



National Law University Odisha



CONSTITUTIONAL LAW SOCIETY

THE CONSTITUTIONAL POST

JULY
AUGUST 2026

T A B L E O F C O N T E N T S

PREFACE	01
ACKNOWLEDGEMENT	02
EDITOR'S CORNER	03
ARTICLES	
Identity after Amendment: Can Legislative Change Undo Constitutional Recognition?	05
Can The State Decide What We Consume? The Constitutional Limits of Government Regulation	07
Freedom of Speech in the Panopticon	09
Who Gets to Judge: An Analysis of Judicial Appointments at the Trial Level	11
The Footpath Question Just Got Answered	13
Is Marriage the Boundary for Protection Against Cruelty?	15
From Franchise to Everything Else: How a Voter-Roll Deletion Became an Indictment	17
Vanashakti v Union of India: A Constitutional Tussle Over Environmental Regulation	20

PREFACE

The Constitutional Law Society is delighted to present the July-August Issue of the Constitutional Post. CLS is pleased to put across their efforts in making this issue of the Constitutional Law Post relevant, contemporary and engaging.

The idea of the Constitutional Post is to familiarize students and academicians with the fundamentals of law while exposing them to contemporary developments. We have received many positive words about this initiative, and we are very thankful for the support that we have got ever since its inception.

We look forward to receiving any feedback from you.





ACKNOWLEDGEMENT & DISCLAIMER

The Constitutional Law Society (CLS) is indebted to National Law University Odisha (NLUO) for giving us the platform to think freely and indulge in these activities. Without the support of Prof. (Dr.) K. Vidyullatha Reddy (Vice-Chancellor of NLUO) and Prof. Rangin Pallav Tripathy (Registrar of NLUO), the creation of 'The Constitutional Post' would not have been possible. Ms. Rishika Khare (Assistant Professor of Law at NLUO and Faculty Advisor of CLS-NLUO) has been involved with the evolution of this idea right from its concept development stage and her contribution has been immensely helpful for making this compendium. We also extend our gratitude to the eminent jurists, writers, and journalists who have contributed to the readings that are referred to in these write-ups for being vocal about their thoughts through their writings, which have helped us to further our goal for the dissemination of Constitutional Law knowledge to the masses among students, budding lawyers, and young legal professionals.

The resources used and referred to in this article have been compiled from a host of different sources. The editors of this issue do not intend in any way to claim the rights to these sources. All of these rights exclusively belong to the host websites, pages and other online resources. The Constitutional Law Society expressly maintains that these sources have been used strictly for educational and non-commercial purposes. It is also to state that the Constitutional Law Society does not wish to endorse any opinion on these matters, and these updates are just a means to facilitate information and relevant articles to members of the legal fraternity so that they are familiarised with the contemporary developments in Constitutional Law.

EDITOR'S CORNER



The July-August edition of the CLP covers several important decisions of the Supreme Court expanding rights, from the roads to homes. Many of the pieces also cover concerning developments across India, which have far-reaching implications on several different rights such as to self-identification, privacy, expression, due process and more.

In other news, the Supreme Court disposed of its suo moto petition against NCERT and others, holding that with the recall of the “offending publication”, apologies tendered and reconstitution of the National Syllabus and Teaching Learning Material Committee, the object of the petition had been achieved and observing that criticism of the judiciary must be voiced in a fair and rational manner through appropriate means. The Supreme Court has admitted a PIL seeking a declaration that constitutional functionaries shall lose rights to entitlements if they tender resignation to avoid removal or no confidence motion proceedings and sought the central government’s response to the same.

Across borders, the Ukrainian parliament is set to vote on a draft law making changes to the judicial system and status of judges, and corresponding amendments to the constitution and is also seeking to amend its procedural laws to increase efficiency at the High Anti-Corruption Court. Meanwhile, the South African Constitutional Court ruled that failures in community participation while exercising exploration rights for off-shore oil and gas could not be remedied after the fact and consultation could not be merely demonstrative, while the Indonesian Constitutional Court held that the State’s nutritious meals programme could not draw its funding from the constitutionally mandated education budget.

EDITOR'S CORNER



While quashing a preventive detention order against a graduate from Delhi University in connection with the protest by industrial workers in Noida, the Allahabad High Court observed that bureaucrats must remain loyal to the Constitution and bound by its edicts while exercising their powers, rather than being loyal to the political executive. The Noida DM has already moved the apex court against the order. Amidst several protests and reciprocal criminal actions under various preventive detention laws, the questions of procedural safeguards and constitutional rights remain precariously in the balance.



IDENTITY AFTER AMENDMENT: CAN LEGISLATIVE CHANGE UNDO CONSTITUTIONAL RECOGNITION?

-Manasvi Singh

An apparently administrative question concerning the validity of transgender identity cards has opened a wider constitutional debate before the Supreme Court. What is the fate of the already acknowledged rights and legal positions when new rules are introduced into the existing legal setting? This question comes into focus in the context of the Transgender Persons (Protection of Rights) Amendment Act, 2026, which made considerable amendments to the provisions that were included in the 2019 Act. In particular, the amendment modifies the definition of “transgender person” by restricting its meaning, abolishes the explicit recognition of the right to self-determined gender identity, and institutes the necessity of the involvement of the medical board in issuing certificates as to a person’s transgender identity.

The Supreme Court, in the case of National Legal Services Authority v. Union of India, concluded that transgender individuals possess a constitutional right to make their choice when it comes to their gender identity. The ruling is founded on the provisions of Articles 14, 15, 16, 19(1)(a), and 21 of the Constitution. Furthermore, on 17 August 2026, the Union Government assured the Supreme Court that transgender identity cards issued prior to the 2026 Amendment would continue to remain valid pending the determination of issues.

The question of the legitimacy of existing identity cards is another important factor in this case. It is crucial to note that people who have previously obtained recognition did so using such powers and procedures available as of the date of recognition. Thus, the problem lies not only in the circumstances of existence of a new legal regime that may be responsible for considering future applications, but also whether the future legal development can revoke the status already acquired by the persons in question.

In this regard, the issue of legal certainty and good faith becomes crucial especially when it comes to the questionable recognition of somebody's identity. Therefore, the Court will have to clarify the interplay between legislative power and constitutional rights.

Parliament has wide-ranging legislative powers but this power is still limited by Part III of the Constitution. If gender identity is protected by the Constitution, statutory recognition can no longer be viewed simply as an administrative matter. The Supreme Court's ruling will have implications that will extend to determining the limits of legislative changes in the area of rights having constitutional protection.

The significance of the dispute therefore extends beyond the validity of an identity card. The issue at stake relates to the constitutional concept of identity. The outcome of the Supreme Court's decision could impact not only whether the 2026 amendment is valid, but whether legislative change has the capability to alter rights that have also achieved constitutional status.



CAN THE STATE DECIDE WHAT WE CONSUME? THE CONSTITUTIONAL LIMITS OF GOVERNMENT REGULATION

-Manthan KB

The recent actions by the state governments across the country including the banning of chewable tobacco, nicotine products, tobacco-containing gutkha and pan masala products along with the regulatory action against products marketed as “energy drinks” in Rajasthan citing health concerns have sparked a new wave of concerns on how much the state can actually regulate where and what the citizens can consume.

The constitution provides a framework to restrict products which pose harm to the public. Article 47 directs the State to act towards the “prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health,” while Article 21 has been interpreted broadly to protect conditions necessary for a dignified life. At the same time, businesses have protection under Article 19(1)(g), subject to reasonable restrictions in the public interest under Article 19(6). Therefore, the State can restrict harmful products, but the restriction must satisfy constitutional standards of reasonableness and non-arbitrariness under Article 14.

The regulation of gutkha and pan masala is a fine example of this balance. Under Section 30(2) of the Food Safety and Standards Act, 2006, State Food Safety Commissioners can prohibit injurious food products in the interest of public health. FSSAI regulations prohibit the use of tobacco and nicotine as ingredients in food products. Several states have consequently prohibited the manufacture, storage, sale and distribution of gutkha and pan masala containing tobacco or nicotine. These restrictions are justified on the basis that these products have been linked to serious health risks.

However, the mere existence of a legitimate public-health objective does not automatically make every prohibition constitutional. If the mere fact that a substance is harmful were sufficient to justify a ban, recreational substances such as alcohol, cigarettes and several other products would necessarily have to be prohibited across the country. Yet Indian law adopts a more nuanced approach. Cigarettes, for instance, are heavily regulated through restrictions on advertising, public smoking, sale to minors, etc. rather than being completely prohibited. Likewise, alcohol is also regulated by the State, despite the Constitution itself recognizing its harmful effects in Article 47. This proves that the relevant question is not merely whether a product is harmful, but whether the specific restriction being put in place is justified.

The Supreme Court in Godawat Pan Masala Products v. Union of India questioned the authority of individual states to impose blanket bans under the then existing food-safety framework. The case demonstrates that while the government can ban harmful substances, public-health objectives must still operate within statutory competence. And where a restriction is imposed for public health, its extent must correspond with the danger posed. A restriction cannot be broader than the harm it seeks to address and must comply with reasonableness under Article 19(6). The distinction between tobacco-containing products and ordinary pan masala is therefore important; a restriction must target the actual harm rather than an unnecessarily broad category.

The recent controversy demonstrates another form of state intervention. In 2026, FSSAI issued notices to several major beverage companies which use the term “energy drink” and alleged that these claims were misleading. FSSAI stated that India does not have a notified standard for the category and that claims such as improving energy, focus or general weakness are not permissible for ordinary food products. Here, the regulation is less about preventing consumption and more about preventing consumers from being misled.

The question therefore is not simply whether the state can regulate what its citizens can consume, it is whether these regulations are reasonable. Where less restrictive measures can effectively address the harm, they should be considered before resorting to a blanket ban.



FREEDOM OF SPEECH IN THE PANOPTICON

– Sangjam Chakraborty

Delhi Police recently claimed that, at the recent Jantar Mantar protests, their facial recognition system identified more than 2,800 “criminals”. On a surface level, it sounds like a police success: scan and catch the bad guys, keep everyone safe. Look a little closer, and the truth lies in who is being watched, and what is being done to all who didn’t ask to be scanned.

Live facial recognition involves capturing images of every face visible in a camera’s field of view and storing them as a biometric template, and then matching them against a watchlist. The system needs to process everyone as it is searching for a few people. At a protest, that means that every person who shows up has their face run through a police database, whether or not they’ve done anything.

This is where Michel Foucault’s concept of the panopticon becomes relevant. Foucault said there was a prison where a single watchtower could see every cell, but no one in the prison would ever know when he or she was actually being watched. So, they start policing themselves. This facial recognition at protests is the same. Note that you do not need to know whether or not an alert was triggered for your face. You only have to be aware of the fact that their system is working and you’ll think twice before showing up.

This has been highlighted by courts in other countries. In the UK, the Bridges case against South Wales Police ruled that people’s facial images captured near a protest were being used to store biometric data without their consent, and that this form of surveillance was deterring people from using their rights to freedom of expression.

In Glukhin v. Russia, the European Court of Human Rights was even stricter: It held that relying on facial recognition for identifying a “lone” and peaceful protester was disproportionate and that no law existed that would control when or how facial recognition could be used in the future against people.

This warning has also been pronounced by the Supreme Court of India itself. In the landmark Puttaswamy case, the Court found that privacy does not disappear in public space as it attaches to the person and not to the place where it is associated. It warned that pervasive State profiling, tracking, or data-seeding “can have a stultifying effect on the expression of dissent and difference of opinion, which no democracy can afford.”

So, when Delhi Police says it has identified 2,800 criminals, the more pertinent question is how many thousands of non-criminals were scanned with them, recorded somewhere and casually reminded everyone that the tower is always facing the people. That’s the idea behind the reminder. Arresting a protester is not necessary to shrink a protest. All you need is to make them hesitate about whether to come.



WHO GETS TO JUDGE: AN ANALYSIS OF JUDICIAL APPOINTMENTS AT THE TRIAL LEVEL

– Snehan

On 21st of August, 2026 a bench of Justices Surya Kant, Augustine George Masih, and K. Vinod Chandran, in a 2:1 verdict, modified its earlier order dated 20.05.2025 which had restored the 3-year practise at the Bar rule as an eligibility criterion to apply for the statewide examinations of Civil Judge (Junior Division). The order delineated, amongst other things, a transitional period from the Court's earlier judgment up to 31.03.2027, as a one-time measure, to permit fresh law graduates to apply for judicial services, while simultaneously relaxing the 3-year rule to having at least a year of standing at the Bar once the said transitional period lapsed. It would seem that the saga has completed a full circle, but what remains is an elusive understanding of judicial appointments to the lowest rung of the court-system.

Article 124(3) provides for the eligibility criteria of a Supreme Court Judge. An advocate with a standing of 10 years at the Bar (in a High Court, or two or more such courts in succession) is fit to be a Judge of the Supreme Court of India. *Mutatis Mutandis*, Article 217(2) provides for a similar eligibility criteria for the High Courts. Interestingly, the Constitution remains silent as to the eligibility criteria for appointments to the District Judiciary. The only relevant mention can be found in Article 233 which deals with the appointment of District Judges. Therein, an advocate with not less than 7 years of standing at the Bar can be recommended by the High Court to be appointed in the District Judge cadre (this has materially translated into public vacancies for the Higher Judicial Services).

The resultant vacuum constrained the First Law Commission (1955-58) to recommend in its 14th Report, a standing of 3-years at the Bar as a prerequisite to apply for the position of Civil Judge (Junior Division). This recommendation

received its constitutional imprimatur only in 1993 when the Supreme Court, for the first time, declared a minimum of 3-years of standing at the Bar as a prerequisite. The Court's reasoning was that Judges from their very first day in office have to deal with questions of life, liberty, property, and reputation of litigants and that neither knowledge derived from books nor pre-service training can be an adequate substitute for the first-hand experience of the working of the court-system.

Since 1993, the highest court of the land has time and again oscillated between the need for prior first-hand experience in the court-system, and the need to attract the best talent for judgeship. In 2002, accepting the recommendations of the Shetty Commission, it was the Supreme Court that had done away with a prior standing at the Bar as a qualification to attract the best of the herd for judgeship. The question that remains unanswered then is not whether the prerequisite of prior standing invariably harms the marginalised, and dampens the Judiciary's own diversity. But, whether a 1 to 3 years of standing at the Bar truly contributes into the faculties that are required for a Judge.



THE FOOTPATH QUESTION JUST GOT ANSWERED

– Harsh Kumar

On June 19, 2026, the Supreme Court in Maniyar Iliyaz @ Shaik Riyaz v. P. Ayyappan ruled that walking on a safe, marked footpath is a fundamental right.

It began as a compensation case. A father was walking his five-year-old son to school when a tanker hit the child from behind — there was no footpath on that road, and nowhere safe to cross. The Motor Accident Claims Tribunal gave the family ₹7.82 lakh. The High Court later reduced that to ₹4.70 lakh. The family had only appealed over the amount. Justices P.S. Narasimha and Atul S. Chandurkar went further and ruled that pedestrians have a fundamental right to safe footpaths.

The Bench held that public authorities have an enforceable duty to build and maintain pedestrian infrastructure, and that citizens can seek restitutionary remedies when they don't. It re-registered the case as a writ petition under Article 32, called Re: Fundamental Right to Walk and Footpath, and directed the Union government to draft a national legislative framework for pedestrian rights. It also raised the appellant's compensation to ₹11.44 lakh. Justice Narasimha wrote that Indian urban planning has run for decades on what he called an "elitism of wheels" — infrastructure designed around whoever could afford a vehicle, with pedestrians left whatever space was left over.

The case that defined this area of law until now was Olga Tellis v. Bombay Municipal Corporation (1985). That ruling protected the person living on the pavement — a pavement dweller's right to livelihood, and to a hearing before eviction. Maniyar Iliyaz protects the person trying to walk down it instead. Both claims now sit on the same strip of concrete, and the June judgment doesn't say what happens when they run into each other.

Punjab had already been moving this way on its own. A 2022 order from the Punjab and Haryana High Court required agencies like the National Highways Authority of India and the state's public works departments to build footpaths and cycle tracks into every new road project. The Supreme Court has now applied that same requirement nationwide, not just in states where a High Court had already ordered it.

The ruling gives people a way to sue when a footpath disappears under encroachment or construction debris. Someone still has to clear the debris — usually the local municipal corporation, and most of them have been slow to do it for years. That part hasn't changed. What's different now is that they have less legal room to ignore the problem.



IS MARRIAGE THE BOUNDARY FOR PROTECTION AGAINST CRUELTY?

– Prathiksha Gowda

On 3rd August 2026, in the case of Dr Lokesh B.H. v State of Karnataka, the Supreme Court held that protection of women against cruelty under Section 498A of the Indian Penal Code, 1860 (re-enacted through Section 85 and 86 of Bharatiya Nyaya Sanhita, 2023) that was earlier applicable only to a legally valid couple may now be used in ‘live-in relationships’ that qualify as “relationships in the nature of marriage”.

In 1983, the Government introduced S.498A among others, with the Criminal Law (Second Amendment) Act, 1983. Cruelty could be claimed by the wife against ‘the husband or a relative of the husband’. However, with the passage of time, it was seen that this language excluded an entire category of intimate partnerships which are common and ordinary in urban India - live-in relationships.

Earlier, in a 2010 case of D.Velusamy vs D.Patchaiammal, the Court set out what constitutes a “relationship in the nature of marriage” to claim civil remedy under the DV Act, 2005. It set down conditions that must be satisfied to be treated like a legally wedded couple. This includes that they are “holding out as spouses”, being eligible to marry, cohabiting voluntarily in a shared household, and maintaining enough permanence to rule out a weekend arrangement or one night stand. Additionally, a comparison is set out with the concept of ‘common law marriages’ or ‘de facto marriages’, that are recognised in some countries. Building on the earlier jurisprudence, Justice Sanjay Karol adds an additional qualifier that is worth scrutinizing closely. It relocates the question from a mere determination of whether the relationship was marriage-like, as required for civil remedies under the DV Act to a question of whether parties intended to marry, to claim remedy against an offence under S498A. This question places an initial evidentiary burden of establishing the nature of the relationship and the intent to marry on the woman alleging cruelty.

Constitutionally, this shift can also be linked to the idea of ‘decisional autonomy’ from Article 21 interpretation in the Puttaswamy Case, where the choice of whom and how one wishes to live is part of their individual liberty. At the same time, Article 14 raises the question of whether women facing the same kind of domestic cruelty should receive different protection merely because one relationship is a marriage and the other is a relationship in the nature of marriage. Since the harm is the same, protection should be based on the nature of the relationship, not merely its formal label.

The Court provided specific filters for what constitutes a live-in partner as a ‘husband’, meanwhile when it extended ‘relative’ to ‘relative of live-in partner’ it added no equivalent filter. It only says that the same conditions as earlier would apply. There’s no discussion of whether a live-in partner’s family occupies anything like the same structural position that in-laws occupy in a joint or co-resident marital household. This asymmetry matters because the Court’s own reason for bringing relatives within the ambit of 498A assumes a particular domestic setting, where there are relatives who share a household with the woman, with routine access to her and often real economic control. However, a live-in partner’s parents, usually living elsewhere and largely absent from the couple’s daily life, do not obviously fit that description, yet the judgment brings them in on identical terms.

In practical terms, women who face domestic cruelty by their live-in partners now no longer have to rely on civil remedies under the DV Act. This safeguard cuts both ways, proving ‘intent to marry’ which is one’s internal state of mind is not obviously easy to establish and may turn out to be just as contested a threshold as marriage itself. While the judgment is not free of flaws, it is keeping pace with how people actually live today, rather than holding back the law to when it was made.



FROM FRANCHISE TO EVERYTHING ELSE: HOW A VOTER-ROLL DELETION BECAME AN INDICTMENT

—Vigaas Singh

West Bengal's Food and Supplies Department began treating an SIR deletion as grounds enough to cancel a ration card from June 2026, when an order tied roughly 63 lakh Public Distribution System cards to voters marked absent, shifted, dead or duplicate in the electoral roll. The Calcutta High Court has pushed back in stages: it first declined to intervene in a public interest petition for want of any actually affected person, then granted relief once individual litigants turned up, and was ordering ration supplies restored wherever they had been cut off solely because of a deletion till the matter is not decided, while the Supreme Court clarified that a person's place on the voter list has no bearing on their entitlement to subsidised food. Food, though, is only the loudest complaint. The Special Intensive Revision ultimately deleted more than 90.80 lakh electors from Bengal's rolls, and a growing share of the fallout is now landing before the Calcutta High Court not as ration disputes but as career and travel emergencies.

The job losses read like a catalogue of ambitions interrupted due to the state's negligence. Akash Sarkar, an Agniveer recruit selected for the Indian Army, found his name deleted from the electoral roll during the SIR, along with his father Faruk Sarkar's. Because of that deletion, the police refused to process his Police Clearance Certificate, a document he needed before he could join the Army, and told him it would stay on hold until his SIR appeal was resolved. It took a nudge from the Calcutta High Court to move things: Justice Bivas Pattanayak disposed of his writ petition on June 17, directing the SIR Appellate Tribunal to decide both his and his father's appeals without delay. The Tribunal has since granted him relief, clearing the way for his certificate to finally go through.

Mehebab Zahedi from Malda had cleared NEET UG and needed a domicile certificate for her Bachelor of Dental Surgery admission counselling; the deletion of her name from the electoral roll during the SIR (over a mismatch between her father Rejaul's name in the 2002 roll and the current one) meant local authorities would not issue one, and the High Court's stop-gap, a "temporary" certificate from the Chanchal SDO contingent on an undertaking to surrender it if she fails before the Appellate Tribunal, is tied to an appeal the tribunal has been asked to dispose of within two weeks. Movement outside the state, or outside the country, throws up the same problem in a different key.

R. Rajagopal, former editor of The Telegraph, spent over a hundred days chasing a passport renewal that should have taken weeks. Police verification stalled after his name, deleted from the Ballygunge rolls because the SIR could not trace it, or his late father's, to the 2002 electoral list, triggered what he was told was an "adverse report." His matriculation certificate and other documents were submitted and found insufficient, all while his appeal sat before a tribunal. Rajagopal, at least, had a public platform to make his ordeal count. Imagine the condition of a man working as a driver in Saudi Arabia found his passport renewal blocked after his name was deleted from the electoral roll during the SIR, with his passport due to expire later in 2026 and his job abroad at stake. Justice Krishna Rao directed the SIR Appellate Tribunal to dispose of his pending appeal within two weeks so the renewal could go through.

Of the 38,10,620 appeals filed against exclusion from West Bengal's rolls, barely 82,782, about two percent, had been decided as of August 7, and more than 91 percent of those ended with the voter's name restored, suggesting the original exclusions were wrong far more often than they were right. Asked on August 11 to fix a firm deadline for the tribunals, the Supreme Court declined, choosing instead to seek fuller disposal data from the Election Commission and monitor the process informally.

That refusal sits oddly next to the Court's own judgment in Association for Democratic Reforms v. Election Commission of India (2026 INSC 564), delivered on 27 May 2026 by a bench of CJI Surya Kant and Justice Joymalya Bagchi in the Bihar SIR case.

The judgment upheld the SIR exercise as proportionate, but drew a careful line around what a deletion from the voter list actually means. It held that the consequence of such a determination is limited. It affects the individual's entitlement to be included in the electoral roll, and thereby their right to participate in the electoral process. It is never a final word on citizenship, because citizenship touches an individual's dignity and standing under Article 21 and cannot be settled by a body with no mandate to settle it (paras 168 to 177).

When the Commission doubts a person's citizenship, the judgment does not let the matter rest there, it directs the Commission to refer that person to the 'competent authority' under the Citizenship Act, 1955, within four weeks, and requires that authority to decide the question, "preferably before the next Parliamentary, Assembly, Local Body elections, whichever is earlier", in the Court's own words (Direction (h), paras 178 to 179). Until that adjudication concludes, the deletion is from the voter list which has no bearing on one's status of being a citizen.

The only deadline the Court actually wrote into its order was for resolving doubts about citizenship, not for anything else. What is happening in West Bengal inverts that design. Ration cards, recruitment files and travel documents are being frozen over deletions that were never citizenship disputes at all, without any referral to the Ministry of Home Affairs and without the four-week clock the judgment prescribed ever starting to run. And the one mechanism that could still catch these errors on appeal, the tribunals, is the part the Supreme Court has now declined to hold to any timeline whatsoever.



VANASHAKTI V. UNION OF INDIA: A CONSTITUTIONAL TUSSLE OVER ENVIRONMENTAL REGULATION

—Mahi Jain

This case concerns a Public Interest Litigation filed, challenging two documents: a Notification dated 14th March 2017 and, an Office Memorandum dated 7th July 2021, issued by the Ministry of Environment, Forest and Climate Change. These instruments allowed industries and developers to obtain Environmental Clearance (EC) after construction had begun, sometimes even after a project was complete in its entirety. This practice of ex-post facto or retrospective Environmental Clearance was working parallel to and breaching the Environment Impact Assessment Notification, 2006, which makes prior EC compulsory before the commencement of any project.

Court's Reasoning and Decision

Earlier, a two-judge bench had held that ex-post facto clearance is completely alien to environmental jurisprudence in the Vanashakti-I Judgment. In a review petition, a three-judge Bench recalled that judgment- this came to be Vanashakti-II.

A fresh three-judge bench of Chief Justice Surya Kant and Justices Joymalya Bagchi and V.M. Pancholi delivered the concluding judgment, Vanashakti-III in July, 2026.

This Judgement provided that the projects commencing construction or operations without EC cannot be retained through post-facto approval. However, it also held that Section 3 of the Environment (Protection) Act, 1986 empowers the Union Government to introduce a delegated legislation which can be narrowly tailored for the exceptional cases where post-facto EC is justified due to public interest. However, the Hon'ble Court clarified, this cannot be done through an executive office memorandum as was the case with the OM dated 7th July 2021.

Justice Bagchi framed the central issue in this case as one of balance between “an existential right of all living beings both present and future to a pollution-free environment” and “an aspirational right to development of a sixth of the world’s population”

Critical Analysis

The real complexity of this judgment, however, lies not in choosing between development and the environment, but in deciding whether environmental law can tolerate rampant violations under a continuing regime of post facto clearances because the non-clearance projects have become a physical and economic reality. In this regard, the hon’ble court adopts “eco-centric proportionality”, recognising that environmental protection is not merely an interest to be weighed against private profit, but that in exceptional cases, demolition may itself produce fresh environmental harm. This reasoning, however, should not weaken the precautionary principle.

In Vellore Citizens’ Welfare Forum v. Union of India, the Supreme Court recognised the precautionary principle as an integral part of the environmental jurisprudence. Prior environmental clearance is the force that gives this principle a practical form because screening, scoping, appraisal and public consultation occur before the project causes any real environmental harm.

Alembic Pharmaceuticals Ltd. v. Rohit Prajapati similarly emphasized that ex-post facto clearance cannot simply convert a violation into a lawful act after the environmental consequences have already occurred. This, in fact, leads to a process of environmental erosion at the cost of development. This is also demonstrated by the fact that payment of compensation becomes the price of retrospective legality. In conclusion, rendering rising environmental corrode and the agent causing it simply paying their way out. Compensations and fines then become part of the “legal” procedure to escape the damage caused and the ex-post facto clearance becoming nothing but a mere stamp. This does not prevent the harm, but rather encourages it and the precautionary principle risks becoming a post-damage financial step.

While the current judgment does offer some respite, an absolute status quo ante approach does not rid us of the root of the problem and the causal agents.

Where the court offers legal channels like narrowly tailored delegated legislation for exceptions, this approach creates its own constitutional issue- the fait accompli. Because demolition may generate construction waste, destroy employment and impose losses on public at large. Nevertheless, this cannot be the sole reason to allow an ex-post facto clearance. A construction company which starts without clearance may deliberately create sunk costs as well as environmental harm through demolition and then ask the Court to treat those costs as a reason against demolition. That would completely inverse the principle environmental law stands on.

CONTENT

Harsh Kumar

Mahi Jain

Manasvi Singh

Manthan KB

Prathiksha Gowda

Sangjam Chakraborty

Snehan

Vigaas Singh

EDITING

Ananya Dutta

DESIGNING

Bhanuni Saini



STAY CONNECTED WITH CLS:



clsnluo.com



[nluo_cls](https://www.instagram.com/nluo_cls)



Constitutional Law Society