**A Rose by any Other Name?**

**Explaining the Absence of Constitutional Environmental Rights in Sri Lanka**

Josh Gellers

University of California, Irvine

**Abstract**

Why do some countries adopt constitutional environmental rights while other do not? The results of a large-N survival analysis indicate that the likelihood that a country adopts a constitutional environmental right is related to at least five factors—GDP per capita, international civil society influence, level of democracy, population density, and protection of civil liberties. However, in order to reveal factors not captured by quantitative techniques and better understand the specific causal mechanisms, a more granular approach to understanding the phenomenon is needed. Therefore, in this paper I offer an analysis of Sri Lanka, a most-likely case (based on the statistical model) which does not have constitutional environmental rights. Through a qualitative content analysis of seven interviews conducted in Colombo and evidence from scholarly literature, I find that constitutional environmental rights were not included in any of Sri Lanka’s governing charters mainly due to the existing capacity of domestic law and policy to address environmental issues, politicization of the constitutional reform process, and the emphasis placed on certain controversies during the drafting of a new constitution. This research provides important insights into constitutional design and how international norms translate into domestic contexts.

**Introduction**

Why do some countries adopt constitutional environmental rights while other do not? Current social science scholarship on the subject is sparse, and those researchers who do discuss the phenomenon do so without additional empirical probing. Many authors recognize the emergence of a trend toward legalization of environmental rights but fail to attribute its existence to anything other than growing international concern for environmental issues since the 1960s (i.e. Bándi 1992, Ebeku 2007, Popović 1996, Shelton 1991).

The results of a large-N survival analysis indicate that the likelihood that a country adopts a constitutional environmental right is related to at least five factors—GDP per capita, international civil society influence, level of democracy, population density, and protection of civil liberties. These factors suggest that the decision about whether or not to enact a constitutional environmental right is guided by normative, not rational-materialist, considerations. However, in order to reveal factors not captured by quantitative techniques and better understand the specific causal mechanisms, a more granular approach to understanding the phenomenon is needed. Therefore, in this paper I offer an analysis of Sri Lanka, a most-likely case (based on the statistical model) which does not have constitutional environmental rights. Through a qualitative content analysis of seven interviews conducted in Colombo and evidence from scholarly literature, I find that constitutional environmental rights were not included in any of Sri Lanka’s governing charters mainly due to the existing capacity of domestic law and policy to address environmental issues, politicization of the constitutional reform process, and the emphasis placed on certain controversies during the drafting of a new constitution. These findings suggest that international environmental norms are only influential to a point, and that domestic factors dominate during the constitutional drafting process.

**Case Selection**

Using the results of a previously conducted quantitative analysis, I developed a case selection process based on a most similar systems design. The goal was to identify and analyze two countries that featured similar values on the significant independent variables, but different outcomes on the dependent variable (i.e. whether or not a constitutional environmental right was adopted). First, I computed the mean scores for each significant independent variable for every country-year in the data set. Second, I sorted every country-year according to whether the value for each independent variable fell above or below the mean value for that variable.[[1]](#footnote-1) Third, I located cases in which constitutional environmental rights were adopted and searched for potential comparison cases by finding countries that matched the binary value on each of the independent variables, but which have not ratified a constitution featuring an environmental right. Fourth, I compared the values of the independent variables during the most recent year in which a constitutional event[[2]](#footnote-2) occurred. Finally, I identified two countries, Nepal and Sri Lanka, as a pair of countries with similar values on the independent variables during years in which constitutional events occurred,[[3]](#footnote-3) but different outcomes on the dependent variable (see Table 1 below).[[4]](#footnote-4)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | Civil Liberties Protection | GDP per capita | Int’l Civil Society Influence | Level of Democracy | Population Density | Constitutional Environmental Right |
| Nepal |  |  |  |  |  | Yes |
| Sri Lanka |  |  |  |  |  | No |
| Median | 3.64 | 6449 | 784 | 1.32 | 151 |  |

Table 1. Most Similar Systems Design for Case Selection.[[5]](#footnote-5)

**Background**

In order to understand why Sri Lankans have not adopted solidarity environmental rights in either their 1978 constitution or their proposed 2000 constitution, it is first necessary to provide some background information and historical context. An island located off the southeastern coast of India, Sri Lanka has a population of more than 20 million people. As a lower middle-income country, Sri Lanka boasts a GDP per capita (2011) of $2,835. Its HDI score ranks 92nd out of 187 countries and 92% of the adult population is literate (“Sri Lanka”). While the country suffered through an internal conflict that lasted 26 years and ended in May 2009, Sri Lanka has recently produced the highest levels of economic growth in South Asia. However, some of this growth may be attributed to private sector development of forested areas, which have seen a reduction of almost 21% between 1990 and 2010. Despite being on track to meet many of its Millennium Development Goals (MDGs), especially in the areas of universal primary education and gender equality, Sri Lanka is either not making progress or falling behind in the safeguarding of forest cover and reducing CO2 emissions (“Sri Lanka Overview”).

Sri Lanka’s history is punctuated by alternating periods of concurrent kingdoms and unification, colonial control, and, up until recently, civil conflict. In the space that follows I will focus on aspects of Sri Lankan constitutional history from the 1500s onwards. During the 16th century, Sri Lanka consisted of three kingdoms: “the Tamil kingdom of Jaffna in the north, the Kotte kingdom with its capital in Colombo, and the kingdom of Kandy in the central highlands” (Hill 2008, 142). The fact of geographic and political division among the kingdoms enabled successive colonizers to achieve dominion over the island, which bestowed upon Sri Lanka “the longest history of colonialism in South Asia” (Rajepakse 2008, 1). With the aid of strong naval forces, the Portuguese sought to conquer the three kingdoms but were only successful in subjugating Jaffna and Kotte. European continental disputes spilled over into Sri Lanka, and by 1658 the Dutch effectively expelled the Portuguese from the country. The Dutch initially concentrated their efforts on weakening the formidable Kandyan kingdom, but this approach was unsupported by the leadership back in Holland, who preferred to maintain a focus on maximizing resource exploitation for commercial gain. Meanwhile, Dutch dominance was being undermined by the English East India Company’s geopolitical interest in access to Kandyan ports. Eventually, seeking to capitalize upon the diminished position of the Dutch in the wake of the French Revolution, the British seized control of Dutch possessions in Sri Lanka in 1795-6. Sri Lanka, or Ceylon as it was known at the time, formally became a British Crown Colony by January of 1802 (de Silva 1981).

The British established complete sovereignty over the country by 1818, ushering in an extended period of constitutionalization marked by several important reforms. The Colebrooke-Cameron reforms of 1833 recommended consolidating provinces into a single administrative unit, establishing representative legislative bodies, and creating an independent judicial system, among other changes. Many of the reforms were implemented, and a new constitution offering some adjustments to the system of representation was promulgated in 1910. However, the growing tension between the English speaking elite class and the broader public instigated calls for a new wave of reforms. The Special Commission on the Constitution, led by Earl Donoughmore, suggested the introduction of universal suffrage, geographic representation, and executive committees focused on ministerial subjects. Although the Donoughmore Constitution was never fully implemented and only lasted 16 years, it paved the way for a relatively peaceful transition to independence. Following the passage of the Ceylon Independence Act of 1947, Ceylon became an independent member within the British Commonwealth and in 1948 the terse Soulbury Constitution, intended to install the Westminster model of governance, came into effect. With the inclusion of Article 29(2), which offered protection for the free exercise of religion, human rights became formally codified in the country’s constitutional law (Rajepakse 2008).

In 1972, Sri Lanka, as the former colony was now called, adopted a new constitution which asserted its status as an independent republic and articulated directives and human rights in the form of chapters on Principles of State Policy and Fundamental Rights and Freedoms, respectively. Significantly, the latter chapter included a provision guaranteeing Sri Lankans the right to life under Article 18(1)(b). In 1977, the ruling regime responsible for crafting the 1972 constitution suffered major electoral defeats, and the new government, led by the United National Party, endeavored to amend the existing charter but ultimately decided to enact an entirely new constitution. Notably, both chapters on Principles of State Policy and Fundamental Rights and Freedoms underwent important revisions, including the addition of environmental directives in the former and the elimination of the right to life in the latter. It is this constitution, along with its 18 subsequent amendments, which currently provides the architecture for governance in Sri Lanka.[[6]](#footnote-6)

**Field Research Overview**

In order to understand why constitutional environmental rights have not been adopted in Sri Lanka, I traveled to Colombo, Sri Lanka during the spring of 2013.[[7]](#footnote-7) From March 27-April 1, 2013, I conducted semi-structured interviews[[8]](#footnote-8) with individuals who possessed knowledge of Sri Lankan law and/or politics. For the purposes of securing Institutional Review Board (IRB) approval, and with the help of Dr. Camena Guneratne, I established an official research affiliation with the Department of Legal Studies at the Open University of Sri Lanka, an institution of higher education established in 1980 which is founded on the philosophy of open and distance learning.[[9]](#footnote-9) Most interviews were conducted at sites throughout the Colombo metropolitan area, which I reached by obtaining the services of traditional taxis hailed from my hotel, the Cinnamon Grand Colombo, or three-wheeled auto rickshaws known colloquially as “tuk-tuks,” which were available throughout the city. In total, I completed seven interviews with five adult males and two adult females who worked in fields such as diplomacy, government administration, and law. All subjects granted consent to be interviewed and for the interviews to be recorded.

**Methodology**

This study was conducted in three phases—(1) interviewee prospecting and interview scheduling, (2) interviewing, and (3) transcribing and analyzing. Each phase is detailed below.

*Interviewee Prospecting and Interview Scheduling*

Potential interviewees were identified in four ways. First, while in the United States I contacted individuals suggested to me by a member of my dissertation committee, Dr. Richard Matthew. Second, those individuals provided me with the contact information for other potential respondents whom I then emailed. Third, I supplemented my list of possible interviewees by conducting individual research to identify people who appeared to have knowledge of constitutional and/or environmental law in Sri Lanka. Fourth, once in Sri Lanka I established additional interview candidates with the assistance of Ira Unamboowe, Executive Director of the American Institute for Sri Lankan Studies (AISLS).[[10]](#footnote-10) These processes yielded an initial list of 28 contacts, which I had organized in an Excel spreadsheet.[[11]](#footnote-11) All potential interviewees were then sent an IRB-approved recruitment letter via email soliciting their participation in the study. I scheduled interviews through email or phone calls made from my hotel, the Cinnamon Grand Colombo, or at the Colombo Center of AISLS.

*Interviewing*

During the second phase of the study, I conducted interviews with the seven individuals on my schedule.[[12]](#footnote-12) All interviews were completed at different locations throughout Colombo, with the lone exception being an interview conducted via Skype in my hotel room because the interviewee was in Switzerland at the time.[[13]](#footnote-13) The interview questionnaire included 29 main questions and five subsidiary questions for a total of 34 potential questions. However, due to the variations in personal and professional experiences of the interviewees and time constraints, the number of questions posed during interviews was significantly less than the total number of questions originally devised for the study. A quantitative analysis of the interview transcripts indicates that, on average, I asked each respondent approximately 11 questions, some of which did not appear on my questionnaire but were relevant to each interviewee, their line of work, and the responses they provided to certain questions. Each interview began with a recitation of the informed consent narrative in order to obtain verbal consent from the interviewee and presentation of a release form which all respondents willingly agreed to sign. All study participants agreed to have their interview recorded on a digital audio recorder. The length of the interviews ranged from 15 minutes and 34 seconds to 29 minutes and eight seconds with an average interview duration of 22 minutes and 44 seconds. Along with the signed release form and recorded interview, each interview was logged manually on a separate form which included the name of the interviewee, location of the interview, date of the interview, and unique interview code, intended both for record keeping purposes and to provide reassurance that subject identifiable information would remain protected in the event a respondent wished to remain anonymous.

*Transcribing and Analyzing*

In the third phase, I began by transcribing each of the interviews in the order in which they were conducted.[[14]](#footnote-14) Each interview was transcribed with the goal of achieving verbatim transcripts, but this was not possible for five reasons: (1) sometimes the respondents used unfamiliar pronunciations of certain English words; (2) as someone who does not speak Sinhala, it proved difficult to discern the precise spelling of certain local language words spoken by subjects; (3) despite post-interview efforts to obtain clarification on words that were unclear, in many cases where a word was at issue I was unable to decipher it; (4) environmental noise obscured portions of several interviews; and (5) the distance from the speaker to the digital recording device or volume of the respondent’s voice occasionally resulted in a reduced sound quality.[[15]](#footnote-15)

Next, just as in the Nepal case, I used qualitative content analysis to systematically examine the interviews that I had transcribed in an effort to understand why Sri Lanka had not adopted constitutional environmental rights.[[16]](#footnote-16) First, I read each interview once after it had been transcribed and then all interviews were read in a single sitting in uninterrupted succession to gain a sense of the whole. Second, I completed an open coding of each interview, which resulted in the identification of 25 initial codes related to the relevant inquiry. Third, I categorized the codes into two broad groups—*Law* and *Rationale*—which successfully encapsulated the various explanations offered by the interviewees. Fourth, I revisited the central research question and performed abstraction, whereby new categories were created to more closely align the codes and categories with the topic under investigation. This process included using content-characteristic words to define main categories and filing codes into generic categories and subcategories. During this portion of the analysis codes within the two original broad categories were shuffled and condensed, and, with the establishment of the newly abstracted categories, the process resulted in the creation of a hierarchical coding structure consisting of one main category, four generic categories, five subcategories, and five sub-subcategories pertaining to two important events—the drafting of the 1978 constitution and the development of the 2000 draft constitution. Finally, definitions were composed for every main category, generic category, subcategory, and sub-subcategory, and exemplars for each were drawn from interview data. This resource became the official code book for the study.

**Findings**

Attempting to decipher the reason why a particular event did not happen presents certain methodological difficulties. I was unable to interview anyone who participated directly in the drafting of the 1978 constitution, and I only interviewed one person who played an important role in proposing new fundamental rights for the 2000 draft constitution. In many cases, interviewees provided subjective speculations regarding the topic of interest. Therefore, in this section I offer only tentative explanations for the absence of constitutional environmental rights in Sri Lanka which are based on information drawn from interviews and augmented by scholarly literature. The results of my analysis reveal that the reasons why environmental rights were not incorporated into either the 1978 constitution or the 2000 draft constitution differ significantly between the constitutional events, but may be construed as relating to largely domestic political dynamics. In the case of the former, the exclusion of environmental rights was not deliberate; instead, the drafters focused on legalizing civil and political rights. In the case of the latter, the omission was likely the product of several factors which affected the demand for such rights and the ability of government to address concerns about environmental quality in the country. I develop these explanations further in the space below.

*1978 Constitution*

Interview data suggest that environmental rights did not appear in the 1978 constitution for at least two reasons. First, the environment was not a central concern during the drafting of this constitution.[[17]](#footnote-17) On the contrary, the United National Party, which enjoyed an overwhelming majority in parliament following the 1977 elections and was led by Prime Minister Junius Richard (J. R.) Jayewardane, “was animated by two concerns—the need for political stability and the need for rapid modernization” (Coomaraswamy 1984, 40). Political stability involved addressing questions regarding the participation of the Tamils in democratic processes and the desire to achieve rapid modernization was inspired by the economic and industrial successes observed in Singapore and South Korea. Second, the Sri Lankan government emphasized protecting civil and political rights in the constitution as opposed to social and economic rights.[[18]](#footnote-18) Moreover, the government responsible for the drafting of the constitution was right-wing and would not allow “the restriction of civil and political rights in the interests of principles of a social and economic nature” (Wickramaratne 1996, 27). These conditions resulted in a new constitution which privileged first-generation human rights above second-generation rights and excluded third-generation rights, although not yet common on the international level at this point in history, altogether.

The literature also suggests additional potential explanations for the particular content featured in the 1978 constitution. First, the chapter on Fundamental Rights, the section of a constitution in which one might find a provision on environmental rights, was composed by lawmakers who were influenced by the Constitution of the Fifth Republic of France (de Silva 1979, 193), the American Bill of Rights, the Fundamental Rights chapter of the Indian Constitution, and the Universal Declaration of Human Rights (Sharvananda 1993, 13–14).[[19]](#footnote-19) As none of these documents contain environmental rights, it is therefore unsurprising that this particular intellectual derivative is similarly devoid of such provisions. Second, while the 1978 constitution presented numerous changes from its predecessor,[[20]](#footnote-20) it was not intended “to be ideologically innovative”; instead, it was crafted with an aim toward addressing “immediate economic and social problems” (Coomaraswamy 1984, 54–55). That environmental rights were not incorporated into the document may be, therefore, a logical outgrowth of constitutional pragmatism or perhaps a signal that environmental issues were considered neither immediate nor economic/social nor problematic at the time. Third, the government, in the form of the Select Committee on the Revision of the Constitution, did in fact solicit the advice of the general public on the issue of deciding which fundamental rights to include in the 1978 constitution through a questionnaire which was published in major newspapers.[[21]](#footnote-21)

*Post 1978-2000 Draft Constitution*

Following the ratification of the 1978 constitution, an unsuccessful attempt was made to enact a new constitution in 2000. Like its forebear, the 2000 draft constitution did not include environmental rights. However, far from being a deliberate act of omission, the absence of environmental rights in this contemporary document can be explained as the product of four conditions—actions, controversies, political environment, and process—which informed the political dynamics in Sri Lanka on this subject for at least two decades.[[22]](#footnote-22)

First, *actions* taken or not taken by civil society or government affected the prospect of adopting environmental rights in the 2000 draft constitution. While it was suggested during one interview that “there hasn’t been a strong environmental lobby”[[23]](#footnote-23) which has advocated for the inclusion of a right to the environment in this draft, civil society groups did in fact urge the Parliamentary Select Committee on the Constitution to consider adding a right to a clean environment, as stated earlier. However, these groups were unsuccessful in convincing lawmakers of the importance of this provision, as “none of the drafts put forward by the government made any reference to environmental rights” (Atapattu 2001, 293). In terms of the government, the general attitude of the leadership has been to relegate environmental rights to the realm of “luxuries that can be postponed” until Sri Lankans “solve other pressing problems of the present.”[[24]](#footnote-24) However, this does not mean that government actors have not endeavored to promulgate environmental rights. Indeed, formal legal recognition of environmental rights has been attempted at least three times since 1978[[25]](#footnote-25)—in the 1995 draft of the National Environmental Act,[[26]](#footnote-26) 1997 Government’s Proposals for Constitutional Reform, and 2008 draft Constitutional Bill of Rights. Yet, none of these documents ultimately became law and thus constitutional environmental rights in Sri Lanka continue to remain absent from the legal infrastructure. A discussion of the 1997 Government’s Proposals for Constitutional Reform and the 2008 draft Constitutional Bill of Rights follows in the space below.

Following the distribution of the March 1997 draft of the Government’s proposed constitution, the Law & Society Trust, a legal research and advocacy organization in Sri Lanka founded in 1982, formed a group of experts and activists to review the document and make recommendations to the Parliamentary Select Committee on the Constitution (Atapattu 1998, 182). The Working Group published their recommendations in a lobby document that appeared in *Fortnightly Review* [Vol. VII, Issue No. 113 (March 1997)] shortly thereafter. While some of the Group’s suggestions appeared in the October 1997 draft of the proposed constitution, the request to include the right to a clean and healthy environment went unheeded. However, certain provisions related to environmental rights did make it into the October edition. In Chapter III, Fundamental Rights and Freedoms, Article 8(1) guarantees the right to life and Article 21(1) provides a right to ownership of property which was “subject to the preservation and protection of the environment and the rights of the community” (*The Government’s Proposals for Constitutional Reform* 1997, 287). In Chapter VI, Principles of State Policy and Fundamental Duties, under the section on Principles of State Policy, Article 53(6) stipulates that “[t]he State shall protect and preserve and improve the environment and safeguard the reefs, shores, forests, lakes, watercourses and wildlife of Sri Lanka” (*The Government’s Proposals for Constitutional Reform* 1997, 295). Finally, the Fundamental Duties section of the same chapter mandates under Article 54(6) that “It shall be the duty of every citizen to…protect and improve the environment and conserve its riches” (*The Government’s Proposals for Constitutional Reform* 1997, 296). All of these proposed provisions were included in the 2000 Constitution Bill using the same phrasing as that which appears in the October 1997 draft with the exception of the fundamental duty relating to the environment, which added the phrase “and value all forms of life.”

The draft Bill of Rights includes a “Right to an Adequate Environment” under Section 14T: “All persons have the right to an environment that is—(a) not harmful to their health or well being; and (b) protected for the benefit of present and future generations.” While the draft Constitutional Bill of Rights did receive mention in the 2011 National Action Plan for the Protection and Promotion of Human Rights (environmental rights were not specifically addressed), the document can only be considered to have afforded the Bill of Rights tacit, tentative endorsement, not granting full legal effect: “The commitment of the Government of Sri Lanka towards the full realization and guaranteeing of Human Rights was further manifested when in 2008, a Committee was appointed to give effect to proposals in Mahinda Chinthana, for the inclusion of a comprehensive Bill of the Rights into the Constitution. A Draft Bill of Rights was thereafter formulated which is being deliberated by stakeholders, *with a view to its incorporation*” (emphasis added; Sri Lanka Ministry of Plantation Industries and Office of Special Envoy on Human Rights 2011, 9).

Second, *controversies*, or central political debates which occurred prior to and during the constitutional reform process, focused drafting efforts and political negotiations on addressing topics besides constitutional environmental rights. In particular, the issue of devolution of power was highlighted during interviews as constituting the central focal point of deliberations.[[27]](#footnote-27) Here the concern revolved around ethnic power sharing and striking an appropriate balance of power between the varying levels of governance in Sri Lanka.[[28]](#footnote-28) Similar to the drafting processes in 1972 and 1978, the writing of the 2000 draft constitution did not prominently feature environmental concerns.

Third, and perhaps most importantly, the *political environment*, that is, contextual and institutional factors present during constitution drafting or reform which may have informed decisions about whether and how to address environmental issues in the constitution, appear to have had a discernible impact on the prospect for adopting environmental rights in the Sri Lankan constitution. Three such factors were determined to have influenced the level of interest in pursuing constitutional environmental rights—consciousness, judicial receptiveness, and legal framework. In terms of a popular *consciousness* regarding the need for a clean environment, although no formal constitutional right to the environment exists, one interviewee argued that the people of Sri Lanka possess an awareness of the issue.[[29]](#footnote-29) In the years immediately following the ratification of the 1978 constitution, rights consciousness in general was said to be noticeably undeveloped in the country. One observer argues that this lacuna has been the result of a “lack of legal discourse or doctrine in Anglo-American constitutionalism which adequately deal with the dilemmas of development,” which stifled the creation of innovative legal doctrine and established a culture of judicial deference to the executive branch (Coomaraswamy 1984, 74). These institutional conditions were compounded by a lack of groups which advocated taking a rights-based approach to redressing grievances. Although by no means a direct measure of increasing consciousness, nevertheless it bears noting that from the time of Sri Lanka’s independence in 1948 up until the middle of 1972 there were only seven environmental non-governmental organizations (NGOs) established in the country. Following the United Nations Conference on the Human Environment in 1972 until the middle of 1992, 176 environmental NGOs were founded. From July 1992 through June 2002, advocacy efforts in this area expanded dramatically, as 468 environmental NGOs came into being (Wickremaratne 2004). This evidence suggests that although people are aware of the need to maintain a clean environment, perhaps this consciousness has not developed into a popular campaign to see this ambition formally recognized in the constitution.

*Judicial receptiveness*, or the degree to which the court system has positively embraced environmental litigation brought under existing legal instruments, was put forth as another potential explanation for the lack of constitutional environmental rights in Sri Lanka. One respondent described how “courts have been sympathetic” to public interest litigation on the environment,[[30]](#footnote-30) which has enabled environmental groups to bring cases using the extant legal regime instead of focusing efforts on adding a new right to the constitution.[[31]](#footnote-31) Other interviewees echoed how the courts have interpreted existing statutes and constitutional provisions in ways that have resulted in favorable judgments for claimants seeking to have environmental grievances redressed.[[32]](#footnote-32) Four examples from Sri Lankan case law help to support these assertions.

In *The Environmental Foundation Limited[[33]](#footnote-33) v. The Attorney-General*,[[34]](#footnote-34) the Supreme Court permitted the petitioner, an environmental NGO, to bring a case against the government on the basis that fundamental rights had been violated. While the Supreme Court did not rule on the issue of *locus standi* directly, it signaled its willingness to entertain claims made by organizations representing the public interest on environmental concerns. In *Ashik v. Bandula and Others* (*Noise Pollution Case*),[[35]](#footnote-35) the Supreme Court held that noise pollution emanating from loudspeakers at a mosque constituted a violation of the fundamental right to equal protection due to the failure of the executive to properly safeguard the public from the harmful effects of noise pollution, as mandated under the National Environmental Act.[[36]](#footnote-36) This decision demonstrated that the Court was open to resolving environmental claims under the banner of fundamental rights when couched in terms of public nuisance doctrine. In the *Eppawala Phosphate Mining[[37]](#footnote-37)* case, Justice Amerasinghe, writing on behalf of the Supreme Court, determined that an agreement struck with a U.S. company to exploit a phosphate mine in Eppawala “should be considered in light of the principles embodied in the Stockholm Declaration on the Human Environment of 1972 and the Rio Declaration on Environment and Development of 1992” (Voigt 2009, 181). With its extensive reliance on international soft law, “the Court clearly endorsed principles of international environmental law, including sustainable development and stressed that development activities in Sri Lanka should be evaluated against these principles” (Atapattu 2001, 296). Finally, in *Watte Gedara Wijebanda v. Conservator General of Forest*,[[38]](#footnote-38) the Supreme Court found that the fundamental right to equal protection guaranteed under the constitution inherently includes the right to a clean environment and the principle of inter-generational equity (Karunaratne 2009, 36). The Court also relied on public trust doctrine and international laws pertaining to sustainable development to inform their interpretation of the Sri Lankan environmental legal regime. Thus, this case provided jurisprudential recognition of a constitutional environmental right through a broad interpretation of the equal protection provision. In short, where environmental issues have been concerned, the Sri Lankan Supreme Court has looked to international law on sustainable development for guidance and liberally interpreted fundamental rights in the constitution in ways favorable to plaintiffs, perhaps eliminating the need, among interested parties, to enact constitutional environmental rights.

The final element of the political environment which may have lessened the desire to adopt constitutional environmental rights lies in Sri Lanka’s *legal framework*, understood here to mean the presence or absence of existing legal or policy instruments which are designed to achieve pro-environmental and/or human rights outcomes.[[39]](#footnote-39) One respondent summarized this relationship by stating that “the incorporation of [an environmental right] as a constitutional feature has never struck people as being either necessary or being important as long as it is there in the policy guidance.”[[40]](#footnote-40) To be sure, Sri Lanka has an extensive history of environmental regulation, one which spans over two thousand years. Following its independence from Britain in 1948, the country adopted a new set of environmental laws and ratified several international treaties relating to the environment (Zubair 2001, 471). By the late 1970s, it was estimated that over the past 100 years or more Sri Lanka had already promulgated at least 50 laws relating to the environment (Wijayadasa 1994, vi). In terms of the focus of the present study, constitutional law, codes, and statutes were cited by interviewees as contributing substantially to a robust environmental legal infrastructure which might render constitutional environmental rights unnecessary at best and redundant at worst.[[41]](#footnote-41)

In the absence of constitutional environmental rights phrased in terms of solidarity rights, relevant constitutional provisions have been utilized in Sri Lanka to achieve similar ends. In this vein, interviewees specifically mentioned provisions contained within Chapter III, “Fundamental Rights,” and Chapter VI, “Directive Principles of State Policy and Fundamental Duties.”[[42]](#footnote-42) In terms of the former, as demonstrated in the section on judicial receptiveness above, Article 12(1) of the 1978 constitution, the right to equality provision,[[43]](#footnote-43) has proven particularly useful in framing the legal claims of plaintiffs in environmental litigation, especially where human rights are implicated.[[44]](#footnote-44) In addition, Article 126 allows individuals to petition the Supreme Court directly where a violation of fundamental rights is alleged, bolstering the ability of a person to bring claims relevant to the equality provision and thus offering a potential avenue for the redressing of environmental grievances. In terms of the latter, under the section on Directive Principles of State Policy, Article 27(14) declares that “[t]he State shall protect, preserve and improve the environment for the benefit of the community.”[[45]](#footnote-45) Under the section on Fundamental Duties, Article 28(f) mandates that it is the duty of every person in Sri Lanka “to protect nature and conserve its riches.”[[46]](#footnote-46) Considered in tandem, these provisions “have been cited as the general principles on which environmental litigation has been based.”[[47]](#footnote-47)

Sri Lankans can also seek to resolve environmental problems in court using codes and established common law doctrine relating to public and private nuisances.[[48]](#footnote-48) In the case of public nuisance, claims can be brought before local magistrates “under Section 98 of the Code of Criminal Procedure Act No. 15 of 1979, and under Section 261, 283 and 284 of the Penal Code No. 2 of 1883” (Schukoske 1996, 158). Bringing complaints under public nuisance presents potential claimants with a viable alternative pathway to engaging in environmental litigation directly through the Supreme Court on the basis of alleged fundamental rights violations because there are magistrate’s courts throughout the island, whereas the Supreme Court is located only in Colombo.[[49]](#footnote-49) Therefore, pursuing this strategy affords lay people, especially those living in remote areas, greater access to courts.[[50]](#footnote-50) In addition, compared to fundamental rights suits, “public nuisance actions are simpler, speedier, and have better remedies” (Schukoske 1996, 168, n. 60).

Finally, certain statutes have been invoked to establish a cause of action where environmental problems have arisen, serving a function similar to that which inheres in constitutional environmental rights—the safeguarding of the environment. In the case of environmental pollution, public nuisance provides the basis for registering complaints with either the Central Environmental Authority[[51]](#footnote-51) or the police,[[52]](#footnote-52) as stipulated under Section 31 of the National Environmental Act (NEA)[[53]](#footnote-53) and a 1995 circular from the Inspector General of Police, respectively.[[54]](#footnote-54) Once a complaint has been made, “officers of the CEA go and inspect the industry.”[[55]](#footnote-55) If it is determined that the source has been operating without the required Environmental Protection License (EPL),[[56]](#footnote-56) the file is sent to the CEA’s legal division, where staff will decide whether or not to file suit in order to compel the violator to engage in pollution mitigation activities. In addition, the statute known as the National Environmental Regulations No. 1 of 1993 under the NEA provides procedural environmental rights, where the potential environmental impacts of new development projects are concerned, which may assist in the protection of solidarity environmental rights. Under this provision, the public may participate in the environmental impact assessment (EIA) process.[[57]](#footnote-57) Specifically, “[t]he public can participate at the “scoping” stage, review the EIA for 30 days, request clarifications from the [project proponent] through the [project-approving agency] and may, at the discretion of the [project-approving agency, participate at a public hearing” (Zubair 2001, 473).[[58]](#footnote-58)

Fourth, *process*, that is, the internal motivating factors that have shaped the nature and outcomes of constitutional reform efforts, likely played an important role in determining the content included in the 2000 draft constitution. The main factor cited as having a major impact on the product was the degree of politicization present during the reform discussions. In particular, “[c]onstitutional reform…has been driven really by the interests of the party in power” as opposed to a “principled, open, transparent process.”[[59]](#footnote-59) To be sure, politicization of constitutional reform is not a new phenomenon in Sri Lanka. On the contrary, the country has a history in which “[t]he making and unmaking of constitutions seems to have now become more a matter of prestige for political parties than a serious and deliberate exercise” (Jayasuriya 1982, 2). Previous constitutions have been criticized for “serving the government” (Coomaraswamy 1984, 55), being “partisan” and “non-consensual” (Edrisinha 2007, 133), and having been drafted in a “slipshod manner” (Perera 1979, 107). In the case of the 2000 draft constitution, not only has it been suggested during interviews that political parties were focused on tending to their own interests as opposed to those of the broader public, but it may also be inferred that since the environmental rights provision proposed by the Working Group assembled by the Law & Society Trust was deliberately not included in either the 1997 Government’s Proposals for Constitutional Reform or the 2000 bill after discussions with the United National Party and an opposition party,[[60]](#footnote-60) at least one political party was responsible for the premature demise of new constitutional environmental rights.

**Discussion**

The results of the qualitative content analysis present several explanations for the absence of constitutional environmental rights in Sri Lanka. In order to evaluate which of these explanations offers the greatest insight into this inquiry, counterfactuals must be considered.[[61]](#footnote-61) First, which conditions did not appear to have a discernible impact on the outcome, in this case the lack of constitutional recognition of solidarity environmental rights? In terms of the 1978 constitution, while all five conditions identified either through interviews or literature appear to have influenced the likelihood that constitutional environmental rights would be adopted, two of the conditions would probably have not shifted the outcome observed. Had the drafters of the constitution been inspired by governing charters that did include environmental rights, it is still quite possible that environmental rights would have been left out. In addition, had the public not been consulted about the types of fundamental rights that should be included in the constitution, it stands to reason that environmental rights would still have failed to appear in the Chapter on Fundamental Rights.

In terms of constitutional reform efforts after 1978 and up through the 2000 Constitution Bill, four of the seven conditions described do not provide strong causal drivers of the observed outcome. In the presence of a strong environmental lobby, the government of Sri Lanka may still have elected to keep environmental rights out of the constitution. If environmental rights had not been viewed by the government as luxuries, they still might have decided not to instantiate them in the new constitution. Had the general population not possessed a consciousness of the issue of environmental rights that perhaps negated the impetus to mount a popular campaign on the subject, environmental rights would probably be just as likely to have been neglected during the period of constitutional reform. Finally, without the degree of politicization that colored the efforts to devise a new constitution, environmental rights would probably still have not made it into the draft bill.

Second, which conditions seem to have been necessary to result in the absence of environmental rights in constitutional documents? In terms of the 1978 constitution, had the drafting process involved focusing on addressing environmental issues, including third generation human rights, and featuring innovative solutions to future problems, it is much more likely that environmental rights would have been firmly planted in the Chapter on Fundamental Rights.[[62]](#footnote-62) In terms of the post-1978 era in Sri Lanka, three conditions seem particularly influential. First, had the focus of constitutional reform not been consumed by the issue of devolution of power, it would have freed up political capital to address other important problems facing the developing country. Second, without substantial support from the judiciary to see that environmental grievances are redressed, the Sri Lankans might have decided to pursue more legislative solutions to problems such as pollution and economic development that harms the environment. Third, if Sri Lanka’s legal framework had been undeveloped or critically lacking in the area of environmental regulation, perhaps the people of Sri Lanka, not just a single Working Group, would have made a major push to include environmental rights in the constitution.

**Conclusion**

Both constitutional periods present different explanations for the lack of constitutional environmental rights. During the drafting of the 1978 constitution, lawmakers sought only to provide basic human rights that reflected contemporary international norms. At the global level, environmental rights were still in their infancy. The majority of the drafting effort focused on designing political institutions. During the subsequent period of constitutional reform leading up to the 2000 draft constitution, the government was mainly concerned with devolving power. Meanwhile, the legal system offered Sri Lankans a set of institutions that, at least on paper, could effectively manage environmental issues, thus reducing the need to pursue alternative avenues capable of resolving environmental problems.

Moving forward, this research would benefit greatly from additional interviews with Sri Lankan lawmakers who played central roles in the drafting of both the 1978 constitution and the 2000 draft constitution in order to ascertain specific motivations for including certain provisions while not including others. Future work should also seek to analyze the role that public opinion and civil society organizations had in the political discourses and decision making processes regarding constitutional reform. In the interim, this case study demonstrates that the absence of certain provisions in a given constitution may reflect not an error of omission, but rather institutional strengths found elsewhere.

**References**

Atapattu, Sumudu. 1998. “A Commentary on the Draft Fundamental Rights Chapter.” In *Sri Lanka: State of Human Rights 1998*, 173–191. Colombo: Law & Society Trust.

———. 2001. “Sustainable Development, Myth or Reality: A Survey of Sustainable Development Under International Law and Sri Lankan Law.” *Georgetown International Environmental Law Review* 14: 265–300.

Bándi, Gyula. 1992. “The Right to Environment in Theory and Practice: The Hungarian

Experience.” *Connecticut Journal of International Law* 8: 439-465.

Bastians, Dharisha. 2013. “Communal Conundrum and Constitutional Calculations.” *Colombo Telegraph*. May 30. http://www.colombotelegraph.com/index.php/communal-conundrum-and-constitutional-calculations/.

Coomaraswamy, Radhika. 1984. *Sri Lanka, the Crisis of the Anglo-American Constitutional Traditions in a Developing Society*. New Delhi: Vikas.

De Silva, C. R. 1979. “The Constitution of the Second Republic of Sri Lanka (1978) and Its Significance.” *Journal of Commonwealth and Comparative Politics* 17 (2): 192–209.

De Silva, K. M. 1981. *A History of Sri Lanka*. Berkeley, CA: University of California Press.

Ebeku, Kaniye S.A. 2007. “Constitutional Right to a Healthy Environment and Human Rights

Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited.” *Review*

*of European Community and International Environmental Law* 16(3): 312-320.

Edrisinha, Rohan. 2007. “Conflict and Constitutional Process: Some Sri Lankan Experiences.” In *Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa and Sri Lanka*, 133–138. Kathmandu: Nepal South Asia Center.

Goonesekere, R. K. W. 1988. *Fundamental Rights and the Constitution: a Case Book*. Colombo: Law & Society Trust.

Guneratne, Arjun. 2008. “The Cosmopolitanism of Environmental Activists in Sri Lanka.” *Nature and Culture* 3 (1): 98–114.

Hill, Christopher V. 2008. *South Asia: An Environmental History*. Santa Barbara, CA: ABC-CLIO.

Jayasuriya, D. C. 1982. *Mechanics of Constitutional Change: The Sri Lankan Style*. Sri Lanka: Asian Pathfinder.

Karunaratne, Wardani. 2009. *Some Significant Environmental Judgments in Sri Lanka*. Colombo: Environmental Foundation Limited.

*National Environmental Act*. 1995.

Perera, N. M. 1979. *Critical Analysis of the New Constitution of the Sri Lanka Government, Promulgated on 31-8-78*. Colombo: V. S. Raja.

Pinto-Jayawardena, Kishali. 2010. “Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry.” International Commission of Jurists.

Popović, Neil A.F. 1996. “Pursuing Environmental Justice with International Human Rights and

State Constitutions.” *Stanford Environmental Law Journal* 15: 338-374.

Puvimanasinghe, Shyami Fernando. 1997. “An Analysis of the Environmental Dimension of Public Nuisance, with Particular Reference to the Role of the Judiciary in Sri Lanka and India.” *Sri Lanka Journal of International Law* 9: 143–171.

———. 2009. “Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest.” *Sustainable Development Law and Policy* 10 (1): 41–49.

Rajepakse, Ruana. 2008. *A Guide to Current Constitutional Issues in Sri Lanka*. Sri Lanka: Citizens’ Trust.

Samarakoon, Miriya, and John S Rowan. 2008. “A Critical Review of Environmental Impact Statements in Sri Lanka with Particular Reference to Ecological Impact Assessment.” *Environmental Management* 41 (3) (March): 441–460.

Schukoske, Jane E. 1996. “Enforcing Environmental Laws in Sri Lanka Through Fundamental Rights Litigation.” *International Legal Perspective* 8: 155.

Sharvananda, S. 1993. *Fundamental Rights in Sri Lanka: A Commentary*. Colombo: S. Sharvananda.

Shelton, Dinah. 1991. “Human Rights, Environmental Rights, and the Right to Environment.”

*Stanford Journal of International Law* 28: 103-138.

“Sri Lanka. Country Profile: Human Development Indicators.” United Nations Development

Programme. Accessed 1 July 2013:

<http://hdrstats.undp.org/en/countries/profiles/LKA.html>.

Sri Lanka Ministry of Environment & Natural Resources. 2003. *Caring for the Environment 2003-2007: Path to Sustainable Development*. Battaramulla: Ministry of Environment and Natural Resources.

Sri Lanka Ministry of Plantation Industries and Office of Special Envoy on Human Rights. 2011. “Sri Lanka National Action Plan for the Protection and Promotion of Human Rights 2011-2016.” http://www.hractionplan.gov.lk/posters/National\_action\_plan\_for\_the\_protection\_and\_promotion\_of\_human\_rights\_2011\_2016\_English.pdf.

“Sri Lanka overview.” *World Bank*. Accessed: 1 July 2013

<http://www.worldbank.org/en/country/srilanka/overview>.

Sripavan, Kanagasabapathy. 2010. “Judicial Innovations in Environmental Jurisprudence: Sri Lankan Experience.” In *Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice*. Manila, Philippines. http://www.scribd.com/doc/37087509/Kanagasabapathy-Sripavan-Judicial-Innovations-in-Environmental-Jurisprudence-Sri-Lankan-Experience.

*The Government’s Proposals for Constitutional Reform*. 1997.

Vinson, Sara. 2010. “Lalanath de Silva: Sri Lanka Environmental Laws.” *Journal of Court Innovation* 3 (1): 375–388.

Voigt, Christina. 2009. *Sustainable Development As a Principle of International Law: Resolving Conflicts Between Climate Measures and WTO Law*. Leiden: Brill.

Warnapala, W.A. Wiswa. 1980. “Sri Lanka’s New Constitution.” *Asian Survey* 20 (9): 914–930.

Wickramaratne, Jayampathy. 1996. *Fundamental Rights in Sri Lanka*. New Delhi: Navrang.

Wickremaratne, Dharman. 2004. *Sri Lanka Directory of Environmental NGOs*. Sri Jayawardenapura: Sri Lanka Environmental Journalists Forum.

Wijayadasa, K. H. J. 1994. *Towards Sustainable Growth the Sri Lanka Experience: The Evolution of Environmental Policies and Strategies in Sri Lanka, 1978-1993*. Central Environmental Authority, Ministry of Environment and Parliamentary Affairs.

*Your Environmental Rights and Responsibilities: A Handbook for Sri Lanka*. 2006. Colombo: Environmental Foundation Limited.

Zubair, Lareef. 2001. “Challenges for Environmental Impact Assessment in Sri Lanka.” *Environmental Impact Assessment Review* 21 (5): 469–478.

**Appendix A**

Introductory Questions

In your opinion, why did the 2000 proposed constitution not include an environmental rights provision?

Who or what entity was in charge of ultimately deciding whether or not to include environmental rights in the constitution?

Who decided which people would be included in the decision making process?

How would you describe your role in the constitution making process?

How did you come to participate in the constitution writing process?

Did you represent an organization during the time in which you participated in the constitution writing process?

What organization did you represent during the constitution-making process?

Did you do anything to prepare for the constitution making process?

If so, how did you prepare?

Do you feel that people involved in the decision making process took your views on the subject of environmental rights seriously?

If you had another opportunity to incorporate environmental rights into the constitution, how would you phrase the provision?

Questions Tied to Independent Variables

*International Civil Society Influence*

Did civil society organizations or non-governmental organizations play any role in the decision making process related to environmental rights?

If so, how would you describe the role or roles that civil society organizations (i.e.

non-governmental organizations) played in the decision-making process?

How did civil society organizations seek to influence the discussion regarding constitutional environmental rights?

Do you recall which organizations were most active in the discussion?

Which ones?

How did other people who had a role in the decision making process receive the recommendations from the civil society organizations?

What kind of impact do you think civil society organizations had on the decision whether or not to include environmental rights in the constitution?

*Regional Diffusion*

Did you or others involved in the constitution writing process look to other constitutions as a model for your country’s?

If so, which constitutions did you or others use to inform your decision making process?

Did you look to see how other constitutions dealt with the issue of environmental rights?

*Human Rights Legacy*

Some scholars have observed that, countries might adopt new kinds of rights in their new constitution because they want to improve the protection of rights that were not well protected in the past. Do you feel that the decision to adopt a constitutional environmental right was influenced by your country’s ability, in the past or present, to safeguard the rights of its citizens?

*Natural Resources Dependency*

Some scholars have suggested that countries whose economies depend on the use of their natural resources might be less likely to adopt laws that could make extracting natural resources more difficult. Do you feel that your country’s use of natural resources for its economic productivity may have had an effect on the decision whether or not to include environmental rights in the constitution?

Did any industry in particular oppose the adoption of constitutional environmental rights?

If so, which one(s)?

*Monetary Incentives*

Some scholars have suggested that sometimes countries adopt rights in order to look more attractive to foreign investors. Do you think that countries would adopt rights in their constitution in order to attract more financial support from certain countries?

Do you feel that your country might be able to attract more financial assistance if it were to adopt environmental rights?

Are you aware of any countries that may have been willing to provide your country with financial support if your country chose to adopt constitutional environmental rights?

*Epistemic Community*

Were the people who participated in this decision-making process similar in any particular way? For example, did they have common educational or training experiences (i.e. attended the same foreign university for undergraduate or graduate work, received training from organizations like the United Nations or non-governmental organizations)?

In terms of the people who took part in the decision making process but were not elected officials, what were their backgrounds?

To the best of your knowledge, were any groups denied the ability to participate?

Were there any groups not present during the discussion that you felt should have been?

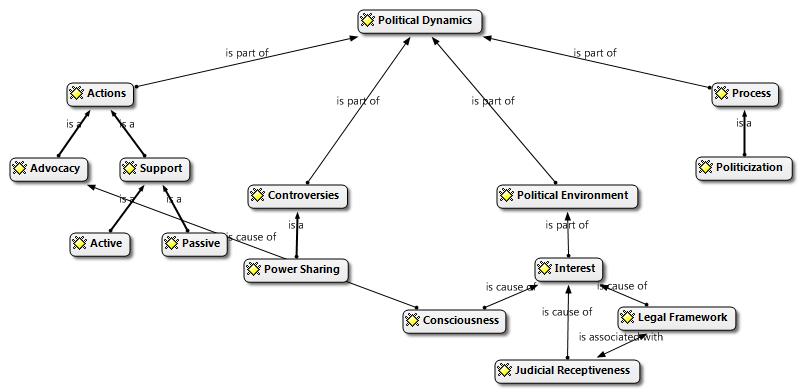
Final Questions

In terms of your experience assisting with the writing of the constitution, what are you most proud of?

Is there anything you’d like to mention that we did not get a chance to discuss during this interview?

**Appendix B**

Conceptual Map of Political Dynamics



1. Each country-year that fell below the median value was coded “0,” whereas each country-year with a value above the median was coded “1.” [↑](#footnote-ref-1)
2. In order to maximize the universe of potential cases for this portion of the study, I defined eligible comparison cases as those countries in which constitutional events such as the passage of a new constitution or the official approval of a draft, interim, or proposed constitution occurred during a given year. [↑](#footnote-ref-2)
3. Nepal adopted a constitutional environmental right in their 2006 Interim Constitution, whereas Sri Lanka did not enact such a right either in their 1978 constitution or its 2000 draft constitution. [↑](#footnote-ref-3)
4. While results of the statistical analysis indicated that regional influence was not a significant factor in the adoption of a constitutional right, the fact that both Nepal and Sri Lanka are located in the same region (South Asia) introduced a convenient de facto control for geography. [↑](#footnote-ref-4)
5. The median scores refer to the following measures used in the quantitative portion of this study: Freedom House’s Civil Liberties score, which ranges on a scale of 1 (greatest protection) to 7 (least protection) for Civil Liberties Protection, World Bank’s measure of Gross Domestic Product per capita in current US dollars for GDP per capita, Union of International Associations’ number of international non-governmental organizations which have members present during a given country-year for International Civil Society Influence, Polity IV’s regime characteristics score, which ranges on a scale from -10 (strongly autocratic) to 10 (strongly democratic) for Level of Democracy, and World Bank’s measure of the number of people living in a square kilometer of land for Population Density. A constitution was considered to contain an environmental right if it included a legally enforceable provision expressing the positive right of an individual to an environment of a certain quality. [↑](#footnote-ref-5)
6. A new Sri Lankan draft constitution was proposed in 2000 by then President Chandrika Kumaratunga following two drafts composed in 1997, but it met a controversial defeat in Parliament (Bastians 2013). [↑](#footnote-ref-6)
7. Financial support for this field research was provided by the UC Irvine Political Science Department. [↑](#footnote-ref-7)
8. For the full list of interview questions, please see Appendix A. [↑](#footnote-ref-8)
9. Information about the Open University of Sri Lanka can be found on the university’s website, available at http://www.ou.ac.lk/. [↑](#footnote-ref-9)
10. The American Institute for Sri Lankan Studies is a non-profit organization and professional association established in 1996 to “promote US research and teaching on Sri Lanka and to build mutually beneficial links between US and Sri Lankan scholars and institutions.” For information about AISLS, please visit the institute’s website, available at http://www.aisls.org/. [↑](#footnote-ref-10)
11. Once in the field, I established nine new contacts and visited Environmental Foundation Limited (http://efl.lk/), an environmental public interest law firm, and the Institute of Human Rights (http://ihrsrilanka.org/), a civil society organization dedicated to the protection of human rights in Sri Lanka. [↑](#footnote-ref-11)
12. During my time in Sri Lanka, I had a maximum of two interviews scheduled on a single day (twice) and three days on which no interviews were scheduled, mainly a result of cultural or religious holidays (Madin Full Moon Poya Day on March 26th and Good Friday on March 29th). [↑](#footnote-ref-12)
13. Interview sites included the Central Environmental Authority, Citizens’ Trust, International Centre for Ethnic Studies, and World Bank, as well as private residences. [↑](#footnote-ref-13)
14. Interviews were again transcribed using f4, a transcription software tool. [↑](#footnote-ref-14)
15. Where the identification of a particular word remained unclear, I indicated as such on the transcript by placing the word in question in brackets alongside a question mark (i.e. [gazette?]). [↑](#footnote-ref-15)
16. Once again interviews were analyzed using ATLAS.ti 7, a qualitative analysis software tool. [↑](#footnote-ref-16)
17. Pilapitiya, Sumith. Personal interview. OUSL\_04.01.13\_07. [↑](#footnote-ref-17)
18. Wickramaratne, Jayampathy. Personal interview. OUSL\_03.30.13\_05. “Among the fundamental rights guaranteed by the 1978 Constitution are freedom of thought, conscience and religion, freedom from torture, right to equality, freedom from arbitrary arrest, detention and punishment, rights relating to criminal procedure and the freedoms of speech, expression, assembly, association, culture, occupation and movement” (Wickramaratne 1996, 27). The absence of economic and social rights in the chapter on Fundamental Rights did not mean that such issues were ignored in the 1978 constitution, however. The chapter on Directive Principles of State Policy and Fundamental Duties, discussed later, did engage economic and social issues, albeit without the explicit use of rights language (Coomaraswamy 1984, 54). [↑](#footnote-ref-18)
19. The 1972 Sri Lankan constitution included a chapter on fundamental rights, many of which were “lifted off the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR);” “those rights were to some extent expanded” in the 1978 constitution (Vinson 2010, 381). While many of the rights contained in the Universal Declaration appeared in the 1978 constitution, the right to own property and the right to work were not. In addition, the right to life, liberty and security of person, a provision included in the 1972 constitution of Sri Lanka, was not adopted in the 1978 constitution (Goonesekere 1988, 1). [↑](#footnote-ref-19)
20. One analyst argues that the changes to the enumeration of fundamental rights was overwrought in that “the rights are spelled out too profusely and as a result the restrictions are spelled out equally profusely” (Perera 1979, 26). For a comprehensive analysis of the differences between the 1972 and 1978 constitutions, see Warnapala (1980). [↑](#footnote-ref-20)
21. Item number three of the Select Committee’s questionnaire posed the following question: “What are the other fundamental rights which you would like to be guaranteed in the revised Constitution?” (Jayasuriya 1982, 64). [↑](#footnote-ref-21)
22. For a conceptual map detailing the relationships between the four conditions and political dynamics of the post-1978 constitutional environment in Sri Lanka, see Appendix B. [↑](#footnote-ref-22)
23. Gomez, Mario. Personal interview. OUSL\_03.27.13\_01.The lack of advocacy efforts related to environmental rights may be due in part to a “rights consciousness” which only began to emerge in the late 1970s (Coomaraswamy 1984, 48). This issue is addressed in greater depth in the section on *political environment*. [↑](#footnote-ref-23)
24. Algama, Ravi. Personal interview. OUSL\_03.29.13\_04. [↑](#footnote-ref-24)
25. I did not include among the attempts listed the 2003 National Environmental Policy, which, under Section 4.3 (“Outcomes to be Achieved”), emphasizes that the Policy focuses on striving to attain “A clean and healthy living environment maintained” and “A healthy ambient atmospheric environment maintained,” since neither can be considered legally enforceable rights (Sri Lanka Ministry of Environment & Natural Resources 2003, 42, 43). [↑](#footnote-ref-25)
26. This draft featured the proposal of a legally enforceable right to “an environment adequate for health and well being” (*National Environmental Act* 1995). [↑](#footnote-ref-26)
27. Gomez, Mario. Personal interview. OUSL\_03.27.13\_01. [↑](#footnote-ref-27)
28. A discussion of these issues is beyond the scope of this chapter. [↑](#footnote-ref-28)
29. Dhanapala, Jayantha. Personal interview. OUSL\_03.27.13\_02. [↑](#footnote-ref-29)
30. Indeed, Justice Kanagasabapathy Sripavan of the Supreme Court of Sri Lanka has acknowledged the importance of the judiciary in safeguarding the environment: “We, the judges of various jurisdictions, as custodians of the rule of law, have a vital role to play in protecting the environment. If we fail to protect the physical factors of the surroundings of human beings, including the land, soil, water, atmosphere, climate, sound, tastes and biological factors of animals and plants of every description, nature would hit us back and if nature really starts becoming furious, we would all be wiped off like ants. Let us hope that man becomes awakened very soon and transforms himself” (Sripavan 2010, 16). [↑](#footnote-ref-30)
31. Gomez, Mario. Personal interview. OUSL\_03.27.13\_01. [↑](#footnote-ref-31)
32. Algama, Ravi. Personal interview. OUSL\_03.29.13\_04. Rajepakse, Ruana. Personal interview. OUSL\_03.28.13\_03. At the same time, at least one observer notes how “[t]he Sri Lankan Supreme Court has not exhibited the enthusiasm for such judicial activism and has not adopted the new doctrines evolved by the Indian Court” (Sharvananda 1993, vi). [↑](#footnote-ref-32)
33. Founded in 1981, the Environmental Foundation Limited (EFL), the “first public-interest law firm in Sri Lanka,” was conceived based on the idea that “Sri Lanka possessed a well-developed framework of environmental laws that were ineffectively implemented and which could be used as a lever to promote environmental action” (Guneratne 2008, 108). [↑](#footnote-ref-33)
34. *The Environmental Foundation Limited v. The Attorney-General*, 1(1) S. Asian Envtl. Rep. 17 (S.C. App. No. 128/91, 1992). [↑](#footnote-ref-34)
35. *Ashik v. Bandula and Others*, S.C., F.R. App. No. 38/2005, SCM 07.11.2007. [↑](#footnote-ref-35)
36. However, despite the order from the Supreme Court to enjoin the activities deemed a public nuisance, the “practice continued unchanged” (Pinto-Jayawardena 2010, 42). [↑](#footnote-ref-36)
37. *Bulankulama v. Ministry of Industrial Development*, S.C., F.R. App. No. 884/99, 2000. [↑](#footnote-ref-37)
38. *Watte Gedara Wijebanda v. Conservator General of Forest and Eight Others*, S.C. App. No. 118/2004, SCM 04.05.2007. [↑](#footnote-ref-38)
39. I deliberately chose to focus on the existence of environmental laws and policies and not their performance since evidence suggests that the implementation of the environmental regulatory scheme in Sri Lanka is seriously inadequate. For instance, in an interview, Lalanath De Silva, Director of the World Resources Institute’s Access Initiative, states that “[t]wo-thirds of [polluting] industries are operating without a license, illegally, with no controls” (Vinson 2010, 380). Furthermore, an empirical study of environmental impact statements (EISs) reveals that “despite the existence of a sound legislative framework in Sri Lanka, the analysis contained within EISs generally fails to convey meaningful information to the relevant stakeholders and decision makers involved in protecting ecological interests and promoting sustainable development” (Samarakoon and Rowan 2008, 441). Thus, while Sri Lanka has numerous environmental regulations on the books, there appears to be a gap between their enactment and successful implementation. [↑](#footnote-ref-39)
40. Dhanapala, Jayantha. Personal interview. OUSL\_03.27.13\_02. [↑](#footnote-ref-40)
41. Interestingly, despite the fact that legal commentators have consistently stated that Sri Lanka does not have a constitutional environmental right *per se*, EFL, the Sri Lankan public interest environmental law firm, has published a handbook which declares unequivocally that “[a] healthy environment is both a right and a responsibility of all Sri Lankans” in the first sentence of a section entitled, “Sri Lankans’ constitutional right to a healthy environment” (*Your Environmental Rights and Responsibilities: A Handbook for Sri Lanka* 2006, 11). The section mentions the relevant Directive Principles, codes, ordinances, and acts, but nowhere is an actual constitutional right cited. Thus, it would appear that even in the absence of a fundamental right to the environment instantiated in the constitution, the “most important” (Guneratne 2008, 105) environmental NGO in Sri Lanka alleges that such a right exists by default. [↑](#footnote-ref-41)
42. The Sri Lankan judiciary’s views on the relationship between Fundamental Rights and Directive Principles of State Policy and Fundamental Duties have shifted over time. Soon after the enactment of the 1978 constitution, in *Seneviratne v University Grants Commission* [(1978-79-80) 1 Sri L.R. 182] Justice Wanasundera of the Supreme Court, citing Indian Supreme Court precedents, suggested that Directive Principles were equal to Fundamental Rights. Later, in *In re the Thirteenth Amendment to the Constitution Bill* [(1987) 2 Sri L.R. 312)], the Supreme Court “implied that although Directive Principles are not enforceable, Bills may be scrutinised to see whether they represent steps taken in the direction of implementing the programme envisaged by the makers of the Constitution” (Wickramaratne 1996, 30). However, analysts have also argued that in the event of a conflict between the two, Fundamental Rights reigns supreme (Sharvananda 1993, 107) and “[r]estriction of fundamental rights in the interests of Directive Principles is not permitted” (Wickramaratne 1996, 32). [↑](#footnote-ref-42)
43. The right to equality provision states: “All persons are equal before the law and entitled to equal protection of the law” (Sri Lanka Constitution of 1978, Art. 12(1)). [↑](#footnote-ref-43)
44. Rajepakse, Ruana. Personal interview. OUSL\_03.28.13\_03. Specifically, the doctrine of non-arbitrariness has created a “new dimension of equal protection” whereby “anything arbitrary can be challenged” under Article 12(1) (Wickramaratne, Jayampathy. Personal interview. OUSL\_03.30.13\_05), suggesting “that the ‘gate’ that was sought to be shut has in any event been opened in a different way” (Rajepakse 2008, 141). Unlike the more contemporary issue of protecting human rights in Sri Lanka, the “liberal doctrine of equal protection…became an accepted norm of politics by the early 1950s” (Coomaraswamy 1984, 77). Perhaps this fact also helps to explain the propensity of public interest lawyers in the country to bring ostensibly human rights cases under Article 12(1). [↑](#footnote-ref-44)
45. Sri Lanka Constitution of 1978, Art. 27(14). [↑](#footnote-ref-45)
46. Sri Lanka Constitution of 1978, Art. 28(f). [↑](#footnote-ref-46)
47. Rajepakse, Ruana. Personal interview. OUSL\_03.28.13\_03. [↑](#footnote-ref-47)
48. *Ibid*. [↑](#footnote-ref-48)
49. At the same time, as one scholar cautions, “the case law illustrates that the success or failure of public nuisance as a means of environmental protection and the degree of either, is to a large extent dependent on judicial sensitivity, attitude and approach in the particular case” (Puvimanasinghe 1997, 169). Furthermore, public nuisance prosecutions might not result in the desired environmental outcomes because “there is no procedure for the abatement of nuisance nor direct relief to the victims of such a nuisance” (Puvimanasinghe 1997, 145). [↑](#footnote-ref-49)
50. Rajepakse, Ruana. Personal interview. OUSL\_03.28.13\_03. [↑](#footnote-ref-50)
51. Created in 1980 with the passage of the National Environmental Act, the Central Environmental Authority (CEA), the main environmental agency in Sri Lanka, “enforces environmental laws” (Schukoske 1996, 156). [↑](#footnote-ref-51)
52. Wimalasena, Manuja. Personal interview. OUSL\_04.01.13\_06. [↑](#footnote-ref-52)
53. National Environmental Act No. 47 of 1980, Sec. 31. [↑](#footnote-ref-53)
54. Inspector General’s Circular No. 1196/95, Crime Branch Circular No. 05/95, 04.10.1995. [↑](#footnote-ref-54)
55. Wimalasena, Manuja. Personal interview. OUSL\_04.01.13\_06. [↑](#footnote-ref-55)
56. EPLs are issued by the CEA and allow “the holder to emit wastes into the environment within stipulated limits and subject to certain conditions” (*Your Environmental Rights and Responsibilities: A Handbook for Sri Lanka* 2006, 20). [↑](#footnote-ref-56)
57. The EIA process is designed “to predict the environmental consequences of development projects and is an important tool to achieve sustainable development” (Samarakoon and Rowan 2008, 441–442). For an overview of the EIA process in Sri Lanka, see Samarakoon and Rowan (2008, 442–445). [↑](#footnote-ref-57)
58. One scholar argues that “[EIAs] provide a better source of protection [than nuisance remedies], as they are prospective and can adopt a preventive approach” (Puvimanasinghe 2009, 45). [↑](#footnote-ref-58)
59. Gomez, Mario. Personal interview. OUSL\_03.27.13\_01. [↑](#footnote-ref-59)
60. Wickramaratne, Jayampathy. Personal interview. OUSL\_03.30.13\_05. [↑](#footnote-ref-60)
61. The following counterfactual analysis is motivated by an assessment of the likelihood that the absence of a condition would still result in the outcome observed (i.e. no constitutional environmental rights adopted), which is mainly based on the extent to which a given condition would have a significant impact on decision making directly related to the adoption of constitutional environmental rights. [↑](#footnote-ref-61)
62. At the time Sri Lanka’s 1978 constitution was ratified, only two countries in the world had constitutions with environmental rights—Yugoslavia and Portugal. That same year, Spain enacted a constitution with environmental rights over three months later. [↑](#footnote-ref-62)