

# **Preserving the Trails: An Analysis of the Right of Indigenous Communities in Sri Lanka towards the Environment**

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## **Abstract**

*The Veddas are an indigenous community living in the villages of Dambana, Pollebadde, Rathugala, Hennanigala, and Dalukana in the dry zone of Sri Lanka and said to be the descendants of the first inhabitants of the island. The environment forms an intrinsic part of their life with hunting and gathering being their main means of living. In the late 1970s, this aboriginal community was ousted from their traditionally inhabited lands and forcefully re-settled or displaced owing to the developmental activities. In the years following the incident, sustainable development, and rights of indigenous communities towards their native lands and the environment have become two of the most widely acknowledged and respected principles in International Law. Notwithstanding these global developments and the attempts to incorporate them into the domestic law, in 2021, the government of Sri Lanka has decided to clear out the lands of the Veddas in Pollebedda-Rambaken Oya as a part of a proposed agriculture and livestock development project. Therefore, this article seeks to ascertain how the existing legal framework in Sri Lanka recognizes the indigenous people's right to environment. The research also seeks to ascertain the compatibility of the Sri Lankan legal framework with the legal principles governing the indigenous people's right to environment in the international arena. The research lays*

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*down that the Sri Lankan legal framework is far behind the international standards when it comes to the protection of the indigenous people's right towards the environment with its supreme law being completely silent regarding any such right. Therefore, the research suggests that the right to environment shall be incorporated within the ambit of the fundamental rights regime in Sri Lanka and a particular focus shall be given to the special needs of the Vedda community.*

**Key words:** *Right to Environment, Indigenous Communities, Vedda Community, Vanniyalaththo.*

## **Introduction**

Many indigenous communities are deeply and invariably linked to their native lands both culturally and spiritually and rely on the natural environment to sustain their lives.<sup>103</sup> This makes the environment an essential part of their lives and its preservation and conservation one of their greatest interests.<sup>104</sup> This truth is of no difference to the indigenous community living in Sri Lanka known as the *Veddas, Vanniyalaththo*, people of the forest or forest dwellers. However, their distinctive need to be in their native lands and familiar environments has hardly been recognized in the decision-making process of the country. The greatest example is the decision of the government to oust the *Vedda* community from the tropical forest lands which they inhabited owing to the Mahaweli Development Project; one of the largest projects in the

<sup>103</sup> Hannah White, 'Indigenous Peoples, the International Trend Towards Legal Personhood for Nature, and the United States' [2018] *American Indian Law Review* 129,129.

<sup>104</sup> *ibid.*

country aimed at the construction of reservoirs, hydro-electricity plants, new settlements, and the development of agriculture based on the Mahaweli river.<sup>105</sup> The Tibbetts-Abbott-McCarthy-Stratton Environmental Assessment (TAMS Environmental Assessment) carried out on the project requested that the catchments of Maduru Oya and Ulhitiya be pronounced as a protected area for elephant conservation and catchment purposes.<sup>106</sup> Consequently, the area was declared as a National Park in terms of the Fauna and Flora Protection Ordinance, No. 12 of 1945 (hereinafter referred to as FFPO) and the *Vedda* people were forcefully resettled amidst the ordinary people who wished to settle down in the segmented *Mahaweli* colonies in the late 1970s. The then leader of the community, Thissahamy, however, decided to remain in their lands with his family and seven other families irrespective of the government decision.<sup>107</sup>

Since the late 1960s, the dire need of protecting the environment has given rise to various novel legal principles in the international arena. One of the most crucial of such principles is the principle of sustainable development which has emerged as a new paradigm of development emphasizing the need of integrating environmental protection concerns into the developmental

<sup>105</sup> Sasni Amarasekara, 'Research Proposal: The Veddas', the Indigenous people of Sri Lanka, Attitude on Cultural Heritage Identification after Relocation from their Forest Homeland' [2017] International Journal of Scientific and Research Publications 17.

<sup>106</sup> Indigenous Communities in Sri Lanka: The *Veddas* (Ceylon Tea Service PLC) 10.

<sup>107</sup> Indigenous Communities in Sri Lanka: The *Veddas* (Ceylon Tea Service PLC) 10.

process.<sup>108</sup> These advancements coupled with the increased attention placed on human rights following World War II, conferred concrete rights on the indigenous communities to their ancestral lands and natural resources in international law.<sup>109</sup> The debate on indigenous community rights mainly revolves around ensuring their right towards the environment for it forms an integral part of their traditional way of living.<sup>110</sup>

However, notwithstanding these developments that had taken place in the international arena, and the attempts to absorb them into the corpus of the domestic law of the country, notably since 2000, in 2021, the government of Sri Lanka has again taken a decision to clear out the lands of the *Vanniyalaththo* in Pollebedda-Rambaken Oya as a part of a proposed agriculture and livestock development project. The proposed development project has proved that the community is highly vulnerable and on the verge of losing their natural and inherent way of life, and the trails left by their ancestors to development. Therefore, this article seeks to ascertain how the existing legal framework in Sri Lanka recognizes the indigenous people's right to environment

<sup>108</sup> Manishka De Mel and Nilshantha Sirimanne, 'Environmental Challenges and Basic Legal Principles' in Mario Gomez (ed), *Judges on Environmental Law* (UNEP 2009) 09-71; Rukshana Nanayakkara, 'Multilateral Environmental Agreements and Sri Lankan Legal System' in Mario Gomez (ed), *Judges on Environmental Law* (UNEP 2009) 147-168.

<sup>109</sup> Eric Dannenmaier, 'Beyond Indiginuos Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine' [2008] *Washington University Law Review* 53, 71.

<sup>110</sup> Hannah White, 'Indigenous Peoples, the International Rend Towards Legal Personhood for Nature, and the United States' [2018] *American Indian Law Review* 129.

*Vanniyalaththo* have been the subject of many research studies, both national and international. However, surprisingly, the legal entitlement of this indigenous community to have their native lands and the environment preserved has never been subjected to adequate research or a comprehensive discussion in the span of literature. Therefore, the authors intend that the present research will serve to bridge this critical gap in the existing body of knowledge.

The paper will first introduce the *Vedda* community in Sri Lanka and will examine the relationship that they have with the environment. Secondly, it seeks to examine the proposed agriculture and livestock development project in Pollebedda-Rambaken Oya and its likely impacts on this aboriginal community and their way of life. Thirdly, it will evaluate how the indigenous people's right to environment is recognized in Sri Lanka. The fourth part will analyse its international counterpart while comparing it with that of Sri Lanka in order to ascertain the lessons for law reform. Fifthly, the paper will lay down recommendations on how the Sri Lankan legal framework on indigenous people's right to environment can be strengthened to preserve the rapidly losing trails of their ecological and cultural heritage. The final part will lay down the conclusions of the paper.

***Vanniyalaththo* and the environment: Are they losing their trails?**

According to *Mahawamsa*: The Great Chronicles of

Ceylon, the history of *Veddas* runs back to the 5<sup>th</sup> Century BC. It was when Prince *Vijaya*; Son of *Sinhabahu* (the king of *Sinhapura* in India) arrived in Sri Lanka (*Thambapanni* as it was called then) with 700 Indo-Aryan followers.<sup>111</sup> He then got involved with *Kuveni* who belonged to the *Yakkha* community, the native inhabitants of the island at that time.<sup>112</sup> *Kuveni* helped *Vijaya* and his colleagues to take control of the *Yakkha* city of *Sirisavatthu*, betraying her own community.<sup>113</sup> *Kuveni* had two children from *Vijaya*; a son and a daughter.<sup>114</sup> However, according to the practice then prevalent in India, *Vijaya* intended to marry a *Kshatriya* princess; one belonging to the social class associated with warrior aristocracy to become a legitimate king.<sup>115</sup> Consequently, *Kuveni* was banished from the kingdom of *Vijaya* and left to the *Yakkha* city of *Lankapura* seeking help.<sup>116</sup> The *Yakkhas* killed her as a punishment for betraying her own, but her children survived.<sup>117</sup> The *Veddas* are said to be descended from her son and daughter; *Jeevahatta* and *Disala*.<sup>118</sup>

However, the aforesaid version of the origin of *Veddas* is not undisputed. For instance, Knox, based on a story that he heard from one Portuguese, links the origin of the community to a prince expelled from China and then

<sup>111</sup> මහවංශය (Buddhist Cultural Centre 2020), 34.

<sup>112</sup> *ibid*, 35.

<sup>113</sup> *ibid*.

<sup>114</sup> *ibid*, 37.

<sup>115</sup> *ibid*, 36.

<sup>116</sup> *ibid*, 37.

<sup>117</sup> *ibid*.

<sup>118</sup> *ibid*.

arrived in Sri Lanka.<sup>119</sup> However, Knox himself expresses scepticism over this story and it can be a slightly mistaken version of the same story embodied in *Mahavamsa*. Spittel, opines that the *Veddas* can be the descendants of the palaeolithic men who came to Sri Lanka from India with leopards and monkeys when the two states were connected to one another and formed one giant piece of land.<sup>120</sup> Deraniyagala links the *Veddas* to Balangoda man, a hominins skeleton that dates back to 30,000 BP, and recognizes him as the common ancestor of the *Vedda* community.<sup>121</sup> This view is supported by Kennedy and others, who hold that the human remains from the Mesolithic cave sites like Batadombalena and Belilena resemble the *Veddas*' anatomical features.<sup>122</sup>

No matter how sources differ on the origin of the *Vedda* community, they all accept that the *Veddas* have always lived in harmony with nature. The lifestyle of the community have been affected and influenced by external developments and their population has been considerably diminished forming only an approximate 0.05% of the total population in the island.<sup>123</sup> However, a considerable

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<sup>119</sup> Robert Knox, *An Historical Relation of the Island of Ceylon* (David Karunaratne tr, MD Gunasena 2020) 216.

<sup>120</sup> RL Spittel, *Vanished Trails* (AP Gunarathna tr, 2<sup>nd</sup> edn, Sooriya Publishers 1995) ii.

<sup>121</sup> SU Deraniyagala, 'Early Man and the Rise of Civilisation in Sri Lanka: the Archaeological Evidence' (lankalibrary.com) <lankalibrary.com/geo/dera2.html> accessed 29 November 2021.

<sup>122</sup> Kenneth AR Kennedy, Shiran U Deraniyagala, John Chiment, Todd Disotell, William J Roertgen, 'Biological Anthropology of Upper Pleistocene Hominid from Sri Lanka, Batabomba Lena' [1986] *Ancient Ceylon* 68.

<sup>123</sup> Sri Lanka: Second Integrated Road Investment Program (Asian Development Bank 2017) 4; *Uruwarige Wannila Aththo and others v Central*

portion of the remaining population still lives in harmony with nature.<sup>124</sup> The ancient *Veddas* wore only bark of a tree and depended solely on what they could find in the jungle.<sup>125</sup> According to Spittel, *Veddas* belonging to this ancient tradition had already started to get vanished when he did his expedition studying the community in the 1920s.<sup>126</sup> Mixed with Sinhalese and Tamil communities they lost track of some of the ancient traditions upheld and followed by their ancestors but never lost their inextricable link with nature. As Spittel explains, where there was a *Vedda*, there was a mountain, with which they had a spiritual connection. He had been indebted to the trees, animals and all the living beings in the environment which provides for and sustains his life. The water stream that flows around the mountain provided him with water and the spirit of his ancestors lives in the jungle for his protection.<sup>127</sup> According to the sources, during the 19<sup>th</sup> and 20<sup>th</sup> centuries, they basically depended on wild plants, animals, and bees honey for survival.<sup>128</sup>

*Environmental Authority and others* [2020] (CA) – This is a writ petition filed against the proposed Pollebedda-Rambaken Oya project by the Centre for Environmental Justice in Sri Lanka together with the members of the *vedda* community.

<sup>124</sup> Premakumara De Silva and Asitha G Punchihewa, *Socio- Anthropological Research Project on Vedda Community in Sri Lanka* (University of Colombo and Ministry of Culture and the Arts Government of Sri Lanka 2011); Premakumara De Silva, 'Diminishing or Struggle for Survival: Case of Veddas' Culture in Sri Lanka' [2011] SAARC Culture 127.

<sup>125</sup> RL Spittel, *Wild Ceylon* (Premachandra Alwis tr, Sooriya Publishers 2001) 31.

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*, 97.

<sup>128</sup> Patrick Roberts, Thomas H Gillingwater, Marta Mirazon Lahr, Julia Lee-Thorp, Malcolm MacCallum, Michael Petraglia, Oshan Wedage, Uruwaruge Heenbanda and Uruwaruge Wainnyalaththo 'Historical Tropical Forest Reliance amongst the Wanniyalaeto (Vedda) of Sri Lanka: an Isotopic



In another book, Spittel mentions that the *Veddas* demarcated a specific area in the jungle for hunting and gathering purposes and never left outside this demarcated area. This practice demonstrates that the community, though lived in the jungle had never been over-exploitative, unnecessarily making use of all the resources inside the forest lands for their own purposes.<sup>129</sup> According to Gunawardhana, *Vanniyalaththo* intentionally live in small groups as they are reliant on limited natural resources.<sup>130</sup>

Although their ancestors lived in stone caves,<sup>131</sup> the community later learnt to build extremely minimalistic houses made in mud and wood collected from the jungle with thatched roofs.<sup>132</sup> Cow dung is mixed with clay and applied on floors while some houses even have bare soil floors.<sup>133</sup> The modern-day houses of *Veddas* mostly

Perspective' [2018] *Human Ecology* 435, 436-437; RL Spittel, *Wild Ceylon* (Premachandra Alwis tr, Sooriya Publishers 2001) 32.

<sup>129</sup> RL Spittel, *Vanished Trails* (AP Gunarathna tr, 2<sup>nd</sup> edn, Sooriya Publishers 1995) iv.

<sup>130</sup> Dambane Gunawardhana, 'The social organization of the traditional Vedda community' [1993] *Soba* 21, 21-24.

<sup>131</sup> RL Spittel, *Vanished Trails* (AP Gunarathna tr, 2<sup>nd</sup> edn, Sooriya Publishers 1995) 1.

<sup>132</sup> RL Spittel, *Wild Ceylon* (Premachandra Alwis tr, Sooriya Publishers 2001), 32; RL Spittel, *Vanished Trails* (AP Gunarathna tr, 2<sup>nd</sup> edn, Sooriya Publishers 1995) 1;

<sup>133</sup> Premakumara De Silva and Asitha G Punchihewa, *Socio- Anthropological Research Project on Vedda Community in Sri Lanka* (University of Colombo and Ministry of Culture and the Arts Government of Sri Lanka 2011) 49 – 50; Premakumara De Silva, 'Diminishing or Struggle for Survival: Case of Veddas' Culture in Sri Lanka' [2011] *SAARC Culture* 127, 146 – 147.

resemble this age-old model.<sup>134</sup> Apart from Vakarai, most *Veddas* still live in temporary or semipermanent houses that are mostly between 101-500 square feet in size.<sup>135</sup> However, it shall also be noted that these traditional housing styles are gradually being affected by modernisation and some members of the *Vedda* community are now constructing houses with more modern construction materials like cement and tin roof sheets.

Moreover, the community uses traditional medicines for illnesses prepared using various plants, parts of plants, mixtures of different plants, minerals high in curative value and bee honey.<sup>136</sup> They have used and still use forest products including various meats and honey, and fish harvest to engage in economic activities. Spittel explains that they used to hang a sack of bee honey or a piece of wild meat in front of the house of a metalsmith or a farmer to have metal weapons and utensils or rice in return.<sup>137</sup> Today, they use the same to earn few coins to buy what they need in the local markets.<sup>138</sup> However, according to certain studies, some members of the

<sup>134</sup> *Uruwarige Wannila Aththo and others v Central Environmental Authority and others* [2020] (CA).

<sup>135</sup> Premakumara De Silva and Asitha G Punchihewa, *Socio- Anthropological Research Project on Vedda Community in Sri Lanka* (University of Colombo and Ministry of Culture and the Arts Government of Sri Lanka 2011) 49 – 50.

<sup>136</sup> Premakumara De Silva and Asitha G Punchihewa, *Socio- Anthropological Research Project on Vedda Community in Sri Lanka* (University of Colombo and Ministry of Culture and the Arts Government of Sri Lanka 2011) 106 - 109.

<sup>137</sup> RL Spittel, *Vanished Trails* (AP Gunarathna tr, 2<sup>nd</sup> edn, Sooriya Publishers 1995) iv.

<sup>138</sup> Premakumara De Silva, 'Diminishing or Struggle for Survival: Case of Veddas' Culture in Sri Lanka' [2011] SAARC Culture 127, 137 – 146.

community are now engaging in more modern occupations like, military services and working in construction sites and garments.<sup>139</sup>

It is clear that although modernization has affected the traditional way of life of this aboriginal community, a considerable number of them still maintains an inviolable and indivisible link with nature. The anthem of the *Vedda* people, composed recently, clearly displays the connection that this indigenous community have with the environment and reads as follows:

Everything that is natural- God given,  
the sun, the moon, the wind, the trees  
and the beauty of the blowing wind, the wild  
animal  
who is a part of nature itself belongs to us the  
vanniyalaththo  
the men of the jungle<sup>140</sup>

It is this link that keeps them on the trails of their ancestors. If the forests, rivers, birds and animals of their native lands are going to get disappeared, it is undoubted that this indigenous community will likely go into extinction.

It is now important to ascertain the objective and the

<sup>139</sup> Premakumara De Silva and Asitha G PUNCHIHewa, *Socio- Anthropological Research Project on Vedda Community in Sri Lanka* (University of Colombo and Ministry of Culture and the Arts Government of Sri Lanka 2011) 189 - 190.

<sup>140</sup> *Indigenous Communities in Sri Lanka: The Veddas* (Ceylon Tea Service PLC) 15.

scope of the proposed Pollebedda-Rambaken Oya agriculture and livestock development project and its likely impacts on the *Vedda* community, their heritage, and their way of life.

### **Pollebedda-Rambaken Oya Agriculture and Livestock Development Project**

Pollebedda is a rural village situated on the way to Rambaken Oya reservoir and one of the traditional homelands of the *Vedda* community.<sup>141</sup> By the Gazette No. 1130/13 dated 04/05/2000, Rambaken Oya area was declared as coming under the purview of the Mahaweli Authority of Sri Lanka which has the mandate of implementing the Mahaweli Development Programme in terms of the Mahaweli Authority of Sri Lanka Act, No. 23 of 1979 (as amended). Consequently, the administration and development of the area are carried out by the Mahaweli Authority.

On 29 September 2020, Mahaweli Authority sought advice from the Minister in charge, other relevant ministers, and authorities to start agricultural projects in the Rambaken Oya and Kandakadu areas.<sup>142</sup> According to a report published by the authority, on 18<sup>th</sup> November 2020, it has granted permission to use certain designated

<sup>141</sup> *Uruwarige Wannila Aththo and others v Central Environmental Authority and others* [2020] (CA).

<sup>142</sup> Mahaweli Authority of Sri Lanka, 'රම්කැන්ඔය මහවැලි කලාපයේ වාණිජ මව්වගම බඩ ඉරිඟු වගාව' (Mahaweli Authority of Sri Lanka, 12 September 2020) < <http://mahaweli.gov.lk/PDF/rambaken-oya/Rambakenoya%2012-9-20.pdf>> accessed 01 July 2021, 1.

areas in Rambaken Oya which have already been cleared up for the purpose of maize cultivation during the Maha season (North-East monsoon season). Moreover, the authority claimed that this decision is taken following the consultations with the Central Environmental Authority, Department of Wildlife Conservation, officials of local authorities, local politicians, and the farmers in the area.<sup>143</sup> It further states that the designated area does not contain any area declared by the Department of Wildlife Conservation as reserved or protected.<sup>144</sup>

Notwithstanding the repeated emphasis by the authority on the legality and the benefits of utilizing these lands to cultivate maize, the proposed project was objected to by several stakeholders, the most prominent being the leader of the *Vedda* community, Uruwarige Wannila Aththo whose traditional way of life is disturbed owing to the project. He, together with the Centre for Environmental Justice and its executive director, Mr. Hemantha Vithanage, filed a Writ Petition in the Court of Appeal of Sri Lanka and demanded that the project be halted until a proper Environmental Impact Assessment (hereinafter referred to as EIA) is carried out. According to the petition, the pesticides, herbicides, and fertilizers used in the large-scale maize cultivation will pollute the water sources linked with Rambaken Oya Reservoir. It will also negatively affect the way of life and livelihoods of the *Vedda* community which are highly dependent on the

<sup>143</sup> *ibid.*, 1-2.

<sup>144</sup> *ibid.*

forest and indigenous medicine often used by them.<sup>145</sup>

Thus, the lives of this indigenous community have once again proved to be highly vulnerable to developmental activities. While it can be expected that the judiciary in Sri Lanka will once again play the ever-vibrant role it has always played in the environmental protection litigation in the country, upholding the proposed development project as adverse to the survival of this invaluable indigenous community, it is important to ascertain how the right of the *vedda* community towards the environment is recognized in the Sri Lankan context.

### **The recognition of the indigenous people's right to environment in Sri Lanka**

The Constitution currently in force in Sri Lanka, the 1978 Second Republican Constitution, contains no express reference to an indigenous people's right to environment. Nowhere in the Constitution, it refers to indigenous communities or the special rights that can be attributable to them. This is not surprising given the Constitutional silence regarding a clean and healthy environment or a right to life. Had at least one of these rights been embodied in the Constitution, it could have been used to establish the right of the *Vedda* community to have their environment preserved and protected. Unfortunately, the Constitutional silence regarding any of these rights creates a significant void in the Constitutional framework of the

<sup>145</sup> *Uruwarige Wannila Aththo and others v Central Environmental Authority and others* [2020] (CA).

country.

At this point, it shall not be forgotten that the judiciary, in fact, attempted to create a right to life by creative interpretation in two cases involving extra-judicial killings. Yet, the judiciary in both cases restricted the scope of the right to 'mere existence' as opposed to the quality of life.<sup>146</sup> Thus, Sri Lanka missed a golden window to create a right to environment through the wide interpretation of the right to life as it is done in India.<sup>147</sup>

However, the judiciary in Sri Lanka, most notably the Supreme Court, which has the power to interpret the Constitution<sup>148</sup> and to hear and determine fundamental rights petitions,<sup>149</sup> has creatively interpreted the limited references to the environment and the restricted fundamental rights embodied in the Constitution to create an implied right towards the environment. When the Constitutional framework applicable to environmental protection is concerned, chapter VI, entitled directive principles of state policy and fundamental duties of citizens, contains 2 significant references to the

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<sup>146</sup> *Sriyani Silva v Iddamalgoda, OIC, Police Station Payagala and others* (2003) SC No. 471/2000 (FR); *Rathnayaka Tharanga Lakmali v Niroshan Abeykoon, OIC, Crime Branch, Embilipitiya* (2019) SC No. 577/2010 (FR) 14.

<sup>147</sup> For instance see, *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh (Dehradun Quarrying Case)* (1985) AIR SC 652; *MC Mehta v Union of India* (1987) AIR SC 982; *MC Mehta v Union of India* (1987) AIR SC 1086; *MC Mehta v Union of India* (1988) AIR SC 1037; *MC Mehta v Union of India* (1988) AIR SC 1115; *Chhetriya Pardushan Mukti Sangarsh Samati v State of Uttar Pradesh* (1990) AIR SC 2060 and *Indian Council for Enviro-legal Action v Union of India (Sludge Case)* (1996) AIR SC 1446.

<sup>148</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 125.

<sup>149</sup> *ibid*, art 17 and 126.

environment. Article 27(14) establishes the duty of the State to protect, preserve and improve the environment for the benefit of the community<sup>150</sup> while article 28(f) imposes a duty on the community to protect the environment and to conserve its riches.<sup>151</sup> However, in terms of article 29 of the Constitution, none of these provisions is enforceable before any court or tribunal.<sup>152</sup>

Whether article 29 entirely numbs out articles 27(14) and 28(f) is a question that must essentially be answered. The perfect answer to this question was provided by Jayawardena J in the landmark *Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and others* (hereinafter referred to as *Chunnakam Power Plant case*), where his Lordship held that ‘the directive principles of state policy are not wasted ink in the pages of the Constitution. They are a living set of guidelines which the State and its agencies should give effect to’.<sup>153</sup> In *Bulankulama v. Secretary, Ministry of Industrial Development* (hereinafter referred to as *Eppawela case*), these provisions were interpreted by the apex court of Sri Lanka as establishing the shared responsibility of the state parties and the common citizenry to protect the environment.<sup>154</sup> In *Centre for Environmental Justice v. Anura Satharasinghe and Others*, the court accepted that

<sup>150</sup> *ibid*, art 27 (14).

<sup>151</sup> *ibid*, art 28 (f).

<sup>152</sup> *ibid*, art 29.

<sup>153</sup> *Ravindra Gunawardena Kariyawasam v Central Environmental Authority and others* (2019) SC (FR) Application No. 141/2015, 50.

<sup>154</sup> *Bulankulama v Secretary, Ministry of Industrial Development (Eppawela case)* (2000) 3 Sri LR 243, 257.



article 27(14) of the Constitution, mandates that the State shall protect, preserve and improve the environment for the benefit of the community.<sup>155</sup> Moreover, the judiciary has further linked article 27(14) with the public trust doctrine and article 28(f) with public interest litigation in a series of judgments concerning the environment.<sup>156</sup>

How these progressive interpretations are being significant in protecting the right of indigenous communities towards the environment? The traditional *Vedda* community whose lives are the most affected by the short-sighted developmental decisions of the government are not financially stable to bear the costs of litigation or equipped with the knowledge to engage in court proceedings. The public interest litigation as it is recognized in Sri Lanka is an extremely significant legal weapon that can be wielded by the aboriginal community in the country. It recognizes that ‘the rights of [*Vedda* community] are linked to the collective rights of the citizenry in Sri Lanka’;<sup>157</sup> and thereby allows those with means and knowledge to fight for the rights of this indigenous community. Secondly, the Supreme Court of Sri Lanka has in several occasions recognized the exploitation of natural resources as tantamount to a

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<sup>155</sup> *Centre for Environmental Justice v Anura Satharasinghe and Others (Wilpattu Case)* (2020) CA (Writ) 291/2015,5.

<sup>156</sup> *Bulankulama v Secretary, Ministry of Industrial Development (Eppawela case)* (2000) 3 Sri LR 243; *Environmental Foundation Limited (EFL) v Urban Development Authority (Galle Face Green Case)* (2005) SC (FR) Application No. 47/2004; *Sugathapala Mendis v Chandrika Bandaranaike Kumaratunga (Water’s Edge Case)* (2008) SC (FR) Application 352/2007.

<sup>157</sup> *Bulankulama v Secretary, Ministry of Industrial Development (Eppawela case)* (2000) 3 Sri LR 243, 244.

violation of the public trust doctrine. In the *Eppawela* case, Amerasinghe J further elevated the status of the doctrine, founding the principle of public guardianship which emphasizes that the ruler is only the guardian of the natural resources of the country.<sup>158</sup> Although the footsteps of Amarasinghe J were not followed in the same way, in a subsequent case, Thilakawardane J, held that the public trust doctrine requires all organs of the state to ensure that natural resources are protected and preserved for public benefit.<sup>159</sup> Thus, the doctrine demands that the traditionally inhabited lands of the *Vedda* community, its environment and resources be safeguarded by the decision making authorities, and be used only for the purposes beneficial to them.

In the absence of rights to environment and life in the fundamental rights chapter of the Constitution, petitioners seeking the environment protection had to always rely on the existing fundamental rights. The most cited fundamental right in environmental litigation is the equality clause embodied in article 12 of the Constitution.<sup>160</sup> This principle was applied in the *Eppawala* case which challenged a government decision to enter into an agreement with a foreign company to lease out the phosphate mine situated in the Eppawala region. In the case, the petitioners argued that they were

<sup>158</sup> *Bulankulama v Secretary, Ministry of Industrial Development (Eppawela Case)* [2000] 3 Sri LR 243.

<sup>159</sup> *Watte Gedara Wijebanda v Conservator General of Forest and eight others* (2007) SC Application No. 118/2004.

<sup>160</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 12.

denied the right to participate in the EIA process prescribed by the NEA because the project proponent was to be allowed to do his own EIA through a foreign consultant of his choice.<sup>161</sup> It was thereafter applied in many subsequent cases including *Environmental Foundation Limited v. Urban Development Authority*,<sup>162</sup> *Al Haj MTM Ashik v. RPS Bandula, OIC Weligama*,<sup>163</sup> *Sugathapala Mendis v. Chandrika Bandaranaike Kumaratunga*<sup>164</sup> and *Chunnakam Power Plant case*.<sup>165</sup> As held by Thilakawardane J in *Watte Gedara Wijebanda v Conservator General of Forest and eight others*:

While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12 (1) of the Constitution.<sup>166</sup>

The same provision can be used to ensure that the lands of the *Vedda* community will not be used for any other purpose without conducting a proper EIA. Section 23AA

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<sup>161</sup> *Bulankulama v. Secretary, Ministry of Industrial Development (Eppawela Case)* (2000) 3 Sri LR 243, 246.

<sup>162</sup> *Environmental Foundation Limited (EFL) v. Urban Development Authority (Galle Face Green Case)* (2005) SC (FR) Application No. 47/2004.

<sup>163</sup> *Al Haj MTM Ashik v. RPS Bandula, OIC Weligama (the Noise Pollution case)* (2007) SC (FR) Application Application No. 38/2005.

<sup>164</sup> *Sugathapala Mendis v. Chandrika Bandaranaike Kumaratunga (the Water's Edge case)* (2008) SC (FR) Application 352/2007.

<sup>165</sup> *Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and others* (2019) SC (FR) Application No. 141/2015, 44 – 60.

<sup>166</sup> *Watte Gedara Wijebanda v. Conservator General of Forest and eight others* (2007) SC Application No. 118/2004, 356.

of the National Environmental (Amendment) Act, No. 56 of 1988 which deals with the approval of projects states as follows:

notwithstanding the provisions of any other written law, from and after the coming into operation of this Act...all prescribed projects that are being undertaken in Sri Lanka will be required to obtain approval under this Act for the implementation of such prescribed projects.

The list of prescribed projects included in Gazette No. 772/22 of 24.06.1993 states that 'all the projects aimed at conversion of forests covering an area exceeding 1 hectare into non-forest uses and clearing of land areas exceeding 50 hectares must undergo an EIA'. Accordingly, if the forests which are the home to *Vedda* community are to be converted or cleared in a large scale, it can only be done following an EIA. The EIA is defined by the United Nations Environmental Programme as 'the examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development'.<sup>167</sup> A proper EIA involves a comprehensive study carried out on the likely impacts of a proposed development project and consults the public for their opinions and viewpoints. An EIA thus makes administrative decisions more transparent while mitigating the negative environmental impacts of the projects. If the lands inhabited by this indigenous

<sup>167</sup> Convention on Biological Diversity, 'What is Impact Assessment' <<https://www.cbd.int/impact/whatis.shtml>> accessed 23<sup>rd</sup> November 2017.

community are acquired without a proper EIA, then it will be a blatant violation of the principle that ‘All persons are equal before the law and are entitled to the equal protection of the law’ embodied in article 12 of the Constitution. This is in fact one of the major arguments raised by the petitioners in the Writ Petition filed against Pollebedda-Rambaken Oya agriculture and livestock development project.<sup>168</sup>

Article 14(1)(g) which guarantees the right of every citizen to the freedom to engage in any lawful occupation, profession, trade, business, or enterprise<sup>169</sup> and article 14(1)(h) which guarantees the right of every citizen to movement<sup>170</sup> can also be utilized to protect the right of indigenous communities to have their environment preserved. The rights were successfully applied and upheld in the landmark *Eppawela* case where the court held that the residents in the area will lose the lands that they live in and depend on if the proposed agreement is implemented.<sup>171</sup> The traditional homelands of the *Vanniyalaththo* are the forests that provide them with homes and livelihood and if the government are to clear out the forests that they live in, it will constitute a violation of the supreme law of the country. Protecting the livelihoods and the residences of the *Veddas* means the

<sup>168</sup> *Uruwarige Wannila Aththo and others v. Central Environmental Authority and others* [2020] (CA).

<sup>169</sup> Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 14 (1) (g).

<sup>170</sup> *ibid*, art 14 (1) (h).

<sup>171</sup> *Bulankulama v. Secretary, Ministry of Industrial Development (Eppawela Case)* (2000) 3 Sri LR 243, 261 -271.

protection of the environment.

While it is impressive how the seemingly narrow Constitutional provisions have been used by the judiciary to confer wider protection on the environment, the non-recognition of the special rights of the indigenous community in Sri Lanka towards the environment is still open for debate. It is undisputed that the preservation of the environment as it is, is extremely significant to the aboriginal people whose lives will be completely transformed without it, in a way that they never intended or anticipated. Similarly, the destruction of their familiar environments will destroy the lives and heritage of the *Vedda* community more critically than it will never affect the common citizenry of the country. In this backdrop, it is imperative to analyse how the indigenous peoples' right to environment is recognized in International Law.

### **The recognition of the indigenous peoples' right to environment in International Law**

The historical and personal experiences of the indigenous communities, no matter where they are from, share at the very least, 'the notion that they have all been oppressed in similar ways for similar motives by similar state and corporate entities'.<sup>172</sup> The histories these indigenous

<sup>172</sup> Ronald Niezen, *The Origin of Indigenism: Human Rights and the Politics of Identity* (University of California Press 2003) 4 – 5; See also, Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Earthscan 2008); Jessie Hohmann and Marc Welle, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018).

communities share, tainted with ‘state-sponsored genocide, forced settlement, relocation, political marginalization, and various formal attempts at cultural destruction’<sup>173</sup> are the fundamental reasons that induced the international organizations and human rights bodies to recognize and strengthen the rights of indigenous communities associated with their specific needs, particularly, their inherent rights towards their native lands.

The International Labour Organization (hereinafter referred to as ILO) Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries in 1957 and the accompanying ILO Recommendation (No. 104) of the same year, recognized the rights of indigenous communities towards their traditionally inhabited lands ‘at a time when scholars still commonly referred to the subjects of their investigations as primitives.’<sup>174</sup> Article 11 of the Convention recognizes the ownership rights of the indigenous people over the lands that they traditionally occupied. Article 12 recognizes that the indigenous people shall not be removed from their habitual territories without their free consent except in accordance with national laws and policies. It further states that if these populations are removed from their native lands as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them and be fully compensated for any loss

<sup>173</sup> *ibid*, 5.

<sup>174</sup> *ibid* 5.

or injury resulted due to such removal.

The Convention No. 107 was revised by the ILO Convention on Indigenous and Tribal Peoples No. 169 of 1989. The convention perceived the integration and assimilation approach adopted in the Convention No. 107 as anachronistic since it will cause the indigenous peoples' ways of life to go into extinction.<sup>175</sup> As manifested in its preamble, the Convention No. 169 seeks to recognize 'the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live'. Article 4 of the convention recognizes the necessity of adopting the special measures to appropriately safeguard property, culture, and environment of the indigenous people. Article 7 imposes a duty on the government parties to carry out studies to assess the social, spiritual, cultural, and environmental impacts of planned developmental activities on the indigenous communities in consultation with them and to use them as the fundamental criteria for the implementation of such activities. Sub-article 4 of the same article emphasizes that the governments shall take measures to protect and preserve the environment of the territories of indigenous people. Articles 14 and 15 respectively recognize their ownership and possession rights over the lands which they traditionally occupy and to use the natural resources in such lands. Article 16 states

<sup>175</sup> S James Anaya, *Indigenous Peoples in International Law* (OUP 2000) 47.



that they shall not be removed from the lands that they occupy, and relocation shall be done only with their free and informed consent. Thus, the Convention No. 169 marks a clear progression from the Convention No. 107 with the strong provisions to advance indigenous peoples rights to have their environment preserved.

The United Nations Declaration on the Rights of Indigenous Peoples (hereinafter referred to as UNDRIP)<sup>176</sup> marked another significant milestone in the recognition of the indigenous people's right to environment. The declaration requires prevention of and redress for any cultural deprivation, removal of lands, dispossession of resources, forcible transfer, or discrimination.<sup>177</sup> It further acknowledges the right of indigenous people to develop and control their traditionally inhabited lands and resources.<sup>178</sup> States are imposed with the duty to protect these lands in accordance with the customs and traditions of the indigenous people.<sup>179</sup> In terms of the declaration, the government shall obtain the free, prior and informed consent of the indigenous people before relocating them, taking their properties, adopting legislation affecting them or otherwise use or develop resources belonging to them.<sup>180</sup> Article 27 of the declaration further requests the states to establish a procedure for recognition and adjudication of

<sup>176</sup> The United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) A/61/295.

<sup>177</sup> *ibid.*, art 8.

<sup>178</sup> *ibid.*, art 26.

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*, art 10, art 11, art 19, art 28, art 29, art 32.

the rights of indigenous people pertaining to their lands, territories and resources.<sup>181</sup>

The UNDRIP undoubtedly marks a victory for the thousands of aboriginal communities to have their rights towards the native lands and the environments guaranteed and safeguarded. Moreover, the principle of free, prior and informed consent embodied in the declaration ensures that the information on any proposed initiative and its likely impacts are properly conveyed to the indigenous communities, guarantees their meaningful participation in the decision-making process and empowers these communities by providing a veto power over the laws that may affect them.<sup>182</sup> The declaration however is a non-binding instrument in international law and therefore, no claim against the violation of these crucial rights can be asserted against a State. Still, some authors argue that the rights under the declaration represent customary international law and therefore, are binding.<sup>183</sup>

Apart from these crucial international conventions and declarations, the rights of indigenous people towards the environment are recognized in a long list of judicial decisions around the world. While an exhaustive list of cases can be cited, the paper draws attention only to a few

<sup>181</sup> *ibid*, art 27.

<sup>182</sup> Cindy S Woods, 'The Great Sioux Nation v The "Black Snake": Native American Rights and Keystone XL Pipeline' [2015 – 2016] *Buffalo Human Rights Law Review* 67, 88.

<sup>183</sup> Hannah White, 'Indigenous Peoples, the International Rend Towards Legal Personhood for Nature, and the United States' [2018] *American Indian Law Review* 129, 134.

recent cases. In *Indigenous Communities Members of the Lhaka Honhat Association vs. Argentina*, which considered a claim brought by several indigenous communities for the recognition of their land ownership, the Inter-American Court of Human Rights held that Argentina had violated the rights to communal property, to cultural identity, to a healthy environment, to adequate food and to water owing to the ineffectiveness of state measures to halt activities that harmed those rights.<sup>184</sup>

In *Kaliña and Lokono Peoples v. Suriname*, Kaliña and Lokono indigenous people claimed that their rights were violated since the state failed to establish a legal framework that recognizes their right to collective ownership of their traditionally inhabited lands, territories and natural resources.<sup>185</sup> The court held that the State had violated the rights to collective property, cultural identity and participation in public affairs of the victims, mainly by preventing their effective participation and their access to some of their traditional territory and natural resources in the Galibi and Wane Kreek Nature Reserves.<sup>186</sup>

It shall also not be forgotten that certain countries even conferred legal rights on the nature to protect the invaluable resources for the sake of indigenous communities. The most notable is New Zealand where it declared the Whanganui River<sup>187</sup> and Te Urewera

<sup>184</sup> (2020) IACtHR Case 12.094 Report No 2/121.

<sup>185</sup> (2015) IACtHR Case (Ser C) No 309.

<sup>186</sup> *ibid.*

<sup>187</sup> Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017.

National Park<sup>188</sup> as legal persons, having all the rights, powers, duties, and liabilities of a legal person<sup>189</sup> and any harm inflicted upon these natural resources as harm inflicted on the Maori tribe.

When compared with the international framework pertaining to indigenous people's right to their traditionally inhabited lands, natural resources and the environment discussed above, it is well apparent that the Sri Lankan legal framework carries many gaps which shall be immediately filled to protect at least the last of the *Vedda* community. None of the rights recognized in the 3 significant international instruments discussed in the preceding part and the judicial decisions receives express recognition in the supreme law of the country. As far as the rights of nature is considered, it seems even beyond the imagination of the legislature of the country. Given the overriding importance attached to the indigenous communities in the international arena and the growing challenges that the *Vedda* community in the country face in protecting and preserving their environmental heritage, there cannot be a better time to bring the indigenous people's right to environment within the ambit of the Constitution of Sri Lanka.

### **Suggestions for Law Reform**

What is the best method to confer the rights on the

<sup>188</sup> Te Urewera Act, 2014.

<sup>189</sup> Te Urewera Act, 2014, s. 11 and Te Awa Tupua (Whanganui River Claims Settlement) Act, 2017, s. 14.

indigenous communities to environment in Sri Lanka? The authors suggest that the first step towards this end will be the express recognition of the rights to life and the environment in the Constitution. While the judicial attempts to create an implied right to environment is extremely appreciated, the heights that the judiciary can reach in safeguarding the rights of the people towards the environment, preserving natural resources, and conferring concrete rights on the indigenous communities towards their traditionally inhabited lands with the express recognition of these two rights in the Constitution would be unimaginable.

Secondly, the authors suggest that the rights embodied in the UNDRIP shall be given an express domestic recognition through a separate piece of legislation. The legislation shall particularly emphasize the principle of free, prior, and informed consent of the indigenous communities with regard to any decision affecting them. The legislation shall ensure that the *Vedda* community is protected and their way of life and heritage is preserved rather than attempting to integrate them into the modern way of life. In doing this, the right of each member of this aboriginal community to pick the life that they want; either staying in their native lands following the tradition or being integrated into the modern societies shall not be recognized and respected. The enactment of this legislation will constitute any violation of the rights recognized therein an infringement of article 12 of the Constitution.

Thirdly, Sri Lanka can declare the last remaining native lands of the *Vedda* communities as legal persons with separate legal personalities and rights following the New Zealand approach. This will enable the community to have these invaluable natural resources and the trees, rivers, mountains, animals, birds, insects, wind and all which form a part of it protected for their inherent and intrinsic value. This will not only benefit the *Vedda* community but the entire humanity and the environment itself, both present and future.

### **Conclusion**

With the emergence of sustainable development and human rights protection concerns around the world, the rights of the indigenous community started to receive widespread attention in the international legal arena. Today, the rights of indigenous communities towards the environment are recognized in 3 basic international instruments and a significant number of case laws. Notwithstanding these developments, the indigenous community in Sri Lanka, *Vanniyalaththo*, were ripped off of and ousted from their traditionally inhabited lands owing to developmental activities. The lives of the *Vedda* community are so linked with their native lands and the environment and without them, they will eventually be absorbed by urbanization. The realization of the right of this community towards the environment has proved to be an unending struggle given the silence of the Constitution regarding any such right or rights to environment and life in general. While the judiciary has interpreted the existing

fundamental rights to create an implied right to environment, the specific right of the community towards their traditionally inhabited lands and the environment has not even been impliedly recognized. Therefore, the paper argues that the indigenous people's right to environment in Sri Lanka shall now receive express legal recognition through Constitutional and legislative reforms. *Vanniyalaththo* are not a set of tribal people, but living proof of our historical, cultural and ecological heritage, and it is our solemn duty to protect them and their way of life.