

SOME ELEPHANTS ARE MORE EQUAL THAN OTHERS: PROBLEMATISING THE LEGAL CATEGORISATION OF ELEPHANTS

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The primary argument of this paper is that elephants are wild animals, and should not be categorised in any other non-wild categories that reduce the legal protection guaranteed to them. Despite having the highest degree of protection under the Wild Life (Protection) Act, elephants continue to face exploitation by humans. The paper contends that this problem arises from the legal exception of elephant ownership created in the Wild Life (Protection) Act, based on an erroneous belief system that a class of elephants can be categorised as ‘captive,’ ‘working,’ ‘domestic,’ and then get licensed as ‘performing’ animals under the Prevention of Cruelty to Animals Act, 1960. Through a detailed discussion on the legislative history of elephant protection, the paper discusses the delicate moral dilemma of sustaining the elephant exception of private ownership and captivity. As a specific illustration to demonstrate our argument against the commodification of elephants, the paper critically examines the divergent judicial approach towards the inclusion of captive elephants as ‘performing animals,’ whether as necessary suffering or in defence of their long cultural use in festivities. In conclusion, the paper calls for a departure from the scheme of categorisation in order to regulate captivity, and end private ownership and consequent exploitation of elephants under the guise of “performance”.

Keywords: Animal Rights, Animal Welfare, Wildlife Protection, Elephant Rights, Captivity

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I. INTRODUCTION

Ramachandran of the Thechikottukavu Devaswom has long been regarded as one of the most controversial captive elephants in the State of Kerala. He has caused thirteen human and three elephant deaths in his lifetime.¹ Endearingly called Raman by his fans, he is also the most well-known star tusker in the State, drawing huge crowds every year when he opens the Vadakkumnathan Temple's gates to usher in the renowned Thrissur Pooram.² Despite Raman's repeated violent behaviour, the battle to exclude him from the Thrissur Pooram has been protracted and unrelenting.

His enormous and extremely dedicated fan base, responsible for making him an indispensable part of the Pooram, has resisted any and every attempt to retire Raman from the Pooram.³ This protracted battle has diverted attention from the reality that Ramachandran, as a privately owned captive elephant, is nothing short of an animal used for entertainment, not different from the ones in circuses —commodified, tortured, abused, and exploited— and in Raman's case, has been so for over five decades.⁴

Raman is one of the over 500 elephants used in the Pooram, a festival annually celebrated in different parts of north-central Kerala after the summer harvest.⁵ Caparisoned elephants are one of the primary attractions of the Thrissur Pooram, the largest, culminating festival of the Pooram season. The festival boasts rows behind rows of a hundred ornately adorned elephants paraded in the temple precincts, carrying idols of the deities from the temples that are paraded in rows and files to form the famous Pooram parades.⁶

¹ Editorial, 'If we Love Elephants, Must End their Torture' *The New Indian Express*, (7 February 2023) <www.newindianexpress.com/opinions/editorials/2023/feb/07/if-we-love-elephants-must-end-their-torture-2544970.html> accessed 15 May 2023.

² Sreedevi Jayarajan, 'Kerala's Celebrity Elephant: Meet Ramachandran, Who Kickstarted Thrissur Pooram' *The News Minute* (Kerala, 24 April 2018) <thenewsminute.com/article/keralas-celebrity-elephant-meet-ramachandran-who-kickstarted-thrissur-pooram-80143> accessed 15 May 2023.

³ See Sudha Nambudiri, 'A "Jumbo" Hit on the Internet' *The Times of India* (Kochi, 8 May 2019) <timesofindia.indiatimes.com/india/keralas-star-elephants-are-a-jumbo-hit-on-the-internet/articleshow/69054074.cms> accessed 15 May 2023; Vishnu Varma, 'Thechikottukavu Ramachandran is Still in Business: The Story Behind Kerala's Most Loved (and Feared) Elephant' *The Indian Express* (12 May 2019) <indianexpress.com/article/express-sunday-eye/thechikottukavu-ramachandran-kerala-thrissur-pooram-elephant-5719357/> accessed 15 May 2023; Saritha S Balan, 'Celebrity Elephant Ramachandran likely to be paraded for Vilambaram Ritual in Pooram' *The News Minute* (Kerala, 11 May 2019) <www.thenewsminute.com/article/celebrity-elephant-ramachandran-likely-be-paraded-vilambaram-ritual-pooram-101621> accessed 15 May 2023.

⁴ Anna Mathews, 'Who is Cruel? Man or Animal?' *The Times of India* (Kochi, 20 February 2019) <<https://timesofindia.indiatimes.com/city/kochi/who-is-cruel-man-or-animal/articleshow/68074354.cms>> accessed 25 May 2023.

⁵ Thrissur Pooram - Pooram of Cultural Capital (Thrissur Pooram) <thrissurPooramfestival.com/thrissur_Pooram.php> accessed 16 May 2023.

⁶ M Suchitra, 'About 100 Elephants Paraded in Kerala's Thrissur Pooram without Permission' *Down to Earth* (29 April 2015) <www.downtoearth.org.in/news/wildlife-biodiversity/>

Both People for the Ethical Treatment of Animals ('PETA') and the Animal Welfare Board of India ('AWBI') have released periodic investigative reports about the elephant abuse that is endemic to the Pooram.⁷ These reports focus on assessing the welfare of captive elephants exhibited and used in the Thrissur Pooram and chronicle instances of cruelty in violation of animal protection laws.

In its 2017 investigation into the Thrissur Pooram, PETA India reported that the elephants used in the festival are forcefully made to exhibit unnatural behaviour that requires training which is often done through punishment and the use of physical cues.⁸ Lack of access to water, food, and shade; violent and torturous training by the mahouts; heavy restraints and widespread health issues are only some of the widely reported instances of cruelty that elephants suffer.⁹

It would be a grave error if we were to see the categorisation of elephants as a trivial legal matter. India has witnessed the tragic demise of approximately 1200 elephants over the past decade, attributed to reasons other than natural causes.¹⁰ More specifically, our own empirical research, the subject matter of an on-going litigation in the Supreme Court of India under Writ Petition 743 of 2014, reveals that within the last five years, the State of Kerala alone has reported 160 captive elephant deaths, with an average of 2-3 deaths per month, the highest in the country. A significant majority of these deaths are a result of the torture, abuse, and neglect of elephants exploited as private property for deep commercial ends. This is a national travesty, and the underlying cause is the hierarchy engendered by categorisation in our legal instruments.

A false distinction of elephant domesticity, without any scientific temper, that those in captivity are radically different from the elephants in the wild, legitimises elephant ownership in captivity, and perpetuates abuse and exploitation. This is the primary reason why, despite repeated attempts to regulate the use of

about-100-elephants-paraded-in-kerala-s-thrissur-Pooram-without-permission-49599#:~:text=About%20100%20captive%20elephants%20were,caparisoned%20elephants%20in%20Thrissur%20town.> accessed 15 May 2023.

⁷ Krishnadas Rajagopal, 'Abuse of Elephants at Pooram: SC Seeks Report' *The Hindu* (6 May 2015) <www.thehindu.com/news/national/kerala/abuse-of-elephants-at-Pooram-sc-seeks-report/article7174958.ece> accessed 15 May 2023; Animal Welfare Board of India, 'Report on Inspection of Captive Elephants Used in Thrissur Pooram 2016' (AWBI, 2016) <www.petaindia.com/wp-content/uploads/2016/04/AWBI-INSPECTION-REPORT-ON-THRISSUR-POORAM-2016_23.04.2016.pdf> accessed 15 May 2023; People for the Ethical Treatment of Animals, 'PETA India Investigation of Thrissur Pooram 2017' (PETA, 2017) <www.petaindia.com/wp-content/uploads/2018/04/Investigation-Report.pdf> accessed 15 May 2023 (PETA 2017).

⁸ *ibid*, PETA 2017, 40.

⁹ *ibid*, PETA 2017, 29.

¹⁰ Wilson Thomas, '1,160 Elephants Killed Due to Reasons other than Natural Causes: MoEFCC' *The Hindu* (Coimbatore, 1 December 2021) <www.thehindu.com/news/national/1160-elephants-killed-due-to-reasons-other-than-natural-causes-moefcc/article37796114.ece> accessed 16 May 2023.

elephants in the festival—legal and otherwise—the Pooram continues, unaltered,¹¹ and Ramachandran, or Raman, is not even offered the dignity of a legally entitled retirement,¹² confirming his slave-hood for life.

The ruse of domesticity has created different elephant categories through regulatory mechanisms of the Wild Life (Protection) Act of 1972 ('WPA') and the Prevention of Cruelty to Animals Act, 1960 ('PCA'). The WPA under Schedule I protects the elephants as a species, thus covering all elephants, but separates them in its legislative scheme between wild and captive.¹³ It further permits private ownership of captive elephants and non-commercial legal transfer of that ownership from one private party to another (explained in detail in Part II).

Moreover, privately owned elephants are allowed to be commercially exploited through the regulatory mechanism of the 'performing animals' exception as a consequence of their captive status under the PCA.¹⁴ These categorisations allow for reduced standards of welfare and protection. Captive elephants do not just lose their status as inherently "wild" Schedule I *Elephas Maximus* but as tradeable commercial commodities become recipients of some of the worst narratives of torture.¹⁵

The fundamental concern we seek to highlight is the law's failure to acknowledge the growing ecological consensus that all elephants are wild animals that have never been domesticated. The process of domestication would involve selective breeding of a specific genealogy of elephants to arrive, at least twelve generations later, on a sub-species that could arguably be called domestic.¹⁶ Without the process of domestication it is not natural for elephants to be in human custody, obeying human commands. Both their custody and obeisance are obtained through gruesome training and violent methods.

The paper expands the above argument through three substantive sections. Part II of this paper discusses the role occupied by elephants in the scheme of

¹¹ PETA 2017 (n 7); Animal Welfare Board of India, 'Report on the Inspection of Captive Elephants Used in Thrissur Pooram 2016' (AWBI, 2016) <www.petaindia.com/wp-content/uploads/2016/04/AWBI-INSPECTION-REPORT-ON-THRISSUR-POORAM-2016_23.04.2016.pdf> accessed 7 September 2023; *Wildlife Rescue & Rehabilitation Centre v Union of India* (2016) 1 SCC 716 (India); Kerala Captive Elephants (Management and Maintenance) Rules 2012 (Kerala).

¹² Kerala Captive Elephant (Management and Maintenance) Rules 2012, Mandate Retirement for Elephants at Age 65. A 2019 Forest Department-Appointed Inspection Reported that Raman was Over 65, And Four Years Hence in 2023, His Retirement has been put in Abeyance.

¹³ See Wild Life (Protection) Act 1972, Chapter V which Regulates and, in Some Cases, Bans Trade in Wild Animals, and Makes Repeated Distinctions Between Wild and Captive Animals.

¹⁴ See Prevention of Cruelty to Animals Act 1960, §22.

¹⁵ 'The Pain of Being a Temple Elephant' *Frontline* (5 March 2014) <frontline.thehindu.com/the-nation/the-pain-of-being-a-temple-elephant/article5749412.ece> accessed 11 September 2023.

¹⁶ See World Animal Protection, 'Elephants not Commodities' (*World Animal Protection*, 2020) <www.worldanimalprotection.org/sites/default/files/2021-06/Elephants_Not_commodities_Full_Report.pdf> accessed 9 July 2023 (World Animal Protection).

wildlife protection legislation and the manner in which a manifestly arbitrary exception of elephant ownership contrary to the goals of the WPA has been retained in the law for over 50 years through four principal amendments in 1977, 1991, 2002 and now 2022.

Part III of the paper focuses the discussion on the use of privately held, captive elephants for entertainment. Both these activities require elephants to perform unnatural tricks which fall within the purview of “performance” under PCA. This section makes a case for elephant rights and against elephant categorisation as ‘performing animals’ by contrasting the case of *N. R. Nair v. Union of India*—in which wild animals (except elephants) are excluded from acts of “performing” to protect their freedom as inherently wild¹⁷—from the divergent logic of *V.K. Venkitachalam v. State of Kerala*, where captive Pooram elephants were not considered “performing” animals for applicability of limited animal welfare laws.¹⁸

This contrast serves to highlight the confusing legal identity of Indian elephants, where their presumed domesticity eclipses their innate wildness. Additionally, Part IV forms the crux of this paper and argues against the practice of elephant categorisation by first, critiquing the strategic nature of classifications, like that of ‘performing animals’ which works against the interest of the animal it is intended to protect and second, problematising the categorisation in itself.

Finally, Part V concludes this paper by providing a critique of the regime of animal welfare, and emphasising the need to shift to a rights-based approach that is more cognisant of elephants and their needs. This can be achieved in two concrete ways: first, the WPA must be amended to remove the legal loophole that allows elephant ownership.¹⁹ Second, we must seek the non-inclusion of elephants as ‘performing animals’ under §22 of the PCA, as was done in the 1998 Notification discussed in Part III.

At its very core, the problem of elephant categorisation reflects the dichotomy between animal ‘welfare’ and ‘rights’. The purpose of this paper is to highlight these tensions. While a welfare-based approach would regulate the human use of captive elephants by imposing different conditions on the various roles (or ‘categories’) in which they are used, a rights-based approach questions their use in the first place. Thus, a challenge to the categorisation of elephants is also a challenge to the welfare regime which simply does not go far enough. In conclusion, we argue for a clear policy pathway to restore the inherent wildness of elephants

¹⁷ *N.R. Nair v Union of India* AIR 2000 Ker 340 (Kerala High Court) (‘NR Nair I’); *N.R. Nair v Union of India* (2001) 6 SCC 84 (Supreme Court of India) (‘NR Nair II’).

¹⁸ *V.K. Venkitachalam v State of Kerala* 2015 SCC OnLine Ker 28772 (Kerala High Court) (Venkitachalam).

¹⁹ See The Wild Life (Protection) Act 1972 (India), §40(2B).

and end both their ownership and all performances, whether to meet a cultural or a pure entertainment end.

II. ELEPHANTS IN THE WILD LIFE (PROTECTION) ACT

The practice of elephant capture and their use, primarily in battles, originated in pre-colonial India.²⁰ However, private ownership, in its modern recognisable forms, dates back to British India where wild elephants were legally captured for use in government service.²¹ The colonial British government created the legal machinery for elephant ownership and trade by extending their dominion over all wild elephants.²² The aim of this was not protection per se “but a means to protect a critical resource.”²³ Natasha Nongbri, in her accounts on elephant hunting, notes:

“In the case of no other wild creature did the question of the nature of proprietorship dog the government as it did in the case of the elephant. Being an animal that was more valuable caught alive rather than dead, much was at stake for both the government and the landed class.”²⁴

The elephants which were not accepted by the British Government devolved to individual ownership.²⁵ Elephant keeping, which was particularly patronised in princely states and zamindari regimes, was ultimately phased out with the culmination of these systems, the legal bans on animal hunting and commercial capture of elephants and the advent of mechanised logging.²⁶ However, the perception of elephants in captivity as domesticated and commercial entities like cattle has continued till today.

²⁰ Dhriti K Lahiri-Choudhury, ‘History of Elephants in Captivity in India and Their Use: An Overview’ (1995) 14 *Gajah* 28 (DKL Choudhury); See also Dhriti K Lahiri-Choudhury, ‘Elephants and people in India: Historical Patterns of Capture and Management’ in Christen M Wemmer and Catherine A Christen (eds), *Elephants and Ethics: Toward a Morality of Coexistence* 149 (Johns Hopkins University Press 2008).

²¹ Sujit Sivasundaram, ‘Trading Knowledge: The East India Company’s Elephants in India and Britain’ (2005) 48(1) *The Historical Journal* 27.

²² Natasha Nongbri, ‘Elephant Hunting in Late 19th Century North-East India: Mechanisms of Control, Contestation and Local Reactions’ (2003) 38 *Economic and Political Weekly* 3189 (Nongbri).

²³ Mahesh Rangarajan, *India’s Wildlife History: An Introduction* (Permanent Black 2006) 47.

²⁴ Nongbri, (n 22).

²⁵ See Niharika Dinkar, ‘Seeing the Elephant: Animal Spectatorship and the Imperial Gaze in Colonial India’ (2021) 37 *South Asian Studies* 117; See also Sujit Sivasundaram, ‘Trading Knowledge: The East India Company’s Elephants in India and Britain’ (2005) 48 *The Historical Journal* 27.

²⁶ DKL Choudhury, (n 20); See Food and Agriculture Organization of the United Nations ‘Elephants in Logging Operations’ (FAO 1999) <www.fao.org/3/v9570e/v9570e02.htm> accessed 16 May 2023; See also Nongbri, (n 22).

To understand the legal space occupied by elephants, first, we consider the evolution of captive elephants as an exception to the absolute protection under Schedule I of the WPA, which is intrinsically linked to the historical and social use of the animal by humans. Second, we study the nomenclature of captivity itself, and what it means for elephants as a species, to rebut the prevailing perception that domesticity and captivity can be used to classify elephants outside the wild.

A. THE EVOLUTION OF THE LAW ON CAPTIVE ELEPHANTS: AN ANALYSIS

One of the core objectives of the WPA is to protect and conserve wild animals in their natural habitat.²⁷ While the intent of the law is to provide the highest level of protection, elephants have always occupied a unique legal position, due to a high demand for their ownership and trade, and their significance in cultural use.²⁸

When the WPA was enacted in 1972, it contained a small but significant provision in its definitions clause, inconspicuous at first glance. Incorporated within the category of “cattle” in §2(6) of the Act was “domestic elephants”.²⁹ In addition to this, the Indian elephant was included in Schedule II of the Act, with a lower protection than today. Accordingly, they could be hunted in accordance with the guidelines specified by the Chief Wild Life Warden upon the grant of a license.³⁰

Further, persons in possession, control, or custody of any captive elephant at the commencement of the Act were to notify the same to the Chief Wildlife Warden.³¹ It is important to note that in this regime, as Schedule II animals, they were not accorded absolute protection from commercial use.³²

The separate treatment of a class of elephants, misidentified as domestic and termed “cattle” with lower protection, was the genesis of the “captive” elephant exception in Indian law, a direct result and continuation of the colonial practice

²⁷ Wild Life (Protection) Act 1972 (India), Preamble.

²⁸ To Understand the Widespread use of Captive Elephants in Trade, Culture, and Religion in Modern India, See Ministry of Environment and Forests, Elephant Task Force, ‘Gajah: Securing the Future for Elephants in India’ (31 August 2010) <http://www.indiaenvironmentportal.org.in/files/ETF_REPORT_FINAL.pdf> accessed 12 September 2023 (Gajah Report).

²⁹ The Wild Life (Protection) Act 1972 (Erstwhile), s 2(6) <cza.nic.in/uploads/documents/guidelines/english/WLPA%201972.pdf> accessed 15 May 2023.

³⁰ *ibid*, §9(1), §9(5). The Above-Discussed Position of License-Based Hunting has been Scrapped after the 1991 Amendment to the Wild Life (Protection) Act which Bans Hunting of all Wild Animals.

³¹ *ibid*, §40(i).

³² *ibid*, §40(2), 43(2)(a).

of elephant trade.³³ Thus, in the modern 1972 regime, we committed ourselves to mutually inconsistent, contradictory goals – both to protect elephants but also to permit captivity, ownership, and trade of a class of elephants.

This ensured that the age-old practises of elephant trade and commercial exploitation could continue unabated. The nomenclature of “cattle” is instructive and deliberate: first, it creates a separate class of “domestic elephants” distinguishable from wild elephants, that, merely because of the circumstance of captivity, could be traded.³⁴ Second, the scientifically flawed proposition that elephants—as a species—could be domesticated was lent legal credence.

In 1977, an amendment to the WPA resulted in shifting the Indian elephant from Schedule II to Schedule I, which provides the highest degree of protection to wild animals.³⁵ Subsequently, in 1991, §2(6) was repealed, thereby stripping statutory justification for ‘domestication’ of elephants. In a way, this removal reflected some part of the growing ecological consensus on the wildness of elephants.³⁶ While this pernicious legal distinction between a wild and a domesticated elephant was removed in the next two decades, the legal loopholes that permitted elephant ownership and their commercial use for “performance” continued.³⁷

The elephant, like other animals in Schedule I was protected as a species, *Elephas Maximus*, irrespective of its legal status as “wild in nature” or “captive”.³⁸ And, the Forest Department is the ultimate owner-custodian, as is the case with all scheduled flora and fauna.³⁹ This would mean by inference that elephants, both wild and captive, deserve the same species protection under Schedule I. This did not address the inherent flaw in the distinction of private ownership of elephants in captivity – which considerably reduces the guaranteed protection of *Elephas Maximus*.

The exception to privately own, and transfer ownership through non-commercial means was cemented by the Wild Life (Protection) Amendment Act, 2002 (‘the Amendment’).⁴⁰ Up until 2002, most wild animals could be held in captivity and technically owned. After the cessation of use of wild animals, except

³³ Nongbri, (n 22).

³⁴ It is important here to understand that ‘Cattle’ from Chattel Refers to Owned Property, and is a Term with Intrinsic Commercial Connotations.

³⁵ The Wild Life (Protection) Amendment Act 1977 (India), §39.

³⁶ Edward O Price, ‘Behavioral Aspects of Animal Domestication’ (1984) 59(1) The Quarterly Review of Biology 1.

³⁷ The Wild Life (Protection) Amendment Act 1991 (India).

³⁸ The Wild Life (Protection) Act 1972 (India), §2(36) and §2(5).

³⁹ See *ibid* §39.

⁴⁰ The Wild Life (Protection) Amendment Act 2002 (India).

elephants in circuses, (discussed in more detail in Part III.B) captive wild animal ownership in practice was reduced only to Elephants.⁴¹

First, by the 2002 amendment, §43(1) was added providing a blanket prohibition against all commercial trade in wild animals, including elephants.⁴² Prior to this, any owner with prior permission could trade in any wild animal including elephants.⁴³ This new prohibition of trade applies equally to all scheduled wild animals, including all elephants. After the complete ban on hunting of wild animals in 1972,⁴⁴ this was perhaps the most radical change brought through this law.

Second, §40 of the Act was amended with two new sub-sections, 2A and 2B, restricting the acquisition of fresh ownership of a wild animal only through succession.⁴⁵ Thus, only animals already in captivity, or private ownership could change hands to an heir upon the death of the human owner, but no new wild animals could be owned or brought under human ownership. This was the third most radical policy change in our wildlife policy that was increasingly phasing out wild animal captivity. From the coming into force of this amendment in April 2003, all trade, and “new” ownership of wild animals was ended.⁴⁶

However, §40, after the newly added provisions 2A and 2B, included a curious proviso which read:

*“Provided that nothing in sub-sections (2-A) and (2-B) shall apply to a live elephant.”*⁴⁷

While no new wild animals could be brought under human captivity or ownership, curiously, an elephant—which also cannot be hunted or captured as a Schedule I species—could still be owned. Hence, technically, an ownership certificate can be issued for a new elephant, and this practice continues till date. The legislature may have removed the separate cattle-trade definition of domesticated

⁴¹ As of 2019, We have Close to 2700 Captive Elephants with 1800 Privately-Owned. This Phenomenon is Unique to Elephants. See Vishwa Mohan, ‘Animal Rights Groups Demand Ban on Ownership Rights to Individuals for Elephants as Captive Animals’ *The Times of India* (New Delhi, 16 June 2020) <timesofindia.indiatimes.com/india/animal-rights-groups-demand-ban-on-ownership-rights-to-individuals-for-elephants-as-captive-animals/articleshow/76409686.cms> accessed 11 September 2023.

⁴² The Wild Life (Protection) Amendment Act 2002 (India), §28.

⁴³ Deeksha Viswanathan, ‘The Wild Life (Protection) Amendment Bill 2022 is a Regressive Step in Our Policy Towards Captive Elephants’ *The Leaflet* (22 October 2022) <theleaflet.in/the-wild-life-protection-amendment-bill-2022-is-a-regressive-step-in-our-policy-towards-captive-elephants/> accessed 16 May 2023 (Viswanathan).

⁴⁴ The Wild Life (Protection) Act 1972 (India), §9.

⁴⁵ *ibid*, s 40(2A), s 40(2B); The Wild Life (Protection) Amendment Act 2002 (India), §25.

⁴⁶ The Wild Life (Protection) Act 1972 (India), §43; The Wild Life (Protection) Amendment Act 2002 (India), §28.

⁴⁷ The Wild Life (Protection) Act 1972 (India), §40(2B).

elephants in 1991, but continues to keep a back channel for elephant ownership and trade (by way of “non-commercial” gifts)⁴⁸ open.

The exemption of elephants from the restriction on private ownership is arbitrary and an extension of the archaic perception of elephants as domesticated cattle. In addition to this, it defeats the collective purpose of the Act i.e. to protect and preserve Schedule I endangered animals.

B. ‘CAPTIVE’ AND ‘DOMESTIC’: UNDERSTANDING THE SEMANTICS

The Delhi District Court, in 2014, discussed the elimination of the distinction between captive and wild elephants.⁴⁹ In *Zulfikar Ali v. The State*, which involved the seizure of an elephant due to the non-production of requisite ownership documents, it was contended that the said elephant was not a “wild animal” that would require ownership documents, but a domestic animal that was kept as a pet. The Court observed:

“The Wild Life (Protection) Act, 1972 does not speak about any domestic animal. The term ‘Wild Animal’ which has been used is in reference to an animal which can be found ‘wild in nature’ in general. Nobody can say that Indian elephant cannot be found ‘wild in nature’. Therefore, an elephant though... may have been domesticated would still qualify to be a “Wild Animal” under the said definition.”⁵⁰

While the scientific reasoning in the order is flawed, since it assumes elephants can be domesticated in the first place, it raises pertinent questions that go to the root of captive elephant categorisation. The semantics of elephant categorisation—as ‘wild’, ‘domestic’ or ‘captive’; or as ‘working’ or ‘performing’—may apparently seem unimportant. However, it must be understood that the selection of the appropriate descriptor-prefix involves deeper considerations like the origins of the institutionalisation of captivity, and the scientific significance of categorising elephants as anything but wild.

A “captive animal”, under the WPA, is any scheduled animal that is “captured, or kept or bred in captivity.”⁵¹ A domestic animal, on the other hand, is defined in the PCA as any animal that has been “sufficiently tamed” to serve

⁴⁸ Viswanathan, (n 43).

⁴⁹ *Zulfikar Ali v The State* C.R. No. 02 of 2014 (Delhi District Court) (India). (Please see this is the case that the author is referring to <https://indiankanoon.org/doc/27695794/>)

⁵⁰ *ibid* [11].

⁵¹ The Wild Life (Protection) Act 1972, §2(5).

human purposes.⁵² Domesticity connotes submission, whereas captivity is obtained from force, a fact acknowledged in how a captive animal is defined in PCA:

“... in captivity or confinement, whether permanent or temporary, or which is subjected to any appliance or contrivance for the purpose of hindering or preventing its escape from captivity or confinement or which is pinioned or which is or appears to be maimed.”⁵³

In the scheme of the WPA, the protection under Schedule I is a species protection accorded to the “Indian elephant (*Elephas maximus*).”⁵⁴ The Act itself, however, only defines captivity as fact of confinement. Thus, understanding this is crucial to imbibe the idea that wild animals are not intended to perform domesticated functions. However, the WPA curiously has two regimes— a wild elephant regime and a captive elephant regime. It protects elephants as a species, yet makes exceptions that allow them to be privately owned and traded, by ostensive non-commercial means.⁵⁵

To truly problematise this distinction, we may draw parallels to the wolf-dog paradigm. The dog is a descendant of the wolf and is among the first species to be domesticated by man. Thousands of years of domestication and selective breeding led to unique, scientifically distinguishable characteristics.⁵⁶ Long-term biological interaction between wolves and humans thus created a distinctive category of dogs belonging to the same genus but with biological and behavioural differences which were unrecognisable in their wild cousins.⁵⁷ Thus, the grey wolf (*Canis lupus*) and the dog (*Canis lupus familiaris*), while belonging to the same family, are distinct species, with the dog’s distinguishing species marker arising precisely from their commensal relationship with humans.⁵⁸ This distinction does not apply to elephants that have not been bred in captivity for sustained periods but only integrated into captive populations comprised of elephants who have mostly been captured from the wild.

⁵² *ibid*, §2(c).

⁵³ Prevention of Cruelty to Animals Act 1960, §2(c).

⁵⁴ The Wild Life (Protection) Act 1972, sch I pt A Entry 83.

⁵⁵ The Wild Life (Protection) Act 1972, §40(2B).

⁵⁶ Virginia Morell, ‘How Wolf Became Dog’ *Scientific American* (1 July 2015) <www.scientificamerican.com/article/how-wolf-became-dog/> accessed 15 May 2023; See also James Gorman, ‘Dog Breeding in the Neolithic Age’ *The New York Times* (25 June 2020) <www.nytimes.com/2020/06/25/science/arctic-sled-dogs-genetics.html> accessed 15 May 2023.

⁵⁷ Adám Miklós and others, ‘A Simple Reason for a Big Difference: Wolves do not Look Back at Humans, But Dogs do’ (2003) 13 *Current Biology* 763; Friederike Range and others, ‘Wolves Lead and Dogs Follow, But they Both Cooperate with Humans’ (2019) 9 *Scientific Reports* 3796.

⁵⁸ Juliet Clutton-Brock, ‘Origins of the Dog: Domestication and Early History’ in James Serpell (eds) *The Domestic Dog: Its Evolution, Behavior, and Interactions with People* (Cambridge University Press, 2020).

Although written sources are few and far between, there is credible evidence for the longstanding presence of captivity as a practice in the history of human-elephant relationships.⁵⁹ However, terming elephants as ‘domestic’ carries a different legal connotation altogether. It erroneously indicates that a “domesticated/tamed” “captive” elephant is a specific species compatible with human use.⁶⁰

We produce the best clarification on the subject in the 2020 report against the use of elephants in tourism titled “Taken for a Ride”, by World Animal Protection, which summarises the scientific position as follows:

“Domesticated’ is a term often used to describe elephants in captivity, to imply they are distinct from their wild counterparts. Tourists and travel industries are exposed to this term in advertising and at elephant entertainment venues where it is communicated through educational materials and by guides and mahouts.

Also, many tourist industry stakeholders in countries using captive elephants refer to them as ‘domesticated animals’. They argue domestication because of the long history of keeping elephants in captivity. Even in scientific literature, a medium relied on for accuracy, the term is sometimes and incorrectly used to describe captive elephants.

But elephants are not domesticated. They have never undergone the process of ‘domestication’: a long-term socio-biological process. Although discussions continue on the exact definition of domestication, it is commonly agreed that domestication can only involve human-guided, selective breeding for no fewer than a dozen generations. In each generation, the offspring that carry the desired traits (e.g. strength, fur, size, behaviour) are selected for further breeding.

The term ‘domestication’ also always refers to a whole population, so by definition, an individual animal can never be domesticated in its lifespan. A domesticated species is significantly different from its wild cousin in its instincts, anatomy and the emphasised traits desired by humans. While domesticated animals still often display a range of natural behaviours, they differ in the intensity of stimuli required to trigger a certain behaviour change. This makes them easier to handle than their wild counterparts.

⁵⁹ Ursula Münster, ‘Working for the Forest: The Ambivalent Intimacies of Human–Elephant Collaboration in South Indian Wildlife Conservation’ (2016) 81(3) *Journal of Anthropology* 425.

⁶⁰ Prevention of Cruelty to Animals Act 1960, §2(d) (“‘Domestic Animal’ Means any Animal Which is Tamed or Which has Been or is Being Sufficiently Tamed to Serve Some Purpose for the Use of Man or Which, Although it Neither has Been nor is Being nor is Intended to be so Tamed, Is or has Become in Fact Wholly or Partly Tamed”).

Throughout the 3,000-year human-elephant relationship, most elephants used by people have been captured from the wild. This means the long history of people using elephants is not a valid argument to label elephants as domesticated. Even today, most adult elephants originate from the wild, while others are typically first or second-generation captive-bred. Breeding is not done selectively – yet selective breeding is a prerequisite in the biological process of domestication.”⁶¹

Scientists, on multiple occasions, have attempted to pinpoint the process that would render an animal domestic. The most oversimplified conclusion of their studies indicates that domesticity is a result of generations of training to adapt to, and/or captive breeding to live in human-controlled environments.⁶² Several experts also agree that the socio-biological process of ‘domestication’ involves the selective breeding of animals by humans over multiple generations.⁶³ An individual wild animal cannot be domesticated in their own lifetime; they can only mark the starting point of genetic and other changes that will, over several generations of artificially selected descendants, produce a domestic animal.⁶⁴

Unlike dogs, which have over generations been bred to live in anthropocentric environments, the elephant is only “domestic” to the extent of adaptation to such environments by administering human stimulus.⁶⁵ Admittedly, elephants are highly adaptable for human usage—however, this is a result of rigorous behavioural training rather than a biological fact. While they are trained into subordination, true domestication involves complete isolation and selective breeding under human control.

For example, using an elephant in a festival or a parade is not like walking one’s dog in a park. The glaring distinction lies in the fundamental essence of consent and autonomy. If elephants willingly performed or listened to human commands, the ethical quagmire surrounding their captivity and exploitation

⁶¹ World Animal Protection, (n 16).

⁶² TP O’Connor, ‘Working at Relationships: Another Look at Animal Domestication’ (1997) 71 *Antiquity* 149, 152.

⁶³ Melinda A Zeder and others, ‘Documenting Domestication: The Intersection of Genetics and Archaeology’ (2006) 22(3) *Trends in Genetics* 139; Greger Larson and Dorian Fuller, ‘The Evolution of Animal Domestication’ (2014) 66 *Annual Review of Ecology Evolution and Systematics* 115; Hannah Goldstein, ‘What is Domestication?’ *World Animal Protection* (9 January 2021) <www.worldanimalprotection.us/blogs/what-domestication> accessed 16 May 2023; Edward O Price, ‘Behavioral Aspects of Animal Domestication’ (1984) 59(1) *The Quarterly Review of Biology* 1; Nerissa Russell, ‘The Wild Side of Animal Domestication’ (2002) 10(3) *Society and Animals* 285.

⁶⁴ Edward O Price, ‘Behavioral Aspects of Animal Domestication’ (1984) 59 *The Quarterly Review of Biology* 1, 3; See Evan K Irving-Pease and others, ‘Paleogenomics of Animal Domestication’ in Charlotte Lindqvist and Om P Rajora (eds), *Paleogenomics* (Springer 2018).

⁶⁵ Suvasini Ramaswamy, ‘How Do You Break the Mind of an Elephant’ *The Wire* (26 February 2016) <thewire.in/culture/journey-from-the-wild-how-to-break-an-elephant> accessed 15 May 2023.

would be rendered obsolete. However, this is not the case. Images of elephants in these festivals bear evidence of heavy chains that bind them, a stark testament to their servitude. Moreover, their natural instincts to be free and wild are “broken” and beaten out of them through cruel and torturous training.⁶⁶ Evidently, their shackles are not merely physical; and symbolise the erasure of their innate disposition to be free.

While it is not uncommon for certain elephants to exhibit an affinity for human interaction, it is imperative to delineate this as an expression of their individual personalities rather than an unequivocal acceptance of subjugation. In many instances, elephants wrenched from their native habitats to perform unnatural acts under duress exhibit unmistakable signs of resistance rather than compliance.⁶⁷ Elephants have never been genuinely domesticated; they have only been systematically subordinated, casting a long shadow of moral quandary upon the celebrated human-elephant relationship.

The WPA distinguishes between wild and captive elephants not explicitly but in terms of the protections accorded to them. This directly stems from the history of the law, which considered ‘tamed’ and captive elephant populations as domestic “cattle”.⁶⁸ Despite the removal of the terminology, the law continues to elevate captivity to a biological categorisation. It forgets that captivity, at its core, is a mere status of ownership. The captivity of the elephant relates more to the owner of the animal than to the animal itself. It does not take away from the innate wildness of the elephant.

Schedule I includes the entirety of the *Elephas maximus* species within the ambit of its protection.⁶⁹ There is no real difference between elephants in the wild and those in private ownership in a manner that warrants differential treatment.

⁶⁶ *ibid.*

⁶⁷ ‘Elephant Runs Amok at Temple in Cheranalloor, Destroys Wall and Pandal’ *Kerala Kaumudi Online* (Kochi, 26 March 2022) <keralakaumudi.com/en/news/news.php?id=780475&u=elephant-runs-amok-at-temple-in-cheranalloor-destroys-wall-and-pandal-780475> accessed 7 September 2023; Ramashankar, ‘Elephant Kills Mahout During Wedding Ceremony in Bihar’s Siwan District’ *The Times of India* (Patna, 28 November 2020) <timesofindia.indiatimes.com/city/patna/elephant-kills-mahout-during-wedding-ceremony-in-siwan/articleshow/79452621.cms> accessed 7 September 2023; Saritha S Balan, ‘Kerala’s Star Tusker Ramachandran Turned Aggressive Due to Repeated Torture: Experts’ *The News Minute* (Kerala, 10 May 2019) <www.thenewsminute.com/kerala/kerala-s-star-tusker-ramachandran-turned-aggressive-due-repeated-torture-experts-101581> accessed 7 September 2023; ‘Alappuzha: Evoor Kannan Kills Handler’ *Deccan Chronicle* (Alappuzha, 5 April 2018) <www.deccanchronicle.com/nation/current-affairs/050418/alappuzha-evoor-kannan-kills-handler.html> accessed 7 September 2023; ‘Elephant Kills Two Mahouts at Padanilapady’ *Deccan Chronicle* (Kottayam, 8 April 2016) <www.deccanchronicle.com/nation/in-other-news/080416/elephant-kills-two-mahouts-at-padanilapady.html> accessed 7 September 2019.

⁶⁸ The Wild Life (Protection) Act 1972 (Erstwhile), s 2(6) <cza.nic.in/uploads/documents/guidelines/english/WLPA%201972.pdf> accessed 15 May 2023.

⁶⁹ The Wild Life (Protection) Act 1972, sch I pt A Entry 83.

Most captive elephants have been captured from the wild.⁷⁰ Few may be bred in captivity, but their commodification and exploitation are an affront to the statutory protection they are guaranteed.⁷¹

Equating captivity with domesticity suggests a scientific deviation from the elephant's natural instincts by virtue of private ownership. Elephants in captivity hold fast to their 'wild' instincts in spite of brutal human training. Terming them as 'domestic' suggests a loss of this wild identity and the seeming adoption of an innately human-friendly nature—all these combine to produce a misconception about the elephant's natural affinity for human contact that only serves to justify exploitation.

III. PERFORMING ANIMALS: A PROTECTIVE CATEGORY?

The 1973 Performing Animal Rules (Rules) and the 2011 Performing Animals Registration Rules, 2001 ('PARR'), both notified under the PCA, collectively govern the welfare of animals used for entertainment. The Rules define "performing animals" as "any animal which is used at, or for the purpose of any entertainment to which the public are admitted through sale of tickets."⁷² PARR adopts a similar definition, but omits the phrase "through sale of tickets", extending the definition to any animal used for recreational purposes to which the public has access.⁷³

While the former broadly outlines the particulars for registration by a person wanting to exhibit or train any performing animal,⁷⁴ the latter rules lay down the general conditions for registering performing animals in India.⁷⁵ This includes *inter alia* conditions for adequate veterinarian care,⁷⁶ prevention of 'unnecessary suffering',⁷⁷ provision of food and water,⁷⁸ protection for sick, injured or pregnant animals,⁷⁹ and any treatment or training that forces animals to behave contrary to their basic natural instincts.⁸⁰ These terms may be imposed prior to granting registration for any 'performing animal.'

⁷⁰ Sangita Iyer, 'Gods in Shackles: The Tragic Lives of India's 2,600 Captive Elephants' *The New Indian Express* (22 March 2023) <www.newindianexpress.com/web-only/2023/mar/22/gods-in-shackles-the-tragic-lives-of-indias-2600-captive-elephants-2558545.html> accessed 16 May 2023 (Sangita Iyer).

⁷¹ World Animal Protection, (n 16).

⁷² The Performing Animals Rules 1973, r 2(b).

⁷³ The Performing Animals (Registration) Rules 2001, r 2(h).

⁷⁴ The Performing Animals Rules 1973, rr 3 and 6.

⁷⁵ The Performing Animals (Registration) Rules 2001, r 8.

⁷⁶ *ibid* r 8(i).

⁷⁷ *ibid* r 8(iii).

⁷⁸ *ibid* r 8(v).

⁷⁹ *ibid* r 8(viii).

⁸⁰ *ibid* r 8(vii).

§22(i) of the PCA creates restrictions on any person exhibiting or training any animal which has not been registered according to the prescribed procedure.⁸¹ The meaning of exhibition and training is contained in §21,⁸² which exhaustively defines the terms “exhibit” and “train”. Accordingly, the former entails exhibition “at any entertainment to which the public are admitted through sale of tickets” while the latter refers to training for the purpose of such exhibition. §22(ii) further restricts the exhibition and training of animals, which the Central Government exempts from the category of ‘performing animals’.⁸³

The legal ramifications of these statutory provisions are three-fold.

First, performing animals have been identified as an independent category of animals that face unique conditions of cruelty and require protection from the same.

Second, the use of animals for the purpose of human entertainment is regularised. Rather than protecting all animals from being put to use for the purpose of entertainment, the law adopts a strategic approach to ensure that the conditions in which they are used are humane. The statute does not meet its protective purpose since it only issues guidelines for how elephants should be treated when used for entertainment, rather than problematising their usage for entertainment in the first place.

Third, these added protections, i.e. the requirement of registration, are reserved only for animals that are paraded or displayed to the public in events that involve ticketed entry. This uniquely affects the temple elephants in Kerala—while they are engaged in a ‘performance’ in strict terms, they would not be covered by the Rules or PARR, since there is no sale of tickets.⁸⁴

A. PERFORMING ELEPHANTS: THE 1998 NOTIFICATION AND N.R. NAIR

There is a final fourth remarkable feature governing performing animals under §22(ii) of the PCA. This is a 1960 insertion that creates a future, transformative possibility of removing an entire species of animals from performance altogether, thereby removing them from the confines of welfare into the realm of

⁸¹ Prevention of Cruelty to Animals Act 1960, s 22(i).

⁸² *ibid* s 21.

⁸³ *ibid* s 22(ii).

⁸⁴ Venkitachalam, (n 18).

rights.⁸⁵ It was this feature that the Indian government, in a notable departure from the doctrine of necessary suffering, used in 1998.

In 1998, the Central Government issued a notification in pursuance of §22(ii) of the PCA, whereby it banned the exhibition and training of five wild animals as performing animals ('the 1998 Notification').⁸⁶ This included bears, monkeys, tigers, panthers, and lions—but not elephants.

This was a radical moment and signalled a strong, secular, animal-centric policy to go beyond the limitations of the PCA. Therefore, we did not merely reduce the suffering of the five wild animals in circuses, but effectively liberated them from the process of exploitation.

This notification was challenged by the circus owner association, and the ban was upheld by the Kerala High Court and the Hon'ble Supreme Court in the *N. R. Nair* (2000) decisions. It was a noble policy framework, the right step, given the widespread public backing against the torture and exploitation of animals for entertainment.

The concluding words of the Kerala High Court's decision in this case create, arguably, the first-ever animal-centric judicial foundation in our modern jurisprudence:

"In conclusion, we hold that circus animals are being forced to perform unnatural tricks, are housed in cramped cages. subjected to fear, hunger, pain, not to mention the undignified way of life they have to live with no respite and the impugned notification has been issued in conformity with the changing scenario, values of human life, philosophy of the Constitution, prevailing conditions and the surrounding circumstances to prevent the infliction of unnecessary pain or suffering on animals. Though not homosapiens, they are also beings entitled to dignified existences and humane treatment sans cruelty and torture. In many respects, they comport better than humans, they kill to eat and eat to live and not live to eat as some of us do, they do not practice deception, fraud, or falsehood and malpractices as humans do, they care for their little ones expecting nothing in return, they do not proliferate as we do depleting the already scarce resources of the earth, for they practice sex restraint by seasonal mating, nor do they inhale the lethal smoke of tobacco polluting the atmosphere and inflicting harm on fellow beings. All animals except the very

⁸⁵ Prevention of Cruelty to Animals Act 1960, s 22(ii).

⁸⁶ Ministry of Social Justice and Empowerment, 'Ban on Exhibition/Training of Five Performing Animals' (14 October 1998) <awbi.gov.in/uploads/regulations/163309993512BAN%20ON%20EXHIBITION-TRAINING%20OF%20FIVE%20PERFORMING%20ANIMALS.pdf> accessed 15 May 2023 (1998 Notification).

lowest exhibit some degree of intelligent behaviour, ranging from learned responses to complex reasoning. Many believe that the lives of humans and animals are equally valuable and that their interests should count equally. Their contribution to the health of human is invaluable, once it is remembered that nearly every advance in health care and combating human diseases been based on animal research. Animals also provide models for the study of human diseases. New drugs are tested on animals to help determine their potential for causing cancer or other disease or for harming embryos and fetuses in the womb. Therefore, it is not only our fundamental duty to show compassion to our animal friends, but also to recognise and protect their rights. If humans are entitled to fundamental rights, why not animals? In our considered opinion; legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change.”⁸⁷

N.R. Nair created the possibility of protecting animals from harm both as our collective fundamental right and duty. It also showed us a path to take animals out of the trap of welfare regimes, at least in the limited context of secular entertainment.

N.R. Nair had one major flaw. It left out elephants while covering most other major species used in circuses that fall under the absolute protections of Schedule I.⁸⁸ This brings us back to the presumption of domesticity, a false cultural, and even policy belief – despite its rejection by subsequent amendments in the WPA and also by modern ecology – that elephants in captivity in India/Asia are a separate class by themselves, incomparable to their wild counterparts, thereby justifying their use and exploitation for human ends.

This distinction is egregious till today, and licenses daily abuse, violence and torture of elephants kept in captivity, as a commodity, and their use for performances.⁸⁹ The greatest defect of the 1998 notification in omitting elephants from the ban against performance still needs remedying by a complete ban on the performance of elephants.

⁸⁷ NR Nair I, (n 17).

⁸⁸ 1998 Notification, (n 86).

⁸⁹ Despite the 2018 draft rules to ban all animals in circuses, a final ban is pending. As of now, circuses are only being called up for meting out cruel treatment to animals, and in theory, a circus satisfying all the requirements under the law can still use an elephant.

B. VENKITACHALAM, KCEMR AND THE DRAWBACKS OF RESTRICTING REGISTRATION TO TICKETED USE

One of the common themes in the litigation surrounding the cultural use of elephants in Kerala is the hesitation to consider them “performing animals” within the meaning of Chapter V of the PCA.⁹⁰

As discussed earlier the venues for elephant keeping are diverse, ranging from those that are purely recreational to those that combine recreation with other educational, commercial, or even religious ends.⁹¹ The common denominator in all these venues is the use of animals for human purposes with commercial ends. Elephants used for purposes such as joyrides are required to be registered under the PARR.⁹² However, the situation is different for the religious or cultural use of elephants.

To reiterate the earlier description, the Pooram, used interchangeably in this paper with the utsavam or any annual temple festival that uses captive elephants, is generally conducted in the post-harvest season in Devi temples in north-central Kerala.⁹³ Most Poorams, especially the largest of them all, the Thrissur Pooram, parades caparisoned captive elephants for different ceremonies. But there are many other rituals, performances and events involving elephants like the controversial Gajamela (where elephants pull a chariot or race) and contests like head lifting competitions.⁹⁴

At this juncture, it may also be prudent to take note of the Kerala Captive Elephant Management Rules, 2012 (‘KCEMR’) which were introduced to regulate the upkeep and management of captive elephants in Kerala.⁹⁵ These rules are particularly important for captive elephants used in festivals like the Pooram since they make provisions for their registration, care and management, working conditions, cruelty and use, in whatever form.⁹⁶ The KCEMR specifically recognises the use of elephants in festivals⁹⁷ and introduces various norms and standards for

⁹⁰ Venkitachalam, (n 18).

⁹¹ See DKL Choudhury, (n 20).

⁹² *Society for Prevention of Cruelty to Animals v State of Kerala*, 2014 SCC OnLine Ker 26343 (Kerala High Court).

⁹³ Thrissur Pooram - Pooram of Cultural Capital (Thrissur Pooram) <thrissurPooramfestival.com/thrissur_Pooram.php> accessed 16 May 2023.

⁹⁴ World Animal Protection, ‘India’s Celebrated Elephants: Can our Actions at Least Speak as Loud as our Words?’ (*World Animal Protection*, 10 June 2020) <www.worldanimalprotection.org.in/blogs/indias-celebrated-elephants-can-our-actions-least-speak-loud-our-words> accessed 16 May 2023; See also Sreedhar Vijayakrishnan and Anindya Sinha, ‘Human-Captive Elephant Relationships in Kerala: Historical Perspectives and Current Scenarios’ (2019) 50 Gajah 29.

⁹⁵ Kerala Captive Elephants (Management and Maintenance) Rules, 2012 (Kerala).

⁹⁶ *ibid* rr 3 and 8.

⁹⁷ *Ibid* r 5(5).

such use. However, the rules fall short of recognising the ‘work’ performed by the elephants in these cases as performance.

Venkitachalam was a case involving a writ filed as public interest litigation that sought to enforce the registration of elephants in a Gajamela under the PARR. In its judgment, the Kerala High Court adhered to the narrow approach by refusing to declare the elephants used in the Pooram festival as performing animals.⁹⁸ While this reasoning was specific to the context of the Pooram and the unique cultural defence that was argued, by excluding them from the ‘performing animals’ category, the Court falls into several traps. First, it subscribes to a narrow understanding of entertainment and exhibition in the PCA. Second, it condones the unprotected usage of elephants in these festivals. Third, it abandons elephants—that are for all practical purposes employed for recreation—in a legal grey area where they are neither truly wild nor performing.

The Kerala High Court underlined the definitions of the words “exhibit” and “train” in §21 of the PCA, which read: “... ‘exhibit’ means exhibit at any entertainment, to which the public are admitted through sale of tickets and ‘train’ means train for the purpose of any such exhibition...”. Accordingly, the Court outlined a two-pronged requirement/condition for the application of §21 of the PCA. The first was the “exhibition of animals” and the second was public admission through the “sale of tickets”.⁹⁹ While the Pooram undoubtedly involves exhibition, the event itself is not ticketed and allows free entry for all devotees and spectators. Hence, on the basis of this technicality, the elephants used in the Pooram were exempted from requiring registration under PARR.¹⁰⁰

However, this technicality lacks logic. The object behind creating specific provisions for performing animals under the PCA was to regulate the commercial use of such animals for entertainment purposes. Restricting these regulations to only ticketed events is a needless and harmful way of narrowing down the protections of the law. Commercial use cannot be understood unilaterally in terms of just buying tickets but must be expanded to indirect ways in which the use of elephants fetches large sums of money for the organisers. Even if entry into these events is free, the entertainment value of the elephant, which pulls the crowds, results in considerable hiring charges for the elephant concerned.¹⁰¹ This is representative of the profit-making and business-oriented character of the event.

The Pooram, ticketed or not, is innately commercial and lucrative. Costs are involved in renting elephants, the expenses of the mahouts, feeding elephants and more.¹⁰² In the absence of a direct source of funding through tickets, the Poorams

¹⁰² ‘Fest Committee to Spend 6.75L to Parade Tusker’ *The Times of India* (Thrissur, 5 February 2023) <timesofindia.indiatimes.com/city/kochi/fest-committee-to-spend-6-75l-to-parade-tusker/articleshow/97615933.cms> accessed 12 September 2023; KR Prahladan, ‘Rent for Elephants on the Rise, Festival Season to be Expensive’ *Mathrubhumi* (Pathanamthitta, 15 September 2023)

receive a large amount of funding from the devotees, various big sponsors, from the Devaswom boards of the government and from advertisement revenue.¹⁰³ The Thrissur Pooram is conducted with an average budget of Rupees 5-6 crores, with Rupees 50 lakhs being spent on the fireworks alone.¹⁰⁴ Most of the money for this is collected from the Thrissur Pooram exhibition, which is essentially a 60-day-long shopping festival.¹⁰⁵ Elephants, particularly the celebrity tuskers like Ramachandran are hired for lakhs of rupees per day.¹⁰⁶ The Cochin Devaswom Board leases out over 6 acres of space in the Thekkinkaadu Maidaan for the Pooram, for a staggering Rupees 20 crores.¹⁰⁷

A daily profit of Rupees 50 thousand is almost guaranteed for the owners of a regular elephant, and over Rupees 1 lakh for a celebrity jumbo.¹⁰⁸ The festivals employ around 400 elephants, with up to 120 elephants used per event.¹⁰⁹ In the first large-scale Thrissur Pooram after the pandemic held in 2022, the Kerala government announced a package of Rupees 15 lakhs toward the conduct of the Pooram.¹¹⁰ Pooram essentially becomes an elephant pageantry that is built around the suffering and use of elephants for commercial purposes.

<englisharchives.mathrubhumi.com/news/offbeat/guruvayur-devaswom-thiruvithamkoor-devaswom-elephants-1.2277592> accessed 15 September 2023; KPM Basheer, 'Elephant Renting is now Jumbo Business' *The Hindu Business Line* (24 July 2013) <www.thehindubusinessline.com/news/national/elephant-renting-is-now-jumbo-business/article23104812.ece> accessed 13 September 2023; Ajayan, 'Elephant Economics Rule in Kerala Fests' *Mint* (Kochi, 22 February 2008) <www.live-mint.com/Home-Page/xxVU7ZvwN7XC3XsshmoCCM/Elephant-economics-rule-in-Kerala-fests.html> accessed 13 September 2023.

¹⁰³ Balu Sudhakaran, '6 Crore Thrissur Pooram; How to Organize Without Spilling Secrets?' *Manorama* (30 April 2023) <www.manoramaonline.com/premium/life/2023/04/30/how-thrissur-pooram-organised-and-the-secrets-behind-Pooram5.html> accessed 15 May 2023.

¹⁰⁴ Indulekha Aravind, 'Why the Kollam Tragedy has had Little Effect on Kerala's Best Known Temple Festival, Thrissur Pooram' *The Economic Times* (17 April 2016) <economictimes.india-times.com/news/politics-and-nation/why-the-kollam-tragedy-has-had-little-effect-on-keralas-best-known-temple-festival-thrissur-pooram/> accessed 15 May 2023.

¹⁰⁵ Sudhakaran, (n 103).

¹⁰⁶ Reghu Balakrishnan, 'Jumbo-Size Growth in this Economy' *Business Standard* (Mumbai, 9 March 2014) <www.business-standard.com/article/economy-policy/jumbo-size-growth-in-this-economy-114030500363_1.html> accessed 15 May 2023.

¹⁰⁷ 'Thrissur Pooram Exhibition; Controversy over Ground Rent' *Media One* (27 February 2023) <www.mediaoneonline.com/kerala/thrissur-Pooram-exhibition-controversy-over-ground-rent-209935> accessed 15 May 2023.

¹⁰⁸ Indulekha Aravind, 'What Makes Temple Elephants So Popular in Kerala' *The Economic Times* (19 May 2019) <economictimes.indiatimes.com/news/politics-and-nation/what-makes-temple-elephants-so-popular-in-kerala/articleshow/69389799.cms> accessed 15 May 2023.

¹⁰⁹ TA Ameerudheen, 'Kerala Temple Festival: As Ban on Celebrity Elephant is Lifted, Spotlight Moves to Stress on Animals' *Scroll.in* (12 May 2019) <scroll.in/article/923061/kerala-temple-festival-as-ban-on-celebrity-elephant-is-lifted-spotlight-moves-to-stress-on-animals> accessed 15 May 2023.

¹¹⁰ 'Govt Help for Thrissur Pooram for First Time in History, Rs 15 Lakh Sanctioned' *Kaumudi* (Thrissur, 29 April 2022) <keralakaumudi.com/en/news/news.php?id=803515&u=govt-help-for-thrissur-Pooram-for-first-time-in-history-rs-15-lakh-sanctioned> accessed 15 May 2023.

While in *Venkitachalam*, the black letter of the PCA and the Rules were strictly interpreted to only exclude elephants that are used for the Pooram, this has widespread ramifications for the use of elephants and other animals for the larger purpose of entertainment. In effect, this permits animals to be rampantly used and exploited for human enjoyment, un-stopped and unregulated by any of the added protections that are in place for performing animals, as long as the organisers of the entertainment program source commercial backing through means other than the sale of tickets. Instead of problematising the widespread commercial usage of animals in the spirit of the PCA, the Court ruling chooses to be distracted by and target some sources of funding—an obstacle that can easily be circumvented by organisers. Yet again, the welfare of animals is deemed subservient to human commercial ends.

IV. THE PROBLEM OF CATEGORISATION

A. PERFORMING ANIMALS: MERELY A STRATEGIC GATEWAY

In *Venkitachalam*, the petitioner's end goal was perhaps not to absolutely deem elephants as 'performing animals' with a sense of finality, but to bring the animals within the larger fold of the PCA and its protections. This partly serves to rebut the erroneous, but widely held presumption among our legislators that the protections under the WPA and the PCA are mutually exclusive, and that wild animals do not automatically fall within the purview of the latter.¹¹¹ However, as a result of the same, captive elephants end up being passed around among different legislative protections, failing to get true and absolute safeguards under any.

The PCA's, performing animal, licensing protections for captive elephants is a strategic recourse to ensure the proper treatment of privately-owned elephants. The exclusion of Pooram elephants from this protection fosters the idea that their use is mandated by ritual or culture, when the role of the elephants in these festivals is less ritualistic and more for the purpose of public entertainment.¹¹²

This is illustrated with the example of the actions of temple authorities in Kerala in the wake of the 2015 fireworks incident at the Puttingal Temple in Paravoor of Kollam district,¹¹³ after which the devaswoms collectively decided to

¹¹¹ §2(a) of the PCA Defines an "Animal" for the Purpose of the Act as Meaning any Living Creature other than a Human Being.

¹¹² PETA 2017, (n 7), 40.

¹¹³ Rajiv G, 'Kollam Temple Fire: Death Toll Reaches 111, 40 Badly Wounded' *The Times of India* (Thiruvananthapuram, 12 April 2016) <timesofindia.indiatimes.com/city/thiruvananthapuram/Kollam-temple-fire-Death-toll-reaches-111-40-badly-wounded/articleshow/51795419.cms> accessed 15 May 2023; See 'Kerala Temple Tragedy: What Exactly Happened at Paravur? Crystal Clear Explanation' *The News Minute* (10 April 2016) <www.thenewsminute.com/article/kerala-temple-tragedy-what-exactly-happened-paravur-crystal-clear-explanation-41405> accessed 15 May 2023.

do away with the traditional ritual of parading elephants to the accompaniment of fireworks (vedikettu).¹¹⁴ Evidently, the customs and ritual practices that seemingly define and underscore such festivals have more value for their entertainment and symbolism than for religion.

However, classifying elephants as ‘performing animals’ is effectively tantamount to inserting elephants in yet another box that can be conveniently and calculatedly adjusted to sustain commercial captivity. All of this stems from the fact that, to this day, the PCA only problematises ‘unnecessary’ suffering of animals.¹¹⁵

David Bilchitz questions the fundamental moral basis of predicating legislation on the assumption that suffering inflicted on animals is permissible when it occurs in pursuance of a ‘necessary’ objective.¹¹⁶ He argues that ‘necessity’ in the context of animal rights can be interpreted in the same vein as necessity in the context of restriction of fundamental rights.¹¹⁷ As a result, in construing necessity, one must adopt a strict standard and consider factors such as the adoption of proportionate methods, the availability of alternatives, and the gravity of the matter.¹¹⁸

Dinesh Wadiwel in the profound “The War Against Animals” lays bare the “diabolical promise” of legal protection from “unnecessary suffering” which only strengthens the violent domination of animals.¹¹⁹ All legal systems will continue to be immoral and unethical as long as they do not question the infliction of harm and pain and our collective belief that it is “humanity’s privilege” to “inflict it.”¹²⁰

Since suffering (and the necessity of suffering) has a tendency to be subjectively interpreted,¹²¹ adopting the language of necessary suffering is limiting. A liberatory legal regime must encompass the recognition of animals as sentient beings with their own interests and capacities for suffering and flourishing. It must pursue the belief that they deserve equal consideration and should not be

¹¹⁴ ‘No Fireworks and Elephant Parade at Thrissur Pooram’ *The Times of India* (Thrissur, 13 April 2016) <timesofindia.indiatimes.com/city/kochi/no-fireworks-and-elephant-parade-at-thrissur-Pooram/articleshow/51817469.cms> accessed 15 May 2023; PETA 2017, (n 7), 40.

¹¹⁵ The Prevention of Cruelty to Animals Act 1960, Preamble; Mike Radford, “Unnecessary Suffering: The Cornerstone of Animal Protection Legislation Considered” (1999) *Criminal Law Review* 702.

¹¹⁶ Davis Bilchitz, ‘When is Animal Suffering ‘Necessary?’ (2012) 27 *South African Public Law* 3.

¹¹⁷ *ibid.*; Frank Hurnik & High Lehman, ‘Unnecessary Suffering: Definition and Evidence’, (1982) 3(2) *International Journal for the Study of Animal Problems*.

¹¹⁸ *ibid.*

¹¹⁹ Dinesh Wadiwel, ‘The War Against Animals’ (2009) 18 *Griffith Law Review* 290.

¹²⁰ Peter Sankoff, ‘The Welfare Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff and Steven White (eds) *Animal Law in Australasia: A New Dialogue* (Federation Press 2009).

¹²¹ Tom Regan, ‘Cruelty, Kindness, and Unnecessary Suffering’ (1980) 55 *Philosophy* 539; Michael Allen Fox, ‘On the “Necessary Suffering” of Nonhuman Animals’ (1997) 3(25) *Animal Law* 25.

treated as mere property or means to human ends. Animals simply cannot be viewed as property—not even as property to be treated without cruelty.¹²²

In a way, the reason the law continues to lend credence to the practice of categorising elephants based on the use to which they are put, is because painting such use to be ‘necessary’, is extremely easy, be it for commercial or religious purposes.

PETA and the petitioners in Venkitachalam make an extremely compelling argument in favour of considering Pooram elephants as performing animals, which was incorrectly dismissed by a narrow construction of the commercial underpinnings of §22 of the PCA.¹²³ However, even in the best-case scenario, the success of this challenge and the mandatory registration of the Pooram elephants under the PARR do little to further the radical liberatory goal for the elephants. For any legislation to be truly emancipatory, it must proceed on the ethos that captivity, even in the best of conditions, would be stressful and traumatic for elephants, and exacerbate their suffering.

Comparing and contrasting *N.R. Nair* and *Venkitachalam* reveals a curious reality. These cases, when read together, seem to suggest that (a) wild animals cannot be performing animals, yet (b) elephants are not banned, but (c) are still excluded from the protections given to performing animals. The confusion created shows that what is desperately needed is a more drastic shift towards a rights-based framework that recognises the inherent value in animals, including captive elephants—a tendency that is already discernible. Instead of focusing on whether the elephant should or should not be performing, we need to reconsider the fundamental cruelty in categorising any animal for human purposes.

The protections under both, the KCEMR and the PCA, simply do not go far enough. They continue to provide for the ownership and human exploitation of the elephant rather than recognising them as autonomous beings with their own rights. A mere registration process does not necessarily act as a deterrent to owners who continue to abuse and mistreat their elephants. The regulations on registration, performances, painful training methods, and working hours all still legitimise putting elephants to use for human purposes,¹²⁴ which is inherently cruel and exploitative.

This also ties into the deeper problem of elephant categorisation. Elephants that are used in circuses, joyrides, temple festivals, etc. are only captive by virtue of their ownership. However, they are and remain wild by nature, despite being

¹²² Peter Singer, ‘Animal Liberation’ in Robert Garner (eds), *Animal Rights* (Palgrave Macmillan, London 1996).

¹²³ Venkitachalam, (n 18).

¹²⁴ Kerala Captive Elephants (Management and Maintenance) Rules, 2012, rr4 and 9; The Performing Animals Rules, 1973, r 3.

trained to adapt for human needs. Yet, the law is silent when it comes to rationally justifying the disparate treatment that is meted out to elephants who, though wild, are arbitrarily subjected to different standards based on what emerges in the final analysis to be nothing but a human whim.

A challenge to the categorisation of elephants is at its core a challenge to the welfare model and a call to implement a rights-based model. Inadvertently, *N.R. Nair* lays the groundwork for a rights-based framework. In *N.R. Nair*, the Kerala High Court observed the need to dismantle the “thick legal wall with humans all on one side and all non-human animals on the other side”, and upheld the right of animals to “dignified existences and humane treatment sans cruelty and torture.”¹²⁵

N.R. Nair’s promise of a dignified existence is a remarkable starting point to realise the emancipatory needs of captive elephants in India. Through this expression, the case opens huge doorways for animal liberation through a model rooted in recognising the rights of animals, rather than providing for mere welfare. It challenges and rebuts the notion that elephant labour is in any manner voluntary or consensual. In most instances, elephants are forcefully captured from the wild and beaten to submit to human requirements—be it elephants used for joyrides, labour, circuses, begging or temple processions.¹²⁶ They are coerced into human bondage through the application of gruelling techniques to ‘break’ them and their instinct or resistance.¹²⁷ These practices contradict the principles of voluntary choice and consent that are central to the right to life and dignity, and highlight the exploitation and coercion inherent in the use of elephants for human purposes.

More than anything, it is important to realise that the plight of animals is perhaps an extreme manifestation of a larger group of constitutional subjects who have been marginalised and excluded from the interpretations and implications of the law. However, the case of animals illuminates an inherent disconnection between those who possess the authority to formulate and enforce laws within modern regulatory states and a particular subset of individuals who are subject to these laws. While oppression undeniably perpetuates and intensifies numerous instances of this disconnection, the context of constitutional animal protection compels us to confront the undeniable reality that formal legal systems inevitably impact those who lack direct involvement in their creation.¹²⁸

¹²⁵ NR Nair I, (n 17), [13].

¹²⁶ Sangita Iyer, (n 70).

¹²⁷ Suvasini Ramaswamy, ‘How Do You Break the Mind of an Elephant’ *The Wire* (26 February 2016) <thewire.in/culture/journey-from-the-wild-how-to-break-an-elephant> accessed 15 May 2023.

¹²⁸ See Jessica Eisen, ‘Animals in the Constitutional State’ (2017) 15 *International Journal of Constitutional Law* 909, 925.

B. UNDERSTANDING THE 'CATEGORISATION TRAP'

In our understanding, the elephant is the only animal that has been subjected to such a wide-ranging nomenclature in law—be it as 'captive', 'domestic', 'cattle', 'wild', 'performing', 'property' or 'working'. Thus, we believe that contrary to popular belief, these numerous avatars do not translate into greater overall protection for the elephants, but rather, lead to a fragmentation of their identity.

First, the creation and enforcement of these categories creates a false dichotomy between different forms of exploitation, suggesting that one is more acceptable or humane than the other. Further, every single category in which an elephant is sought to be fit involves their use and exploitation for human needs. 'Captive' elephants are used for tourism or as part of religious or cultural festivals. 'Working' elephants are often employed in the logging, agriculture, or transportation industries. 'Performing' elephants may be used in circuses, festivals, or other avenues for entertainment. In all cases, elephants are used for the benefit of mankind, a proposition that is fundamentally detrimental to their interests, or the *jus animalium*.

Second, categorisation, if at all, should be made according to the needs of the elephants, and not in line with those of their human 'masters'. The existing categorisation is solely conceptualised on the basis of their use (for humans), undermining their inherent value as living beings.

Third, and most importantly, all these categorisations are purely artificial constructs. From a scientific perspective, elephants exist as a single un-manipulated class, regardless of their interactions with humans. Captive, performing, domestic, and working elephants all have the same undifferentiated genetic and social makeup, with differential treatment only being a product of human domination. It must be understood that categorising elephants does not take away from the fact that they are inherently and solely wild.

Reducing the status of a wild elephant to a privately owned, working, captive or performing elephant leads to the presumption that the protections under Schedule I of the WPA are taken away. This exacerbates the already detrimental conjecture about the mutually exclusive application of the PCA and the WPA. In fact, the framework of the PCA, WPA, PARR, KCEMR and other regulations are complicit in fostering the idea that captive elephants are a wholly different category that is disentitled to the protections received by their 'wild' counterparts.

However, as we discussed at the very outset, the distinction and separation between captive elephants and wild elephants is unscientific and erroneous. Domesticated animals are heavily dependent on humans for their survival and usually undergo substantial genetic changes through multi-generational selective

breeding.¹²⁹ Elephants are in captivity invariably by force and continue to exhibit the natural behaviours and instincts that they exhibit in the wild. While some captive elephants may demonstrate certain different behavioural traits like a certain level of comfort and lack of fear towards humans, it is important to note that these differences do not necessarily indicate domestication. In essence, domestication in this context is but a synonym for cruelty and subjugation.

The language of control, regulation, and management in the WPA advances these conceptions of human dominion over elephants, with its provisions envisaging the Forest Department as custodians that can lease and use elephants as their property.

Only the complete acceptance of the fundamental concept that all elephants are wild can lead directly to an acknowledgment of the fact that captivity is not a marker of identity but a question of circumstance. To that end, the categorisation of elephants is a trap and even the noblest taxonomies deploy their resources merely for welfare. But what do we do when the welfare regime which is erected for the protection of animals itself begins to collapse? The concept and goals of the welfare model operate on the basic premise that humans can use animals for various purposes as long as they are treated with (what humans believe to be) care and respect. The failing of this model emerges from the fact that welfare does not go so far as to acknowledge the moral philosophical ethos that elephants (and animals) hold inherent value.

What our nomenclature needs to normalise is the concept of ‘captive wild’ elephants—a term that adequately represents the circumstances of their life, without taking away the basis of their freedom and liberty. ‘Captive’ in this context reflects a distortion in the innate identity of elephants who, being caged, savagely beaten, harshly trained, and separated from their environment for profit and entertainment are broken in body and mind, stripped of their dignity and their freedom to lead a life free of agony and distress.

V. CONCLUSION

The issue of captive elephants in India is a complex one that raises important questions about our relationship with animals and the ethics of their use for human purposes. Through this paper, we have argued that the categorisation of elephants is a problematic approach that fails to fully account for the needs and welfare of these intelligent and sensitive animals. Elephants are complex beings with individual needs and preferences and no single categorisation—other than simply deeming them ‘wild’ creatures—can fully capture their lived experiences.

¹²⁹ Hafiz Ishfaq Ahmad and others, ‘The Domestication Makeup: Evolution, Survival, and Challenges’ (2020) 8 *Frontiers in Ecology and Evolution* 103.

Despite the progressive evolution of wildlife protection laws, the exemption of captive elephants and their allowance for commercial purposes signifies a deep-rooted contradiction and a missed opportunity for genuine protection. The artificial distinction between captive and wild, domestic, and performing elephants stands on unscientific grounds, as elephants as a species are only wild by nature. The semantic labels that are attached to them fail to capture the essence of their existence and perpetuate a flawed understanding of their needs and rights.

Elephants possess a natural instinct for freedom and autonomy. They thrive in their natural habitats where they can roam vast distances, form intricate social structures, and exhibit a range of natural behaviours. When deprived of their wild environment and forced into captivity, elephants experience significant distress and suffer from various physical and psychological ailments.

To navigate the complexities arising from this hierarchical framework, we propose through this paper that it would be prudent for legislative bodies to consider embracing a rights-based approach, rather than the conventional welfarist stance. It acknowledges that animals possess inherent needs and interests that extend beyond mere reduction of suffering and places paramount importance on recognising the fundamental rights of elephants as sentient beings.

This shift in perspective would acknowledge their emotional, psychological, and social needs, going beyond a surface-level consideration of their physical conditions. This starts with a comprehensive reconsideration and overhaul of the ‘captive elephant exception’ and the recognition that captivity and trade in elephants is inherently immoral.

In real policy terms it would involve:

First, an amendment of the WPA to remove the legal loophole that allows elephant ownership, a long-standing pending recommendation of the *Gajah* report issued by the Ministry of Environment and Forest in 2011.¹³⁰

Second, the exclusion of elephants from the list of ‘performing animals’ under §22 (ii) of the PCA, closing the unfinished business of the 1998 Notification that unfairly left elephants out, by continuing to treat “captive” elephants erroneously as “domestic” and therefore “unwild”.

However, as *Venkitachalam* and the pending retirement of Raman confirms— an aspect too large to cover in the limited and complex argument already established in this paper —the use of Elephants in synonymous entertainment

¹³⁰ Gajah Report, (n 28).

tropes under the constitutional protection of a cultural right is a battle that would require much more work both in terms of shift in policy and advocacy on the ground. But hopefully, our listed policy demands of ending ownership and excluding elephants from secular “entertainment” activities altogether will be an important first step to chip away at the cultural defence.

Finally, in recognising the multifaceted lives and intrinsic worth of captive elephants, embracing a rights-based approach is not just a legal shift, but a compassionate evolution that acknowledges their right to dignity, autonomy, and a life beyond the confines of exploitation.