

MAJESTIC GIANT, YET ABROKEN SPIRIT : LEGAL PROTECTION OF CAPTIVE ELEPHANT IN SRI LANKA

HMMC Herath¹ and WMASB Wijethunga²

^{1,2} Faculty of Law, General Sir John Kotelawala Defence University, Sri Lanka
ayeshanshanaka88@gmail.com

Abstract - Sri Lanka has a large-scale historical evidence for the captivity of elephants. Although historically this was carried out on cultural grounds, currently captive elephants are being misused as a commercial asset. This study seeks to answer the problem as to how adequate is the current legal framework on captive elephants in Sri Lanka in providing them with a due legal protection. The primary objective of the study is to assess the current laws applicable in Sri Lanka pertaining to the captive elephants and their implementation in practice. Determining the effectiveness of the existing legal provisions on captive elephants involves the secondary objective of this discipline. The scope of the study has limited to certain types of captive elephants, thus excluding the elephants in the National Zoological Gardens. The research was carried out using two methodological approaches. The black letter approach was used to undertake a deep analysis on the legal provisions pertaining to captive elephants. Empirical research methodology was used to gather information on the consequences on the captivation of elephants and its practical implication. Towards the end, this study seeks to address certain pertinent questions on captive elephants in Sri Lanka still remain unanswered.

Keywords - Captive Elephants, *Elephas Maximus*, Captivity, Protection, Sri Lanka

I. INTRODUCTION

Captive elephants possess a prolonged history in Sri Lanka. Sinhalese Kings retained the elephants for military purposes and to amplify the dominion of their reign. Some chieftains who assisted the Sinhalese kings to seize elephants were allowed to retain an elephant or two for themselves. This practice was perpetuated by the Dutch. The tradition of tamed elephants came into Sri Lanka from the reign of King Narendrasighe. He has imported Indian-Muslims as mahouts in order to tame the elephants

for elephant battles which was wholly conducted for the enjoyment and as a sport. To this day custodianship of elephants prevails in Sri Lanka (Walisundara, 2018; Gunawardana, 2018). Unfortunately, the captivity of these wild giants now has been commercialized. Albeit numerous laws are available to protect these captive elephants, a drawback in implementation is occurred due to political, cultural, sociological and commercial reasons (Sukumar, 2011).

Today captive elephants in Sri Lanka are mainly being used for:

- A) Tourism – elephants are frequently used for back safaris, which is accompanied by a mahout. Habarana, Mineeriya and Kaudulla are considered as the most popular areas for back rides. The Pinnawela elephant orphanage governed by the National Zoological Gardens is yet another tourist attraction (Walisundara, 2018).
- B) Ceremonies and Temple Work – Elephants are engaged in processions all over the island. In 2017, an approximate number of 82 elephants were taken for the Esala Perahe. Certain elephants are kept in temples as a symbolic representation. Most present mahouts being uneducated and not being trained, often these poor animals are left out chained for hours which causes possible injuries (Walisundara, 2018).

Albeit the National Zoological Gardens also possess captive elephants which are being utilized for performances (Gunawardana, 2018), the main focus of the study revolves around the above two types of captive elephants. Hence, the captive elephants in the “National Zoological Gardens” are excluded from this study.

According to empirical data gathered by the Department of Wildlife Conservation (DWC), as at 31st January 2017, 265 elephants have been registered under private ownership from which 114 were dead and 06 were cancelled. Correspondently by January 2017 the number of privately owned elephants are recorded as 145 in number. Today elephants are mostly taken to temples to be used in processions, safaris or hotels for tourist rides. Whilst an elephant is supposed to work half a day, roguish mahouts make the elephants work longer hours (Gunawardana, 2018). Presently a mahout is compensated around Rs.3000 on daily basis inclusive of a fee of Rs.1000 for elephant's food (Mahout, 2018). The elephant is the first to suffer when the opportunities to work is reduced. Owner's or mahout's lower income result in the reduction of the quantity of elephant's food, physical injuries and medical negligence (Walisundara, 2018).

The government banned the seizure of wild elephants in the 1970s, afterwards the Pinnawala Orphanage became the main source of providing tamed elephants, mainly for temples. A programme for restraining the illegal ownership of elephants, many of which were seized from the wild feloniously within the island was initiated by the government in 2015. Illegal capture of the wild elephants was 47, out of which 20 were lodged at the Pinnawala Elephant Orphanage which were taken into custody of DWC (DWC, 2018). Meanwhile an interim order was acquired from the Colombo High Court suspending the release of 15 elephants to their alleged owners to take part in the Esala Perahera Kandy in year 2017 (Walisundara, 2018). Being productions of an ongoing case, it was illegal, irregular and bad precedent to make such order allowing the temporary release of those 15 elephants, held by the Wildlife and Nature Protection Authorities, after being confiscated from or surrendered by persons who had charges of falsely, fraudulently and nefariously holding those elephants purloined from the wild (Gunawardana, 2018).

According to the data in the elephant registry, from 2006-2010 as many as 95 tamed elephants have died. The tragic death of the elephant Kandula on the safari trail was a major concern among the other deaths of the captive elephants in 2017. As per senior environmental lawyer Jagath Gunawardana, this animal was malnourished and transported in an unacceptable manner. Stating the poignant situation of elephants which are supposed to be utilized for religious purposes, are being used for commercial activities, he noted that law has established it as illegal to use elephants for commercial activities directly

or indirectly. That is to say Section 49 (1) of The Fauna and Flora Protection Ordinance No 2 of 1937 (FFPO 1937) expressly elaborates the fact that carrying on or exercising the business or trade of a taxidermist, tanner, curer or trophy-dealer, or any other business or trade involving the purchase or sale of any dead or live animal or of any part of any dead animal is prohibited, unless otherwise a licence is obtained. Owing to malnutrition and neglect by temple authorities, one elephant was reported to be dead in 2017 and majority of elephants in Devalayas suffer from diabetes due to consumption of fruits in large quantities (Gunawardana, 2018).

The study comprises of two main objectives. The primary objective includes, critically analysing the present applicable legal regimes pertaining to captive elephants in the Sri Lankan sphere and their enforcement in the practical scenario. The secondary objective of the research involves ascertaining the breadth and the efficacy of the existing legal provisions on captive elephants. The paper will focus on the important provisions in the Constitution, FFPO 1937 and Prevention of Cruelty to Animals Ordinance No 13 of 1907 (PCAO 1907) and raise some pertinent questions that still remain unanswered. Whilst, looking closely into the fundamental provisions of the law under which captive elephants are being protected in Sri Lanka, the present paper will fashion it to quench the thirst of enterprising legal practitioners.

II. METHODOLOGY AND EXPERIMENTAL DESIGN

Two methodological approaches were undertaken in order to gather data. The black letter approach was utilized to entertain a thorough and objective analysis on the current legal provisions pertaining to the captivating elephants in Sri Lanka, its impacts and implementation in practice. Black letter approach was carried out based on relevant legislations as primary sources and books, journal articles, newspaper articles, commentaries, electronic resources pertaining to elephant captivity as secondary sources. Empirical research methodology was used to gather information on the effects of captivity of the elephants in reality. Empirical approach was furnished through conducting semi-structured interviews with stakeholders in the Environmental Law regime such as lawyers, environmentalists, officials of DWC and additional data was gathered through private elephant owners and mahouts.

III. APPLICABLE LAWS

Being one of the endangered, red-listed species in the world as per the International Union for Conservation of Nature and looking towards the present pathetic condition occurred to the captive elephants, it is important to analyse their legal status within Sri Lanka.

Sri Lankan Constitution, by virtue of “directive principles” (Article 27) and “fundamental duties” (Article 28) encompasses the protection of elephants as a shared responsibility. For inaugurating a just and free society the directive principle of state policy shall pledge directions to the Parliament, the President and the Cabinet in enacting the laws (Article 27(1)). Accordingly, the environment is ought to be protected, preserved and improved by the state for benefiting the community (Article 27(14)). Rendering the duties and entertainment of rights are interconnected thus the duty to safeguard environment and its resources is with every citizen (Article 28(f)). Nevertheless, Articles on the protection of elephants in the Constitution do not impose legal rights and obligations and cannot be enforced in any legal proceeding.

FFPO 1937 could be regarded as the primary legislation on the protection of domesticated elephants. Illegal seizure of wild elephants is an offence according to the Section 12 of the ordinance. An illegally caught elephant ought to be a captive elephant aged under 45 years that has not been released from Pinnawala. A prominent heed was given to the case of captive elephants in Sri Lanka with the incident involving the baby elephant which was claimed to have been deserted at the temple of Venerable Dhammaloka Thero. According to the FFPO 1937, possession of an elephant that is not licensed and registered is a punishable offence. DWC has been able to expose 30 cases of unregistered elephants since 2015. The Ordinance declares “no person shall own, have in his custody or make use of an elephant unless it is registered and unless a licence in respect of the elephant has been obtained”(Section 22A(1)). The Ordinance requires every private owner and custodian of an elephant to duly register their elephant in the register of elephants (Section 22A(2)) maintained by the Director (Section 22A(4)), paying the stipulated registration fee (Section 22A(3)) and correspondently procure an annual licence in respect of the elephant (Section 22A(5)).

The Ordinance further describes that “where a person becomes the owner, or obtains the custody, of an elephant

by virtue of sale, gift, the death of the previous owner or in any other manner whatsoever, such person shall immediately inform the Director or prescribed officer and, if the elephant is registered or licensed, take such steps as may be prescribed to have the previous registration and licence cancelled and to have a fresh registration made and a fresh licence obtained”(Section 22A (6)). Under Section 22A (7) of FFPO 1937, possession of an unregistered elephant is a punishable offence to which either a fine not exceeding five hundred rupees or a three months imprisonment or fine and imprisonment both are awarded.

Ordinance makes the unlawful possession of an elephant a punishable offence stating that “Any person who is in unlawful possession of an elephant shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand rupees or to imprisonment of either description for a term which may extend to one year or to both such fine and imprisonment ; and the court may on the conviction of any such person make order for the disposal of the elephant in respect of which the offence was committed, having regard to the rights of any other person who may appear to the court to be lawfully entitled to the possession of such elephant” (Section 23(1)). The term “unlawful possession” had been explicated in Section 23(2) under three types; those seized without a licence, a person not being the successor to the title of the custodian or is not retaining it under possession in lieu of a lawful owner. This undermines that substantiating the legally obtained right to have the elephant is with the owner.

An elephant is regarded as a property of a person, if the elephant is killed or taken by under a permit by such person as per Section 17(1) of the Ordinance. All other elephants are deemed as a property of the State (Section 17(2)) to be protected under the “Offences against Public Property Act No 12 of 1982”. The Ordinance provides that “Any person who (a) in contravention of this Part of this Ordinance or contrary to the tenor of any licence issued to him thereunder, hunts, shoots, kills, injures, takes, follows, or pursues any elephant shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand rupees or to imprisonment of either description for a term which may extend to two years or to both such fine and imprisonment”(Section 20(a)). In addition, an appropriate court order could be made to dispose the elephant. If it had been stolen and the rightful owner is known, it can be handed back, otherwise it can be either released to the wild or handed over to an elephant orphanage.

The case of elephants in captivity further extends to the inhumane treatment they are subjected to in captivity not restraining to the illegal possession alone. This is where the PCAO 1907 comes into play. Section 14 of the Ordinance elucidates the term “animal” to be included any domestic or seized animal. The Ordinance provides that “Any person who shall (a) cruelly beat, ill-treat, over-drive, override, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, over-ridden, abused, or tortured, any animal; (b) by any act or omission cause unnecessary pain or suffering to any animal; or (c) convey or carry, or cause to be conveyed or carried, in any ship, boat, canoe, or in any vehicle, basket, box, or cage, or otherwise, any animal in such manner or position as to subject such animal to unnecessary pain or suffering, shall be guilty of an offence, and shall be punished with a fine which may extend to one hundred rupees, or with imprisonment of either description for a term which may extend to three months, or with both” (Section 2). In certain occasions hauling of heavy loads of timber and other such goods are done by captive elephants. Overdriving of the animal by a custodian is a punishable offence which amounts to cruelty. The use of an elephant in any kind of work including riding when it is weak, ill or wounded or unfit due to any other reason is an offence.

The Ordinance further expresses that “If any animal is found in any place suffering pain by reason of starvation, mutilation, or other ill-treatment, the owner of such animal, and any superintendent or manager of such owner, shall severally be guilty of an offence (Section 4), and shall be punished with a fine which may extend to one hundred rupees, and in the case of a second or subsequent offence, with a fine which may extend to two hundred rupees, or with imprisonment of either description for a term which may extend to three months, or with both” (Section 3) . According to Section 12 of the Ordinance, all offences committed are cognizable offences which demarcates that a person apprehended committing any act unlawful under the PCAO 1907 could be imprisoned without a warrant.

Although the Extraordinary Gazette Notification No. 662/04 dated 14th May 1991 provides for the registration, escape/death and donation/sale of elephants, both the Ordinance and Regulations lack provisions as to the welfare of the elephants.

IV. RESULTS

Following shortfalls of the existing legislations on the protection of captive elephants were perceived as the key findings of the study gathered through the empirical data:

- 1) It stipulates more extensive coverage on welfare issues of the captive elephants.
- 2) The regulation for massacring the elephants, domestic or otherwise must go in line with humane practices adopted in modern communities.
- 3) There is no pronouncement for:
 - transportation of captive elephants
 - training of domestic elephants in particular events (especially in religious processions)
 - loads (including the count of passengers) to be hauled by a captive elephant
 - a proper training of mahouts
 - captive breeding
- 4) There is no provision for a third party involvement (Abeysekera v. Goonewardene (1938) 39 NLR 525) e.g. initiation or intervention by a registered animal welfare organization in any legal proceedings pertaining to a captive elephant.
- 5) The power of the police to implement the law is inadequate and the time period provided for making a complaint after committing an offence are inadequate , i.e. making a complaint after 3 months since the execution of an offence is insufficient.
- 6) Certain forfeits prescribed for any cruelty to a captive elephant is too low and outdated to have any deterrent effect e.g. a fine that may extend to hundred rupees, or an imprisonment up to 3 months or both as the penalty for the perpetrators of animal cruelty has intercepted the law from serving the purpose for which it was enacted.
- 7) In terms of administrating the legislations, there is no proper authority.
- 8) The definition given to “animals” in Section 14 of PCAO 1907 limits the solicitude, ought to be imparted to elephants to only those elephants under the custodianship of people, which in turn opens a path way to be ferocity to those that are not.
- 9) Authorities have no specific mechanism to periodically evaluate and monitor as to whether the interests of the elephants have been met. Consequently, DWC undertakes no statics or adequate information on the physical and mental status, nutrition and health of captive elephants.

10) The available animal cruelty offences are finite in amount and insubstantial in nature.

V. DISCUSSION AND CONCLUSION

There are many cases subjected to the captive elephant cruelty gone unreported or ignored. Instances of mahouts overworking the animals, not giving them enough food, abusing with goad have been reported. Sri Lankan law on cruelty to elephants remaining abortive and lacking teeth. As highlighted by Mr. Jagath Gunawardana (2018), the need for reform on this front is a prompt necessity. Cruelty to animals defined by PCAO 1907 is a law that dates to over a century, and obsolete which fails to address the current situation in Sri Lanka. Further it was revealed that, the lack of implementation of the existing law and averting its impacts highlights the need to reform the law, and it pressurizes the requirement to pass the proposed Animal Welfare Bill which would depict cruelty issues and inhumane treatment which applies to elephants in captivity.

Moreover, Mr. Jagath Gunawardana (2018) proclaimed that the Law Commission initially drafted the Animal Welfare Bill in 2006 and conferred to the parliament in 2010. The Bill gives an extensive definition for “animals” and also recognizes duty of care for custodians. It further provides for compassionate treatment of animals and propounds the establishment of an independent National Animal Welfare Authority. Major areas of focus highlighted in the Bill include, sustaining the elephants’ health, responsibilities of their custodians and caretakers, maintenance of baby elephants born to such female elephants, employing elephants in work, reproduction, exploiting for perahera and video shootings, attires, perpetuate the places elephants are kept in a well-established manner. Although the Bill was expected to be finalized in 2016 with the proposed changes incorporated to it received by the public consultation, it has been over a year since the passing of Bill and its enactment is hindered by the corrupt administration and religious system in the country.

As revealed in the key informant interview with DWC (2018), despite the legal provisions, there have been approximate 30 reported incidents pertaining elephants whose origin cannot be properly traced or for whom forged registration documents were fertilized. According to Meyer (2015), having consumed approximately six gallons of milk per day, a baby elephant is attended for about two years and the calves in the wild inclined to stay with their

mothers until they are around 5 years. Interviews further revealed that many calves do not survive in confronting the separation from their mothers when taken away for entertaining humans. This showcases the flagrant abuse of the legal provisions which prohibits the capture of wild elephants.

Empirical data has unfolded the concern that most of the elephants are being physically suffered due to the prevailing safaris which provides for the elephants back rides. As per Mr. Jagath Gunawardana (2018) explicable safari is to see the elephants in the wild, in their natural habitats without inhibitions. Hence the tradition of elephant back safaris should be banned from Sri Lanka.

If Sri Lanka desires to safeguard elephants from being extinct, it should encourage natural breeding of the elephants. As per the census conducted by DWC in 2011, only 3 births in captive elephants outside the Pinnawala Orphanage have occurred while 70 natural elephant births took place at Pinnawala by 2015. Whilst acknowledging the fact that both private ownership and elephant orphanage are modes of captivity, empirical data discloses that the majority of the private owners are unaware as to the proper conservation methods. This situation is augmented by the silence of the law regarding the knowledge and resources to be procured by the private elephant owners in order to concede a proper protection to the elephants under their custody. Accordingly, it is discernible that the private ownership is extremely unpropitious to the natural breeding of the elephants.

On the other hand, it was revealed by the empirical data that lack of proper transportation measures, have resulted the elephants with severe injuries and in the worst case, loss of life. This position has been further worsened by the absence of legal provisions in this respect. Hence, a licensing process to transport elephants as well a permit to ensure the standards of the vehicle which transport the elephants need to be established in order to avoid tragic deaths of elephants, regardless if they are domestic, tame or wild.

A proper legal criteria as to the eligibility of private ownership of elephants should be established. In addition, contriving a legally authorized improved training method for mahouts is an essential requirement since the Mr. Walisundara divulged the fact that present day mahouts who are most likely to be college dropouts are not experienced in handling and controlling elephants and this has resulted in many incidents of animal cruelty

including drunken mahouts ill-treating elephants. Improved, humane veterinary services are essential for a well fostered elephant. The government should deploy and train veterinary surgeons and post them to districts where there are captive elephants for this purpose. Large scale planting of the captive elephant's preferred foods with the aid of suitable approved organizations is necessary to serve the supply of food of captive elephants periodically.

It is unambiguous that the private ownership of elephants can neither be justified on cultural nor religious grounds. Captivity of the wild animals upheld the theory of Anthropocentrism which indicates that the human beings are superior to the nature and human life has intrinsic value while other entities (including animals, plants, mineral resources, and so on) are resources that may justifiably be exploited for the benefit of humankind. This is exacerbated by the loopholes of the current legal regime governing the captive elephants and its execution. Hence Sri Lanka should deviate from relying on the egocentric perceptions which makes the elephants to become a property rather than a free spirit and must properly implement existing legal regime on the protection of captive elephants without any prejudice.

REFERENCES

Abeysekera v. Goonewardene (1938) 39 NLR 525 [Online] Available at: <https://www.lawnet.gov.lk/wp-content/uploads/2016/11/143-NLR-NLR-V-39-ABEYSEKERA-v-GOONEWARDENE.pdf> [Accessed 09 05 2018].

Anon., 2018. Mahout, Pinnawala Elephant Orphanage [Interview] (2 March 2018).

Anon., 2018. Official of DWC Sri Lanka [Interview] (21 February 2018).

Dayanada, W. W. D., 2012. Visitor survey of the Pinnawala elephant orphanage, Sri Lanka. *Gajah*, Volume 37, p. 3–10.

De Silva, M. a. D. S. P., 2007. *The Sri Lankan Elephant: Its Evolution, Ecology and Conservation*. s.l.:WHT Publications, Colombo, Sri Lanka.

Extraordinary Gazette Notification No. 662/04 dated 14th May 1991

Fauna and Flora Protection Ordinance No 2 of 1937

Edirisinghe, A., 2017. 'A FREE SPIRIT, NOT A PROPERTY: PRIVATE OWNERSHIP OF ELEPHANTS IN SRI LANKA VS ANIMAL RIGHTS'. Kandy, s.n.

Epstein, R., 2004. *Animals as Objects, or Subjects, of Rights* In *Animal Rights: Current Debates and New Directions*,. s.l.:Oxford University Press.

Fernando, P. J. J. P. T. H. W. P. J., 2011. Current status of Asian elephants in Sri Lanka. *Gajah*, Volume 35, p. 93–103.

Gunawardana, J., 2018. Attorney-at-law, Environmentalist, lecturer, University of Colombo [Interview] (20 February 2018).

Kurt, F. a. G. M., 2007. *The Sri Lanka Elephant in Captivity*. New Delhi: Cambridge University Press (Pvt.) Ltd.

Mendis, R. a. J., 2017. *Ceylon Today*. [Online] Available at: <http://www.ceylontoday.lk/print20170401CT20170630.php?id=30134> [Accessed 22 February 2018].

Meyer, A., n.d. [Online]

Available at: <http://www.elephantsforever.co.za/life-cycle.html> [Accessed 1 March 2018].

Prevention of Cruelty to Animals Ordinance No 13 of 1907

Public Property Act No 12 of 1982

Sooriyagaoda, L., 2017. *Daily News*. [Online]

Available at: <http://dailynews.lk/2017/07/26/local/123261/court-orders-temporary-release-15-elephants-kandy-esala-perahera> [Accessed 22 February 2018].

Sukumar, R. (., 2011. *The story of Asia's elephants*. Mumbai: Mumbai The Marg Foundation.

The Constitution of the Democratic Socialist Republic of Sri Lanka

Walisundara, G. B., 2018. President, The All-Island Basnayaka Nilames Association, Basnayaka Nilame, Kataragama Devalaya, Kandy [Interview] (18 February 2018).