy, the Court also appears to have lost sight of the significant ecological and human-rights impacts of large-scale renewable (solar) energy projects.¹¹ The decision also reflects an undue deference to cost-efficiency calculations and governmental assertions of technical feasibility, which may appear deeply misguided to those who recognise the urgency of addressing both the climate and biodiversity crises.¹²

⁸ *ibid.*

⁹ (2014) 7 SCC 547.

¹⁰ Kumar and Abhayraj Naik (n 7).

¹¹ *ibid.*

5. CONCLUSION

In the context of India's fragmented and complex climate policy landscape, there is a compelling argument for adopting a comprehensive policy document or unified national legislation. This would replace outdated climate change plans and reflect a renewed vision for urgently and effectively combating the challenges of climate change. A judgment like *M.K. Ranjitsinh* will undoubtedly bolster claims brought before the judiciary that directly address violations of the right to protection against the adverse effects of climate change.

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Virender Gaur v. State of Haryana (1995) 2 SCC 577

T.N. GODAVARMAN THIRUMULPAD

v.

UNION OF INDIA AND OTHERS

SUPREME COURT, INDIA

I.A.Nos.1433 & 1477 of 2005 in Writ Petition (C) No. 202 of 1995. Judgment dated 13th February, 2012. Reported in 2012 (3) SCC 277, 2012 AIR(SCW) 1644, AIR 2012 SC 1254, 2012 (4) ALD 47, 2012 (4) LW 911, 2012 (2) SLT 446: CDJ 2012 SC 133.

BEFORE

S. Radhakrishnan J

Chandramauli KR. Prasad J

COUNSEL

Learned amicus curiae, Mr. P.S. Narasimha, Senior Counsel Mr. Rajiv Dutta.

DECIDED ON

13.02.2012

MATERIAL FACTS

The Asiatic Wild Buffalo (*Bubalus Bubalis*), a globally recognised and magnificent animal, faces the threat of extinction. Concerned about this, the Learned Amicus Curiae petitioned the court to direct the Union of India and the State of Chhattisgarh to create a rescue plan and allocate necessary funds to protect the species. The petition also sought measures to prevent interbreeding between wild and domestic buffalo to preserve the species' genetic purity.

MATTERS FOR DETERMINATIONS

- a) Whether the lack of clear boundary demarcation in the Udanti Wildlife Sanctuary (UWLS) contributes to cases of encroachment, and what role land hunger plays in these encroachments?

- b) Whether the development activities by various government departments and semi-government village institutions impact the villages inside and around the sanctuary, and how this development affects the villagers?
- c) Whether increased development activities interfere with the forest and wildlife privacy, leading to conflicts with wildlife?
- d) Whether conflicts with wildlife manifest through abnormal behaviour in wild animals, such as aggressive monkeys, cattle lifting by carnivores, and injuries caused by bears during the Mahua season, and what the ecological costs are of development that prioritizes human progress over ecosystem health?

RELEVANT AREAS OF LAW

Forest Conservation Act, 1980-Centrally Sponsored Scheme of 2009(CSS) -“Integrated Development of Wildlife Habitats” -Wildlife (Protection) Act, 1972 - National Wildlife Action Plan (2002- 2016)-The Tiger Task Force, 2005-recommendations -National Forest Commission, 2006- Article 51A(g) of the Constitution-act for the protection of wild animals, birds and plants and for matters connected therewith -with a view to ensure the ecological and environmental security of the country -Article 48A of the Constitution- duty on the State to protect and improve the environment and to safeguard the forest and wildlife of the country - 42nd Amendment Act 1976 of the Constitution - Entry 17B - Concurrent List and the “protection of wild animals and birds” and mandatory responsibility to protect and conserve the wildlife and its habitat -Section 18 of the constitution -empower State Government to declare its intention to constitute any area other than an area comprised within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment- Chapter IV- confers various other powers upon the State Government like acquisition-initiation of acquisition proceedings-declaration of areas as sanctuary-restriction on entry to the sanctuaries etc. - Section 36A -empower state Government-after consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries and those areas which link one protected area with another -The International Union for Conservation of Nature (IUCN)- endangered species.

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

- a) The Central Government before the Act came into force did not have much control over the States and the Union Territories for implementation of its various schemes and the Parliament, in order to give effect to Article 51A(g), enacted the Act for the protection of wild animals, birds and plants and for matters connected therewith, with a view to ensure the ecological and environmental security of the country. Article 48A of the Constitution of India imposes a duty on the State to protect and improve the environment and to safeguard the forest and wildlife of the country.
- b) Article 51A(g) states that it is the duty of every citizen of India to protect and improve the natural environment including the wildlife and to have compassion for the living creatures. By the 42nd Amendment Act 1976 of the Constitution "Forests" was added as Entry 17A in the Concurrent List and the "protection of wild animals and birds" was added as Entry 17B. Consequently, both the Central and State Governments/UTs are mandated with the responsibility of protection and conservation of wildlife and its habitat. Chapter IV of the Act deals with the "protected areas." Earlier headings 'Sanctuaries', 'National Parks' and 'Closed Areas', was substituted by the words "protected areas"
- c) Section 36A of the Act empowers the State Government, after consultations with the local communities, to declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries and those areas which link one protected area with another, as a conservation reserve for protecting landscapes, seascapes, flora and fauna and their habitat. The Act also empowers the State Government, where the community or an individual has volunteered to conserve wildlife and its habitat, declare any private or community land not comprised within a National Park, Sanctuary or a Conservation Reserve, as a Community Reserve, for protecting fauna, flora and traditional or cultural conservation values and practice. The management of Community Reserves shall primarily be done by the communities/individuals themselves. The Centrally Sponsored Scheme (CSS), therefore, intended to bring these two categories of PAs also under the ambit of the Scheme along with the existing National Parks and Wildlife Sanctuaries.

ORDER OF THE COURT

The State of Chhattisgarh was directed to fully implement the Centrally Sponsored Scheme, "Integrated Development of Wildlife Habitats," to prevent the extinction of the Wild Buffalo. The State must take immediate measures to ensure that interbreeding between wild and domestic buffalo does not occur, thereby maintaining the genetic purity of the wild species. Additionally, the State was instructed to undertake intensive research and monitoring of the

Wild Buffalo population in Udanti Wildlife Sanctuary and other areas where the species may still be found, including preparing genetic profiles for future reference. The State is also required to initiate wildlife training programs for officials of the State Forest Department, particularly for managing the sanctuary and other areas where Wild Buffalo are found. Furthermore, the State must submit an Annual Plan of Operations to the Central Government within three months, detailing the proposed actions in line with the "Integrated Development of Wildlife Habitats" scheme. All necessary steps should be taken by the State to protect the Asiatic Wild Buffalo, which has been declared the State animal of Chhattisgarh.

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recommendations of the Tiger Task Force, 2005

National Forest Commission, 2006

Regulations No.2, 15 and 20 of the National Environmental (Protection and quality)

Regulations made under Section 32 read with section 23A and 23B of the National Environmental Act

Article 48A and 51(A) g of the Constitution of India

42nd Amendment Act 1976 of the Constitution

Management plan for Udanti Wildlife Sanctuary (2002- 2003, 2011-2012)

The National Wildlife Action Plan (2002-2016)

The International Union for Conservation of Nature (IUCN)

Mehta v. Kamalnath 1997 (1) SCC 388

Vellore Citizens Welfare Forum v. Union of India and others 1996 (5) SCC 647

Biological Diversity Act, 2002

Environmental Protection Act, 1986

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

(CITES) The Convention of Biological Diversity 1992 (CBD)

Convention for Conservation of Antarctic Living Resources 1980

The Protocol to Antarctic Treaty on Environmental Protection 1998

The Bern Convention on Conservation of European Wildlife and Natural Habitats 1982

T.N. GODAVARMAN THIRUMULPAD

v.

UNION OF INDIA AND OTHERS

I.A.Nos.1433 & 1477 of 2005 in Writ Petition (C) No. 202 of 1995. Judgment dated 13th February, 2012. Reported in 2012 (3) SCC 277, 2012 AIR(SCW) 1644, AIR 2012 SC 1254, 2012 (4) ALD 47, 2012 (4) LW 911, 2012 (2) SLT 446: CDJ 2012 SC 133.

Samadhi H. Premasiri *

ABSTRACT

This review analyses the conservation efforts for the Asiatic Wild Buffalo (*Bubalus Bubalis*), an endangered species residing in India's Western and Eastern Ghats. An Amicus Curiae petitioned the court to direct the Union of India and the State of Chhattisgarh to develop a rescue plan, including funding and measures to prevent interbreeding with domestic buffaloes and conserve the genetic purity of the Asiatic Wild Buffalo. It also requested the relocation of villagers from Udanti Sanctuary and collaboration with research institutions for long-term management. This emphasizes the need for sustained efforts and proper funding to prevent the extinction of the Asiatic Wild Buffalo and support its conservation. Delivering its judgement on 13.02.2012, the Supreme Court of India recognised an ecocentric approach for conservation. The review utilises the black letter research approach to analyse the selected judicial decision. It holds that this case has made a remarkable contribution to address the conservation efforts through ecocentrism.

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1. INTRODUCTION

The Wild Buffalo is classified as "Endangered" in the IUCN Red Data Book.¹ It is listed in Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and is also categorized under Schedule I of the Wildlife (Protection) Act of 1972, highlighting its high conservation priority.² As the third-largest land mammal in India, following the elephant and the rhinoceros, the Wild Buffalo was designated as the state animal of Chhattisgarh in July 2001.³ Udanti Wildlife Sanctuary, now designated as a tiger reserve, is renowned as a natural habitat for the Wild Buffalo in Central India.⁴ Located in the Gariyaband and Dhamtari districts of Chhattisgarh State, this sanctuary provides an ideal habitat for the Indian Wild Buffalo.⁵ It was established as a wildlife sanctuary in 1985 under the Wildlife (Protection) Act of 1972 by the Government of Madhya Pradesh, per notification number 15/4/83/10/2, Bhopal, dated 09/03/84.⁶ The existing populations of Wild Buffalo in India are highly endangered because of habitat loss and degradation due to anthropogenic interference.⁷ Furthermore, the loss of genetic purity because of cross breeding with domestic and feral animals is another major threat.⁸ In response to these threats, Learned Amicus Curiae petitioned the Court to direct both the Union of India and the State of Chhattisgarh to implement a comprehensive rescue plan for the Asiatic Wild Buffalo. This plan includes securing necessary funds, preventing interbreeding with domestic buffaloes to maintain genetic purity, and relocating villagers from the Udanti Sanctuary to support the Buffalo's survival.⁹ Additionally, the Court was asked to ensure that research and management of the species be handled by reputable institutions such as the Wildlife Institute of India and the Bombay Natural History Society.

¹ Mishra R.P. and A. Gaur, 'Conservation status of Asiatic Wild Buffalo (*Bubalus arnee*) in Chhattisgarh revealed through genetic study' Technical Report of WTI and CSIR-CCMB, 2019.

² *ibid.*

³ Madhumay Mallik, 'Bringing back the Wild Buffaloes in Central India' (Wildlife Trust of India, 18 May) <<https://www.wti.org.in/feature/bringing-back-the-wild-buffaloes-in-central-india/>> accessed 13 August 2024.

⁴ Kotwal P.C & Mishra R.P., 'Studies on Indian Wildlife Buffalo (*Bubalus bubalis* L.) in Udanti Wildlife Sanctuary India' Tigerpaper, Vol. XXX: No. 02, April-June 2003, p7.

⁵ *ibid.* 2.

⁶ *ibid.*

⁷ Regmi S, Dr. Chalise M.K., 'Food Habit and Conservation Threats of Wild Water Buffalo', Nature kabhar, 1st of January 2019.

⁸ *ibid.* 7.

⁹ *T.N. Godavarman Thirumulpad v Union of India and Others* (I.A.Nos. 1433 & 1477 of 2005 in Writ Petition (C) No. 202 of 1995. Judgment dated 13th February, 2012. Reported in 2012 (3) SCC 277, 2012 AIR(SCW) 1644, AIR 2012 SC 1254, 2012 (4) ALD 47, 2012 (4) LW 911, 2012 (2) SLT 446; CDJ 2012 SC 133.

2. THE LEGAL AND FACTUAL BACKGROUND

The State of Chhattisgarh outlined its efforts to conserve the Wild Buffalo, which has been declared a State Animal.¹⁰ Despite these efforts, the implementation of the comprehensive operational management plan for the Udanti Wildlife Sanctuary has been hampered by financial constraints.¹¹ However, a Memorandum of Understanding (MOU) with the Wildlife Trust of India was established to address genetic purity and breeding concerns.

On September 8, 2006, the Court directed the Central Empowered Committee (CEC) to conduct an inquiry and submit a report.¹² The CEC, after consultations with the Ministry of Environment and Forests (MoEF) and state officials, submitted its report on September 10, 2008.¹³ The report indicated that the efforts by the State of Chhattisgarh to preserve the Wild Buffalo were unsatisfactory.¹⁴

The Court reviewed the Centrally Sponsored Scheme (CSS) of 2009 titled "Integrated Development of Wildlife Habitats," formulated during the Eleventh Five Year Plan. This scheme aimed to support the provisions of the Wildlife (Protection) Act, 1972, the National Wildlife Action Plan (2002-2016), and various other recommendations. It included additional support for Conservation Reserves and Community Reserves, acknowledging their role in wildlife conservation.

The Wildlife (Protection) Act, 1972, and constitutional provisions Articles 48A¹⁵ and 51A(g)¹⁶ mandate the protection of wildlife and the environment. The Act empowers state governments to declare areas as sanctuaries, conservation reserves, and community reserves, with the objective of conserving wildlife and their habitats.

The legal and ethical perspectives on environmental protection and biodiversity involve diverse legislative and philosophical frameworks. The Biological Diversity Act of 2002 aims to

¹⁰ Mishra R.P. and A. Gaur (n 1).

¹¹ *T.N. Godavarman Thirumulpad v Union of India and Others* (n 9) ‘..a comprehensive operational Management Plan for Udanti Wildlife Sanctuary was also enclosed stating that the execution of the said Management Plan had suffered setbacks due to acute financial shortage for its implementation. Further, it was stated that the funds allotted under Central Assistance from the Government of India, Ministry of Environment and Forests was not in tune with the budget requirement for development of the sanctuary and the conservation of the endangered species.’

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ The constitution of India 1950, art 48A ‘The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.’

¹⁶ The constitution of India 1950, art 51A(g) ‘It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.’

conserve biological diversity and ensure fair benefit-sharing from genetic resources, while the Environmental Protection Act of 1986 authorizes measures to improve environmental quality.

3. THE ORDER OF THE COURT

The Court concluded that the State of Chhattisgarh must fully implement the CSS to save the Asiatic Wild Buffalo from extinction. Immediate measures are required to prevent interbreeding between wild and domestic buffaloes, maintain genetic purity, and enhance research and monitoring of the Wild Buffalo population. The State was also directed to address human-wildlife conflicts and improve management practices in line with the objectives of the CSS and the Wildlife (Protection) Act.

Legally, the Wildlife (Protection) Act, 1972, and constitutional mandates provided a solid foundation for conservation, but practical challenges in management and human-wildlife interactions necessitate more effective strategies. The Court's directive for the State to fully utilise the CSS funds, maintain genetic purity, and address human-wildlife conflicts reflects a crucial step toward reversing the decline of the Asiatic Wild Buffalo population.

4. ANALYSIS

The aforementioned declarations and directions in this case specifically highlight the critical duties of enforcement authorities to ensure the legal protection of animals in India. Additionally, the emphasis on maintaining genetic purity of endangered species and addressing human-wildlife conflicts represents a crucial step toward reversing the decline of the Asiatic Wild Buffalo population.

4.1. Human -Wildlife Conflict

Human-wildlife conflict is rapidly emerging as a significant threat to the survival of many endangered species.¹⁷ Since laws are man-made, they often reflect an anthropocentric bias, where human interests are prioritized over the rights of wild animals. However, in the grand scheme of the universe, both humans and animals hold equal importance.¹⁸ Despite this, environmental protection in the context of such conflicts is frequently approached from a human-centred perspective.

¹⁷ 'Human Wildlife Conflict one of the greatest threats to wildlife species' WWF and UN Environment Programme Report'(www.unep.org 08th July 2021) <<https://www.unep.org/news-and-stories/press-release/human-wildlife-conflict-one-greatest-threats-wildlife-species-wwf>> accessed 13 August 2024.

¹⁸ *ibid.*

The conflict between humans and animals often arises not because animals encroach on human territories, but because humans encroach on theirs. The court emphasized that this case centers on the conflict between humans and endangered species, endangered not only by natural causes but also by human failure to preserve and protect them—driven by attitudes of destruction for pleasure and gain.¹⁹ Such conflicts are often attributed to factors like human population growth, land use transformation, species habitat loss, degradation, and fragmentation, increased eco-tourism, access to natural reserves, and the rise in livestock populations.²⁰

4.2. Eco-centric Approach

The Court emphasised that environmental justice could be achieved only if we move away from the principle of anthropocentric to ecocentric. Many principles like sustainable development, polluter-pays principle, inter-generational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and non-humans only have instrumental value to humans.²¹ Humans take precedence and human responsibilities to non-humans are based on benefits to humans. Ecocentrism is nature centred where humans are part of nature and non-human has intrinsic value.²² In other words, human interest does not take automatic precedence and humans have obligations to non- humans independently of human interest. Ecocentrism is therefore life-centred, and nature-centred where nature includes both humans and non-humans. Through these concepts the Supreme Court stated that the National Wildlife Action Plan 2002-2012 and the CSS (Integrated Development of Wildlife Habitats) is centred on the principle of ecocentrism and specifically highlighted the necessity to preserve and conserve the habitat of Wild Buffalo.

Internationally, CITES (1973) and the CBD (1992) address species extinction and biodiversity conservation. Early agreements like the Rio Declaration and UNCED were anthropocentric, focusing on human concerns, but there is a growing shift toward recognising ecological rights and intrinsic values.²³ Legal principles such as the Public Trust Doctrine, Precautionary Principle, and Polluter-Pays Principle reflect human-centred views, whereas ecocentric

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ Washington, W., Taylor, B., Kopnina, H. N., Cryer, P., & Piccolo, J. J. 'Why ecocentrism is the key pathway to sustainability. *Ecological Citizen*'(The Ecological Citizens, 30 May 2017) <<https://hdl.handle.net/1887/50284>> accessed 13 August 2024.

²² Washington, W., Taylor, B., Kopnina, H. N., Cryer, P., & Piccolo, J. J (n 21).

²³ *ibid.*

approaches emphasise the intrinsic value of all life forms.²⁴ Traditional Indian perspectives, such as the *Isha-Upanishads*, highlight the equality of all species and caution against human dominance, reflecting an evolving, more holistic approach to environmental protection.²⁵

4.2. Genetic purity

Case was filed seeking a direction to the Union of India and the State of Chhattisgarh to prepare a rescue plan to save Wild Buffalo, an endangered species from extinction and to make available necessary funds and resources required for the said purpose and also for a direction to take immediate steps to ensure that interbreeding between the wild and domestic buffalo does not take place and the genetic purity of the wild species is maintained. Direction was also sought for to prepare a scheme in consultation with the villagers for relocation of villagers from the Udanti Sanctuary to ensure the survival of the endangered Wild Buffalo. The Court highlighted that the necessity of the take immediate steps to ensure that interbreeding between wild and domestic buffalos does not take place and genetic purity of the wild species is maintained.²⁶

5. CONCLUSION

The review of the judgment delivered in this case highlights how the Indian Judiciary skilfully integrated an ecocentric approach, transcending the traditional anthropocentric framework. The judiciary thoroughly addressed the importance of genetic purity and the necessity of conservation. This judgment stands as a landmark in the global movement towards shifting from anthropocentric legal frameworks, emphasising the obligations humans have towards non-human entities, independent of human interests.

²⁴ *ibid.*

²⁵ Babbar S.K & Johannsdottir L, 'India's ancient philosophy on holistic education and its relevance for target 4.7 of the United Nations sustainable development goals -Discover Sustainability 2024' (Springer ,2 April 2024) <<https://doi.org/10.1007/s43621-024-00225-2> >accessed 13 August 2024.

²⁶ *T.N.Godavarman Thirumulpad v Union of India and Others (I.A.Nos.1433 & 1477 of 2005 in Writ Petition (C) No. 202 of 1995. Judgment dated 13th February, 2012. Reported in 2012 (3) SCC 277, 2012 AIR(SCW) 1644, AIR 2012 SC 1254, 2012 (4) ALD 47, 2012 (4) LW 911, 2012 (2) SLT 446: CDJ 2012 SC 133.(n 9)*

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The Constitution of India 1950

Washington, W., Taylor, B., Kopnina, H. N., Cryer, P., & Piccolo, J. J. '*Why ecocentrism is the key pathway to sustainability. Ecological Citizen*'(The Ecological Citizens, 30 May 2017) <<https://hdl.handle.net/1887/50284>>

**BANGLADESH ENVIRONMENTAL LAWYERS
ASSOCIATION (BELA)**

v.

**THE CHITTAGONG CITY CORPORATION REPRESENTED
BY ITS MAYOR AND OTHERS**

SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION (Special Original Jurisdiction), WRIT PETITION NO. 4871 OF
2012

BEFORE

Quazi Reza-Ul Hoque, J.

Abu Taher Md. Saifur Rahman, J.

COUNSEL

Mr. Minhazul Haque Chowdhury, Advocate for the Petitioner

Mr. Syed Mamun Mahbub, Advocate for Respondent No. 6

Mr. Masud R. Sobhan and Ms. Fatema S. Chowdhury, Advocates for Respondent No. 11

DECIDED ON

15.09.2015

JUDGEMENT OF

Quazi Reza-Ul Hoque J.

MATERIAL FACTS

The petition was filed by BELA under Article 102 (2) (a) (i) of the Constitution of Bangladesh, challenging the unauthorised construction of a market by Respondent No. 12 on the bank and part of a pond in the heritage site of the Bayezid Bostami shrine in Chittagong. The pond, home to critically endangered black Soft-shelled Turtles known as Bostami Turtles, is considered a

heritage site. The construction was alleged to violate the Detailed Area Plan (DAP) of Chittagong, threatening the pond's ecology and the turtles' habitat. BELA argued that the construction of the market would harm the turtles by obstructing sunlight and reducing their habitat, and would degrade the religious, cultural, and historical significance of the site.

MATTERS FOR DETERMINATION

- a) Whether the construction of the market was legal and in the public interest
- b) Whether the heritage site, including the pond and its endangered turtle species, should be protected
- c) Whether the actions of the respondents were in compliance with the law and the DAP of Chittagong

RELEVANT AREAS OF LAW

Article 102 (2) (a) (i) of the Constitution of Bangladesh, Environment Conservation Act, 2000 (Act No. XXXVI of 2000)

PROPOSITIONS OF LAW ESTABLISHED IN THE DECISION

- a) The court establishes the legal and constitutional obligation to preserve heritage sites, cultural landmarks, and ecologically sensitive areas.
- b) The decision integrates the DAP as a guideline for urban planning and conservation, emphasising its legal enforceability in restricting unauthorized construction.
- c) The judgment reaffirms the *locus standi* of non-governmental organisations (NGOs) like BELA to file PILs in matters involving environmental protection and heritage conservation.
- d) The judgment highlights the necessity of conducting Environmental Impact Assessments (EIA) for projects within ecologically sensitive or heritage sites.
- e) The judgment reinforces the supervisory and enforcement roles of authorities like the Department of Environment, the Chittagong Development Authority, and the Ministry of Housing and Public Works.
- f) The decision emphasizes that administrative permissions or agreements that contravene environmental or heritage conservation laws can be subject to judicial review.

DECISION OF THE COURT

The court ordered that the pond in front of Bayezid Bostami Mazar Sharif be protected to its original size and position. It directed the Secretary, Department of Environment, and the

Chittagong Development Authority to oversee that the turtles' habitat is not disturbed and that clean water, air, and light are available to them.

AUTHORITIES REFERRED TO IN THE JUDGEMENT

Environment Conservation Act, 2000

Detailed Area Plan (DAP) for Chittagong Metropolitan Master Plan

**BANGLADESH ENVIRONMENTAL LAWYERS
ASSOCIATION (BELA)**

v.

**THE CHITTAGONG CITY CORPORATION REPRESENTED
BY ITS MAYOR AND OTHERS**

WP 4871 of 2012

Thiloka Yapa*

ABSTRACT

This review analyses the judgment delivered in the High Court Division of the Supreme Court of Bangladesh by the Bangladesh Environmental Lawyers Association (BELA). The litigation aimed to protect the Bayezid Bostami Shrine, a heritage site in Chittagong, and its critically endangered Bostami Turtles, whose habitat was threatened by unauthorized construction near the shrine's pond. The court ordered the protection of the pond and the preservation of the endangered species' habitat, emphasising the importance of balancing environmental conservation with heritage protection. Additionally, the judgement analyses the role of Public Interest Litigation as a tool for advancing environmental and cultural preservation in Bangladesh. The court's application of sustainable development principles reflects an evolving judicial approach that seeks to protect heritage sites while considering the community's developmental needs. This case sets an important precedent in heritage and environmental conservation law in Bangladesh.

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1. INTRODUCTION

This case revolves around a Public Interest Litigation (PIL) filed by the Bangladesh Environmental Lawyers Association (BELA) in the High Court Division of the Supreme Court of Bangladesh. The litigation seeks the conservation and protection of the Bayezid Bostami Shrine, a heritage site in Chittagong, and its surrounding environment, focusing on the critically endangered Bostami Turtles inhabiting the shrine's pond.

2. THE LEGAL AND FACTUAL BACKGROUND

The Bayezid Bostami Shrine is a religious, cultural, and ecological site, home to the critically endangered Bostami Turtles. In 2000, the IUCN- the World Conservation Union classified Bostami Turtles as critically endangered species.¹

The dispute arose when unauthorised construction work began on a commercial market named Sultanul Arefin Hazarat Bayezid Bostami Market by a private entity (Respondent No. 12 in the case), on the bank of the pond associated with the shrine. This construction threatened the pond's ecosystem and the habitat of the endangered turtles.

The petitioner, BELA, argued that this construction violated local environmental laws and the Detailed Area Plan (DAP) for Chittagong, which designated the area as a heritage site requiring conservation. BELA sought judicial intervention to halt the construction and protect the shrine's ecological and cultural significance.

Respondent No. 11 defended the construction, claiming it was part of a broader plan to renovate the shrine and surrounding area, approved by the Chittagong Development Authority (CDA) and other relevant bodies. However, BELA argued that no Environmental Impact Assessment (EIA) had been conducted, and the necessary approvals were not in place, making the construction unlawful.

3. THE ORDER OF THE COURT

The High Court Division ordered that the pond and its ecosystem, including the habitat of the endangered turtles, must be preserved in their original size and condition. It directed the construction of a clear boundary wall around the pond, under the supervision of the CDA and the Department of Environment, to protect the pond and ensure that the turtles' habitat is not

¹ *Bangladesh Environmental Lawyers Association (BELA) v. The Chittagong City Corporation represented by its Mayor and Others* WP 4871 of 2012, 02.

disturbed. The Court also ordered that the Secretary of the Department of Environment and Forest oversee the implementation of this order to maintain the ecological balance and the site's heritage value.

4. ANALYSIS

The case discusses the pressing issue of protecting cultural heritage and endangered species, particularly in the absence of an EIA and proper environmental clearance. PIL, rooted in Article 102 of Bangladesh's Constitution, has emerged as a vital tool for citizens and organisations to defend public and environmental interests, gaining momentum through key legal milestones. By applying principles like the Precautionary Principle and Sustainable Development, the judiciary seeks to strike a balance between preserving the environment and embracing development, ensuring a legacy of care for future generations.

4.1. Environmental Impact Assessment

The absence of an Environmental Impact Assessment (EIA) or environmental clearance for the proposed construction at the Bayezid Bostami shrine raised significant concerns in this case. Despite the site's identification as a heritage location in the Master Plan, no formal assessment of the environmental impact, particularly concerning the endangered turtle species and the preservation of the heritage site, has been conducted. This omission is a critical point of contention, as the petitioner has argued that construction should not proceed without a thorough evaluation of its potential environmental consequences.

In Bangladesh, the framework for environmental assessment began with the introduction of EIA guidelines for the water sector in 1992, followed by the enactment of EIA legislation in 1995 and EIA rules in 1997.² In Bangladesh, Initial Environmental Examination (IEE) and EIA study was made a regulatory need under certain categories of projects as specified in Environment Conservation Rule, 1997 for obtaining an Environmental Clearance Certificate which is mandatory for any industrial and other development projects.³ The lack of such a clearance in this case highlights a significant oversight in the regulatory process, jeopardising both the environmental and cultural integrity of the Bayezid Bostami shrine.

² Salim Momtaz, 'Environmental Impact Assessment in Bangladesh: A Critical Review' (2002) 22 *Environmental Impact Assessment Review* 163 <[https://doi.org/10.1016/S0195-9255\(01\)00106-8](https://doi.org/10.1016/S0195-9255(01)00106-8)> accessed 07 August 2024.

³ M M Shamsuzzaman, X Xiangmin, Y Ming and N J Tania, 'Towards Sustainable Development of Coastal Fisheries Resources in Bangladesh: An Analysis of the Legal and Institutional Framework' (2017) 17 *Turkish Journal of Fisheries and Aquatic Sciences* 833 <<https://www.trjfas.org/pdf.php?&id=1051>> accessed 09 August 2024.

4.2. Public Interest Litigation

Public Interest Litigation (PIL) allows individuals or organisations to file a petition in the interest of the public at large, particularly when the rights of a group are being violated or a matter of significant public concern is at stake. In this case, the BELA filed the petition under PIL to protect the Bayezid Bostami heritage site from unauthorised construction, which threatened the environmental and cultural integrity of the site. PIL is particularly applicable here because the petition was not filed for any personal gain but to safeguard environmental and public heritage, reflecting the broader societal interest in environmental conservation and cultural preservation.

The legal basis for PIL in Bangladesh is found in Article 102 of the Constitution of the People's Republic of Bangladesh.⁴ Despite its potential, PIL in Bangladesh has not yet fully matured due to procedural inefficiencies and a lack of anticipated judicial activism. Additionally, the fact that the Constitution's basic principles of national policy are non-enforceable further complicates the effective use of PIL. As a result, Bangladesh still faces challenges in using PIL as a tool for social change.⁵ Furthermore, the fact that the Constitution contains basic principles of national policy that are not enforceable also impedes the smooth functioning of public interest litigation. Bangladesh still has a long way to go before public interest disputes can be used as a tool for social change.⁶

PIL has undergone significant judicial development in Bangladesh, beginning with the landmark case *Kazi Mukhlesur Rahman v Bangladesh*⁷, commonly known as the *Berubari* Case. Although the Standing Principle was not perfectly established in this early case due to the subject matter being under parliamentary approval and enactment, the *FAP 20 case*⁸ in 1996 marked a turning point. In this case, the Appellate Division recognised PIL as a distinct type of constitutional litigation within the Bangladeshi legal system. Following this development, any member of the public who identifies a public wrong or injury has the option to file a writ petition on behalf of a group of people or a vulnerable section of the community.

⁴ The Constitution of The People's Republic of Bangladesh (2011).

⁵ Fahima Hasan, 'Public Interest Litigation in Bangladesh: An Analysis' <https://www.researchgate.net/profile/Fahima-Hasan/publication/376985375_Public_Interest_Litigation_in_Bangladesh_an_analysis/links/659088c02468df72d3ec0705/Public-Interest-Litigation-in-Bangladesh-an-analysis.pdf> accessed 15 August 2024.

⁶ *ibid.*

⁷ *Kazi Mukhlesur Rahman vs Bangladesh* 22 DLR (AD) (1974) 44.

⁸ *Dr. Mohiuddin Farooque V. Bangladesh* WP 998 of 1994, CA 24 of 1995 (1996.07.25) (*Flood Action Plan Case*).

Under Article 102 of the Constitution, PIL enables courts to intervene when a breach of fundamental rights, as outlined in Part III of the Constitution, has occurred. Article 102(1) specifically empowers the courts to issue orders compelling the government to take necessary actions or to refrain from actions that are forbidden by law. This provision is particularly important in cases where individuals lack the resources or the liberty to initiate litigation on their own behalf.⁹

The use of PIL for environmental issues, often referred to as Public Interest Environmental Litigation (PIEL), is a relatively recent development in the country's legal system. The landmark case of *Dr. Mohiuddin Farooque v Bangladesh*¹⁰ marked the first instance of PIEL, where the Supreme Court acknowledged the right of 'any citizen' or any voluntary organisation acting on behalf of citizens to file a writ petition in response to public injury. This case significantly expanded the concept of locus standi, allowing for broader access to justice in matters of public interest to prevent social catastrophe. PIEL now serves as an additional remedy alongside the traditional writ remedy available to a 'person aggrieved.'¹¹

4.3. Precautionary Principle

The Precautionary Principle is a strategy for approaching issues of potential harm when extensive scientific knowledge on the matter is lacking. It advocates for preventive action in the face of uncertainty to avoid harm to the environment or human health. In this case, the principle applies to the potential environmental damage caused by the construction near the Bayezid Bostami shrine, particularly concerning the critically endangered Bostami Turtles. The precautionary approach would require halting or modifying the construction to prevent irreversible harm to the turtles and their habitat, even if all possible risks have not been fully quantified.

In Bangladesh, the precautionary principle is regarded as a guiding, non-binding principle for policy making.¹² The courts in Bangladesh have examined the seriousness of environmental

⁹ Md Akramul Haque, 'Judicial Development of Public Interest Litigation in Bangladesh: An Analysis' <https://www.researchgate.net/publication/359467991_JUDICIAL_DEVELOPMENT_OF_PUBLIC_INTEREST_LITIGATION_IN_BANGLADESH_AN_ANALYSIS> accessed 02 August 2024.

¹⁰ *Flood Action Plan Case* (n 8).

¹¹ 'Environment and Sustainable Development in Bangladesh: A Legal Study in the Context of International Trends' <https://www.researchgate.net/publication/254188632_Environment_and_Sustainable_Development_in_Bangladesh_A_Legal_Study_in_the_Context_of_International_Trends> accessed 15 August 2024.

¹² Jona Razzaque, 'Public Interest Environmental Litigation in India, Pakistan and Bangladesh' <<https://www.biliabd.org/wp-content/uploads/2021/08/Jona-Razzaque.pdf>> accessed 15 August 2024.

damage to determine the necessity of applying a precautionary approach. A relevant case is *Dr. Mohiuddin Farooque vs. Bangladesh and Others*,¹³ where the court recognised the *locus standi* of a potential consumer. In this case, the petitioner, as a potential consumer, filed a writ petition in the High Court Division to prevent the release of dried skimmed milk powder contaminated with high radioactivity, imported by Danish Condensed Milk, Bangladesh from Estonia. The court acknowledged the right of a potential customer to file a suit, assuming that such injury had either occurred or was 'likely to occur,' and proceeded to issue remedial directions.

In the FAP 20 case¹⁴, the court considered the potential seriousness of environmental damage that could result from the project in discussion. However, the court did not apply the precautionary principle and allowed the development project to proceed.

The judges of the Bangladesh Supreme Court do not recognise the precautionary principle as a part of international customary law.¹⁵ Nevertheless, the judiciary of Bangladesh acknowledges that the Rio Declaration, which introduced the Precautionary Principle¹⁶ holds persuasive and binding value, and Bangladesh has signed the Declaration.¹⁷ However, the judiciary also believes that an international agreement, even if signed by a country, requires ratification and can only be enforced as law when legislated by the country's legislature.¹⁸

While the precautionary principle has been incorporated into much of the current environmental legislation in Bangladesh, the courts in Bangladesh can refuse to apply it if the matter before them is not covered by such legislation. Most of the cases discussed were brought against public or government bodies, and the courts applied the precautionary principle when there was a threat of serious and irreversible damage. Furthermore, the court demonstrated a strong application of the precautionary principle by shifting the burden of proof onto the polluter.¹⁹

4.4. Sustainable Development

¹³ *Flood Action Plan Case* (n 8).

¹⁴ *Flood Action Plan case* (n 8); N Mohammad, 'Environment and Sustainable Development in Bangladesh: A Legal Study in the Context of International Trends' (2012) 3 *Mediterranean Journal of Social Sciences* 188, 199 <<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=3ac8b824ebe1597937c930d0976852547b0a5ec4>> accessed 15 August 2024.

¹⁵ *ibid* (n 14) 200.

¹⁶ Declaration of the United Nations Conference on Environmental and Development (adopted 12 August 1992 A/CONF 151/26) (Rio Declaration), principle 15.

¹⁷ Mohammad (n 14) 200.

¹⁸ *ibid*.

¹⁹ Mohammad (n 14) 200.

Sustainable Development emphasises meeting the needs of the present without compromising the ability of future generations to meet their own needs.²⁰ This concept is particularly relevant in the context of balancing heritage conservation with modern development. The court's directive to protect the Bayezid Bostami site while considering the community's needs for development reflects an application of sustainable development principles. The goal is to ensure that any development in the area does not harm the environment or the cultural heritage, preserving these for future generations.

Bangladesh has integrated the principle of sustainable development into its legal and policy frameworks. Notable policies include the National Environmental Policy (1992), which emphasises the need to protect the environment while promoting development. This policy, along with subsequent legislation, has laid the groundwork for incorporating environmental considerations into national development plans.

The government has also aligned its development agenda with the United Nations Sustainable Development Goals (SDGs), aiming to achieve a balance between economic growth, environmental sustainability, and social inclusion by 2030. The courts in Bangladesh have increasingly recognised sustainable development as a guiding principle in legal decisions, particularly in cases involving environmental protection. The judiciary has played a crucial role in interpreting and enforcing environmental laws in ways that promote sustainable development.

In cases like *Khushi Kabir and others v. Government of Bangladesh*²¹, the High Court Division highlighted the adverse impacts of certain commercial activities on sustainable development, reflecting the judiciary's commitment to this principle. In this case, the High Court Division addressed the issue of commercial shrimp cultivation and its detrimental impact on socio-economic development and sustainable development. The petitioners argued that shrimp farming would cause irreparable ecological and environmental damage to the community and the livelihoods of the inhabitants of Khulna. They contended that the government's orders regarding commercial shrimp farming violated the spirit of the Environmental Policy of 1992 and breached Article 32 of the Constitution. The petition claimed that allowing shrimp cultivation in the area under Polder 22 would result in significant environmental problems.

²⁰ United Nations 'Sustainability' (*United Nations*) <<https://www.un.org/en/academic-impact/sustainability#:~:text=In%201987%2C%20the%20United%20Nations,development%20needs%2C%20but%20with%20the>> accessed 16 August 2024.

²¹ *Khushi Kabir and others v. Government of Bangladesh* WP No 3091/2000.

5. CONCLUSION

This case serves as a significant precedent in environmental and heritage conservation law in Bangladesh. The High Court Division's ruling highlights the importance of balancing development with environmental protection and cultural preservation, particularly when dealing with critically endangered species and heritage sites. This case exemplifies the evolving use of PIL in Bangladesh, particularly in the realm of environmental protection. It demonstrates the potential of PIL to act as a powerful tool for social change, empowering citizens and organisations to hold authorities accountable for environmental and cultural preservation. The application of the Precautionary Principle and the emphasis on Sustainable Development within this judgment reflect a growing judicial recognition of the need to protect the environment for future generations while considering the present needs of the community.

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As the world grapples with an escalating triple planetary crisis of climate change, pollution and biodiversity loss, the critical intersection between environmental protection, democratic governance has never been more apparent. South Asia which was recently deemed the second most autocratic region, is home to nearly two billion people and some of the most vulnerable ecosystems in the world, stands at a crossroads. The region's legal systems and environmental jurisprudence have long played a vital role in safeguarding its habitats, and peoples. However, environmental challenges continue to persist, and are compounded by econo-political crises. Governance structures and regulatory institutions play a crucial role in enforcing environmental laws and policies, ensuring that economic development does not come at the cost of ecological balance. Grassroots movements, environmental defenders, and engaged civil society organizations remain at the forefront of advocating for stronger protections and responsible governance.

Amid economic and political challenges, the judiciary remains a true guardian of the environment against violative anti-democratic interventions. The courts have historically played a pivotal role in upholding anthropocentric and eco-centric environmental rights. Landmark rulings have set critical precedents that ensure the protection of the environment not only for this generation but for those to come. The judiciary has consistently ensured that environmental laws are upheld, holding institutions accountable for their implementation.

This South Asian Environmental Law Report 2024 chronicles the evolving legal landscape, highlighting the judiciary's role in shaping environmental jurisprudence. It underscores the importance of judicial independence, and regional knowledge sharing in advancing environmental justice. This report serves as a crucial comparative resource for legal practitioners, policymakers, activists, and scholars committed to environmental protection globally.

As we navigate an era of unprecedented economic, democratic and environmental challenges, let this report serve as both a record and a call to action: to maintain the courts as one of last defenders of the environment, the climate and natural resources, and to ensure that future generations inherit a just and sustainable world.

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