

Captive Elephants and the Wildlife Protection (Amendment) Bill, 2022: Discussion Paper

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1. About the *proviso* under Section 43(2)

The Wildlife (Protection) Amendment Bill, 2022 (“**Bill of 2022**”), which proposes to amend the Wildlife (Protection) Act, 1972 (“**the Act**”), was passed by the Lok Sabha on 2nd August 2022. This Amendment Bill was a revised version of the Wildlife (Protection) Amendment Bill, 2021 (“**Bill of 2021**”), which was tabled in December 2021 and was referred to the Parliamentary Standing Committee. The Vidhi Centre for Legal Policy submitted a detailed review of the Bill to the Committee. Although the revised Bill is yet to address many of our suggestions, we submit this research note on the newly inserted *proviso* in Section 43(2) of the Act. It is our view that the same is against the mandate of the Act and fails to address concerns regarding the exploitation of Asian Elephants, classified as ‘**Endangered**’ by the International Union for Conservation of Nature and included under **Schedule I** of the Act.

The Wildlife (Protection) Amendment Bill, 2022 seeks to amend Section 43(2) by inserting the following *proviso* as underlined:

43. Regulation of transfer of animal, etc.— (1) No person having in his possession a captive animal, animal article, trophy, or uncured trophy in respect of which he has a certificate of ownership shall transfer by way of sale or offer for sale or by any other mode of consideration of commercial nature, such animal or article or trophy or uncured trophy.

(2) Where a person transfers or transports from the State in which he resides to another State or acquires by transfer from outside the State, any such animal, animal article, trophy or uncured trophy in respect of which he has a certificate of ownership, he shall, within thirty days of the transfer or transport, report the transfer or transport to the Chief Wild.

“Provided that the transfer or transport of a captive elephant for a religious or any other purpose by a person having a valid certificate of ownership shall be subject to such terms and conditions as may be prescribed by the Central Government.”

On analyzing the newly inserted provision we are of the view that it is unclear and conflicts with other provisions under the Act. Following are our submissions on the previously mentioned amendment:

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2. The Amended Section 43(2) conflicts with Section 12 of the Act

Capturing any Schedule I animal irrespective of their wild or captive nature is a prohibited activity under the Act⁴, except under some extraordinary circumstances as prescribed in Section 11 and Section 12, with the prior permission of the Chief Wildlife Warden. Capturing any wild animal is considered as 'hunting', which is defined under Section 2(16) of the Act to include '*capturing, coursing, snaring, trapping, driving or baiting any **wild or captive animal** and every attempt to do so*'. To qualify as captives, elephants must either be hunted or bred in captivity.⁵

Section 11 permits hunting (capturing) in circumstances where animals become dangerous to human life/property or are so disabled/ diseased as to be beyond recovery. Section 12 permits capturing of Schedule I animals for '**special purposes**' which are exhaustively mentioned in the provision. These include purposes such as education, scientific research, translocation of any wild animals to an alternative suitable habitat, population management of wildlife without harming any wild animal, collection of specimens for recognized zoos/museums, and for collection of snake venom for life-saving drugs. Therefore, exceptions regarding hunting (capturing) of any Schedule I animal for additional 'purposes' must be treated as a 'special purpose' and remain within the scope of purposes listed under Section 12.

Prior amendments to Section 12, adding additional purposes for which wildlife may be hunted, have been enacted with specific and careful justifications for such inclusions. For instance, the Wildlife (Protection) Amendment Act, 1982 included the term 'Scientific Management' as a special purpose under Section 12. The object and reasons of this Amendment stated that "*Under the present scheme of the aforesaid Act, wild animals specified in Schedule I of the Act cannot be hunted by any person except as provided in sections 11 and 12 for specific purposes. There is no provision, at present, for permitting the capture and translocation of wild animals for scientific management, which may, for instance, be necessary in the case of elephants for their population management or for introduction in the alternative suitable habitat of endangered species like the Great Indian Rhinoceros and the Asiatic Lion.*"

Although commercial trade of elephants is legally prohibited under Section 43(1) of the Act, the *proviso* to Section 40 creates an exemption by permitting the transfer of ownership of elephants with the permission of the Chief Wildlife Warden. This exemption has been exploited tremendously to abuse elephants in the guise of gift, donations etc. The Report of the Elephant Task Force- Ministry of Environment and Forest (2010)⁶ highlights that a vast majority of captive elephants were born in the wild but were utilized as circus elephants, tourist elephants, used as rides or for alms by wandering mendicants, engaged for private/religious festivals and other purposes in religious trusts/ institutions. In fact, the Task Force had recommended suitable amendments to the Act to prevent such misuse.

It is pertinent that the purpose for transfer or transport of captive elephants must be only in the best interest of the animal and the only purpose for which elephants may be transferred must be for those mentioned under Section 12. However, the newly inserted *proviso* to Section 43(2) states as follows-

Provided that the transfer or transport of a captive elephant for a religious or any other purpose by a person having a valid certificate of ownership shall be subject to such terms and conditions as may be prescribed by the Central Government.

⁴Section 9 of the Wildlife (Protection) Act, 1972

⁵Section 2 (5): "Captive animal" means any animal, specified in Schedule I, Schedule II, Schedule III or Schedule IV, which is captured or kept or bred in captivity

⁶Gajah- Securing the Future for Elephants in India: The Report of the Elephant Task Force, Ministry of Environment and Forests, August 31, 2010

The *proviso* carves out additional exceptions for the transfer and transport of captive elephants for 'religious and other purposes' beyond the special purposes mentioned under Section 12 and enlarges the scope for exploitation of captive elephants. The primary objective of the Act is to protect wildlife to ensure the ecological and environmental security of the country. The Act takes a protectionist approach towards wildlife, which is clear from the preamble, and only in extraordinary circumstances mentioned in Section 12, permits capturing of wildlife. Ordinarily, any interference in the general well-being of wild animals should be guided by the factors listed in Section 12. However, the proposed proviso recognizes additional elements, i.e., 'Religious or other purposes', for interference with the general well-being of captive elephants. This is inconsistent and extraneous to the factors mentioned in Section 12. Further, the explicit use of the word 'religious' provides legality to one of the misuses highlighted by the Task Force.⁷

3. The proviso creates an undue exception by permitting the transfer and transport of captive elephants for 'religious and other purposes'

The placement of the *proviso* under sub-section (2) of Section 43 is unusual as the subject matter of sub-section (2) only mentions reporting requirements after the transfer or transport of wildlife. However, the effect of the insertion of the *proviso* here is on general regulation of the transfer and transport of captive elephants. Originally, such activities (transfer and transport) with respect to captive elephants were conducted as per the Act, in consonance with the manner of treatment for other Schedule I animals. The new *proviso* enables them to be regulated separately by the Central Government, in a manner different from how other Schedule I animals are regulated.

The normal function of *provisos* in legislation is to qualify or create an exception to what is in an enactment, and normally, a *proviso* is not interpreted as stating the general rule. This means that the *proviso* qualifies the generality of the main enactment, by providing an exception and taking out, from the main enactment, a portion which, but for the proviso, would fall within the main enactment.⁸ Therefore, when the *proviso* in the Bill of 2022 is construed, it creates an exception from the applicability of the provisions of the Act on the transport and transfer of wildlife to captive elephants, by stating that the terms and conditions for the transfer and transport of elephants as determined by the Central Government shall become applicable instead. It also creates an exception for 'religious and other purposes' as a ground for transfer and transport of captive elephants.

The insertion of 'religious and other purposes' under the proviso is not only vague but is clearly in conflict with Sections 11 and 12 which have been prescribed after careful consideration. The Amendment Bill digresses from the protectionist approach of the Act, by disregarding previous expert opinions on the need for altogether phasing out private ownership of elephants.⁹

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⁸ *Shah Bhojraj Kuverji Oil Mills And v. Subbash Chandra Yograj Sinha*, 1961 AIR 1596; GP Singh, *Principles of Statutory Interpretation*, 15th Edition (2021), LexisNexis at page 153.

⁹ n3

4. Way Forward

The newly added *proviso* to Section 43(2) must be removed as it is inconsistent with the object and purpose of the Act. Where the Central Government seeks to regulate the transfer and transport of an animal for any purpose, the Act should explicitly provide these purposes. In addition, it should be consistent with the exceptions carved out under section 12 and the object and purpose of the Act.

The policy of the Central Government should be aimed at phasing out captive elephants for private ownership. Elephants should be in exclusive custody of the State. One of the ways of achieving this would be to remove the exemption provided for elephants under Section 40(2A) and (2B).¹⁰

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