

# INTERVIEW

## LALANATH DE SILVA: SRI LANKA ENVIRONMENTAL LAWS

*Lalanath de Silva currently serves as the director of the World Resources Institute's Access Initiative. He offers a unique perspective into environmental law in Sri Lanka. A graduate of the Sri Lanka Law College, de Silva obtained a Master of Laws degree from Washington University School of Law in 1991. While practicing law in Sri Lanka, de Silva represented politically unpopular clients who were subjected to intimidation and violence. From 1994 to 1996, he served as Legal Consultant to Sri Lanka's Ministry of Environment and Forests, during which time he was involved in the creation of the majority of Sri Lanka's environmental regulations. From 1996 to 2002, he practiced law within the private sector, and was Chairman of the Public Interest Law Foundation and Executive Director of the Environmental Foundation. As a Legal Officer in the Environmental Claims Unit of the United Nations Compensation Commission (UNCC) from 2002 to 2005, he aided in the processing of environmental damage war reparation claims resulting from the 1991 Gulf War. As director of the Access Initiative, de Silva works to promote access to justice in environmental decision-making in countries across the globe.*

*Interviewed by Sara Vinson\**

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**Can you provide some background information on the Access Initiative and how you came to be involved with the program?**

The Access Initiative is ten years old now and is operating in fifty countries. It is basically a civil society initiative where coalitions in different countries try to assess their governments under Principle 10 of the Rio Declaration, which has three pillars: access to information concerning the environment; opportunity to participate in decision-making processes about the environment; and access to judicial and administrative proceedings including redress and remedy. We have developed a web-based diagnostic tool kit, with some 148 indicators that are applied to a minimum of eighteen case studies. The tool kit helps identify gaps in laws and practices pertaining to access. We use the evidence developed with the tool kit as a basis for making recommendations and engaging the governments in a dialogue concerning improving access to information and participation, and reforming institutions, laws and practices in order to do so. This has been the strategy and the objective of the Access Initiative. There have been several outcomes that show that this strategy actually does work.

I have been working with NGOs for most of my life except for two brief stints when I worked with the UNCC for three years and the government of Sri Lanka for two years. And so I've always had an abiding interest in access issues. When my work with the UNCC was finished in 2005, I applied for the position of director of the Access Initiative. As director, I have changed the Initiative's course from centering on assessment to centering on outcomes, and changing laws, practices, and institutions.

**From 2002 to 2005, you served as a Legal Officer in the Environmental Claims Unit of the UNCC. Can you please briefly describe your work in this position, including your help in processing the largest war reparations claims dealing with environmental damage ever handled by the UNCC?**

For me, the time I spent at the UNCC was both educational and exciting. It was very new work for me because until then I had worked at the local or regional level. The UNCC work allowed me to get into an international institution, look at things from an international perspective, and work closely with national governments. I worked particularly closely with the governments of

Saudi Arabia and Iran because I was handling their claims for environmental damage resulting from the 1991 Gulf War. I also worked with the government of Iraq, of course.

The UNCC's establishment of the Environmental Claims Unit to consider war related reparations was the first international mechanism established for war reparations. Historically, the winning side set up tribunals. Even the Nuremburg Trials were basically set up by the Allied Forces, which won the war in Germany. This was the first time that the U.N., as an international body, set up an institution to assess war reparations, which for the first time, again, included environmental restoration and damages. The whole process was novel.

The processing of claims involved natural resource damage assessments, which was very new at the time. From about 2002 to 2005, we worked extensively with scientists and economists trying to put valuation methodologies in place. We had immense challenges because there was hardly any data on the areas that had been damaged in the Middle Eastern desert in 1991. We used satellite photographs trying to figure out what had happened on the ground. There were enormous challenges in terms of evidence of causation and assessing damages.

Roughly \$80 billion worth of environmental claims had to be processed. The main sources of damage were, of course, the oil well fires. Iraqi troops set fire to oil wells as they retreated. Saddam Hussein also dumped 200 million barrels of oil into the Gulf because he wanted to set it alight in the hopes of stopping the forces from coming ashore. There was also the military damage itself. The desert has a very thin layer, about half an inch to one inch, of fertile soil. So, when it rains, you have grass and vegetation, which is why you have shepherds. When that topsoil is removed, that's the end of the vegetation cover. It's dead. The use of large military vehicles and the building of camps and all kinds of military fortifications devastated the desert. Refugees were another source of damage. All of this had to be assessed.

**Now let's go back to your time working for the Sri Lanka government as the Legal Consultant to the Ministry of Environment and Forests. Can you tell us about your work at the Ministry?**

I was at the Ministry of Environment and Forests from 1994 to 1996. This time was also quite exciting. I basically wrote about 80% of Sri Lanka's environmental regulations. We also drafted a national environmental protection act, which included an environmental tribunal—a law that never saw the light of day. It was killed both by some territorial government agencies, as well as outside companies. There are bits and pieces of it floating around. While I was there, we put together a number of regulations, ranging from noise regulations to chlorofluorocarbons (CFCs), as well as appellate procedures and hazardous waste.

**What were your biggest accomplishments as Legal Consultant to the Ministry of Environment and Forests?**

The biggest accomplishment during this time was just getting all those regulations on the books and mastering the administrative system. Learning how these regulations are drafted, processed, and adopted and working the system to make that happen was a challenge. I am also proud of another achievement. The U.S. Energy Information Administration regulations had been adopted before I joined the Ministry. I was involved in drafting those regulations as an NGO representative. After I joined the Ministry, I was actively involved in implementing and enforcing those regulations.

**What is the most memorable case you worked on as an environmental lawyer in Sri Lanka?**

My most memorable case was one that I brought in my own name against the Minister of Environment. It is widely cited and studied in law schools. I brought the suit to force the Minister of the Environment to pass regulations to control vehicle emissions. I was asking for three types of regulations: (1) vehicle emission standards, (2) oil standards for petroleum and diesel, and (3) imported second-hand vehicle standards. We had many second-hand vehicles coming into the country, particularly from Japan. I wanted pollution control standards for those.

The argument was that my right to life had been violated. Unfortunately, the Sri Lanka Constitution does not include an express right to life. The biggest hurdle, therefore, was to convince the court that the right to life was implied by virtue of the existence of other

human rights in the Bill of Rights. The Chief Justice referred this to a constitutional bench of five judges. It was quite an experience to argue before five judges rather than three. I was on my feet for one and a half days. I was not getting through to them on the right to life. At the end of the first day, the presiding judge asked me whether it was the only argument I had. He asked whether I also had an argument on the basis of equality before the law. I did have that argument, but I was not pressing it then. He asked me to think about that argument.

I consulted senior colleagues at the bar and they asked whether I wanted a precedent or whether I wanted clean air. The next day, I presented the argument based on equality — when you have an ambient air quality standard, you also need emission standards — without emissions standards, one cannot maintain an ambient standard. Failure to enact emission standards would lead to violations of the ambient standard in some places — like large cities where vehicular pollution was rampant. In turn, this would result in unequal application of the law in those areas and consequently a heavier pollution impact on human beings living in those areas. I argued that this was unequal treatment of those individuals by deliberate omission on the part of the Minister of Environment. The argument went extremely well. After about an hour, the court stopped me and turned to the additional solicitor general. Within half an hour, the state had agreed to enact all the standards I was asking for within six months. We got a consent decree saying they would be enacted within six months.

**What are some of the most important environmental issues that Sri Lanka currently faces? Would you say that the Ministry of Environment and Forests' efforts and regulations have been effective thus far in combating these issues?**

Sri Lanka faces a number of issues. Three or four are particularly important. As an island country, the coastline is very important for commercial reasons, including the hotel industry and fishing. There is a lot of competition for space on the coastline. However, with global warming, the coastline is threatened, due to sea level rise, as well as coral die back. Sand mining also upsets the sand movement along the coast. So, coastal zone issues and coastal erosion are very big, visible issues.

Deforestation is also a big issue. There is very little tropical forest left. About 10% to 12% of our land area is in national parks and there is a lot of pressure to reduce those park areas. Twelve percent of a small island is a large amount of land. It is also a very crowded island. Although, when you fly over the country, you would never guess that because it is very green. So there is always pressure to reduce these forest areas.

Another issue we have is elephant-human conflict. In addition, in cities you have the “brown” issues, like water and air pollution.

The Ministry of Environment and Forests’ regulations have been effective to some extent, but in my view, not effective enough. In Sri Lanka, we have an environmental protection licensing scheme for polluting industries. Out of some 40,000 to 50,000 industries that have been surveyed as requiring a license, only 17,000 have obtained one. That’s less than one-third. Two-thirds of these industries are operating without a license, illegally, with no controls. So, there’s still a big problem, and I would say it’s only been about 30% to 50% effective.

There are also capacity constraints on the Ministry of Environment and the Central Environmental Authority — the leading environmental agency in the country. They need more resources and more personnel to enforce these rules and regulations. Also, because of the long civil war in Sri Lanka, there has never been enough money for these issues. Hopefully now with the end of the war, that situation will change. But one danger is the growing push by the government to attract investors at all costs — including waiving environmental safeguards. That would be a big mistake indeed. While Sri Lanka needs new investors to boost its lagging economy, these must be filtered through environmental safeguards.

**Have there been any initiatives in Sri Lanka for the development of an environmental court or tribunal? Do you think one is needed?**

When I was in the Ministry from 1994 to 1996, I made an effort to create a state of the art tribunal. However, the entire bill was killed. Since then, there has not really been an effort to set up an environmental tribunal, although the judiciary has become very green. There are many green judges, all the way from the Supreme Court down to the local courts. Also, when I was at the Ministry,

there was an extensive program to educate the judges. Every three months or so, we would have trainings. That really did help.

A specialized environmental tribunal is needed. These are specialized issues and it would be better to have a specialized institution. However, perhaps, there are other ways to meet these adjudicatory functions. Perhaps it would be through a tribunal, or an ombudsman, or some other kind of decision-making entity.

**The 1978 Constitution lists eight fundamental rights, including: free speech, association and conscience; freedom from torture and illegal detention; and equality. Some have claimed that the 1978 Constitution has taken a “minimalist” approach to human rights, in that it does not account for broader civil and political rights, including economic, social, cultural, and environmental rights. Do you agree with this critique?**

Yes and no. Our first Republican constitution was in 1972. The previous constitution did not have a bill of rights. In 1972, we got a bill of rights — a chapter described as “fundamental rights.” It had many of the currently enumerated fundamental rights and was lifted off the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup> There was, however, no enforcement mechanism other than ordinary suits for declarations and damages.

In 1978, those rights were to some extent expanded. The limitations were reduced and an enforcement mechanism, via access to the Supreme Court, was introduced. These were pretty innovative and creative changes. From that point of view, the 1978 Constitution broadened and improved upon the 1972 Constitution. However, if you judge it based on international standards, Sri Lanka’s constitution falls far short. Sri Lanka is a party to the UDHR and ICCPR, and so has an obligation to update its laws and ensure they conform to the international obligations articulated in those international human rights instruments.

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1. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966).

**The Constitution grants the executive the power of judiciary appointments. What overall effect has this had on the judicial system?**

The executive refers to the president who may make high appointments. Appointments to the lower judiciary are made by the Judicial Service Commission, which is composed of Supreme Court judges. Appointments to the upper judiciary — the Court of Appeal and Supreme Court — are made by the president.

Previously, the president did not have executive power. Under the 1972 Constitution, the president was a nominal head of state. Appointments were made by the president on the advice of the prime minister. Over the years there have only been a handful of controversial appointments — perhaps three or four. Most appointments have been either automatic elevations from the lower judiciary or senior counsel from the Attorney General's Department have been appointed.

Unfortunately, there had not been an appointment from the bar since the '70s. Recently, the current president appointed Justice Sureshchandra from the private bar. He is known to me and a good choice. The bar brings a wealth of experience. It is a great pity that more members of the bar have not been appointed to the bench. We have lost out on experience and innovation, and a great source of appointees. I don't think this has been by design. I don't think any president has decided not to appoint members of the private bar. It's just that there has been pressure to push people up from the lower judiciary or attorney general's department. Also, there has not been a great deal of interest from the private bar due to potential loss in income if appointed.

The handful of controversial appointments involved clearly political appointees. Though previous presidents clearly made political appointments, the current president has not done this. At the same time when you look carefully at some of these political appointments, some of them turned out to be great judges. For example, the first woman appointment was very controversial. She was a professor of law and pretty junior to be appointed to the Supreme Court. Over the years though, she has turned out to be a very respected and intelligent judge who writes very good judgments.

All in all, when you talk about appointments, it is difficult to say that the executive has been responsible for politicizing the

judiciary through appointments. Rather, the judiciary has become politicized through external benefits received by judges. For example, once they leave the bench, some have been appointed as ambassadors. There are many “plums” that come with a judicial appointment, like housing. Those kinds of things have influenced judges’ behavior more than actual political appointments. I think this is where the problem lies. There is a need to insulate the judiciary from those kinds of benefits which sometimes amount to misaligned incentives.

There has also been some harassment of judges. Neville Samarakoon CJ, for instance, was charged with contempt of Parliament and there was a motion to dismiss him as chief justice. He had fought for better salaries for judges and fallen out with the president of that time. Other judges who have issued decisions against the government have received threatening calls, government-organized protests outside their homes, and withdrawal of police guards. Bribery has begun to creep into the judiciary, particularly in the lower judiciary. This is pretty painful because Sri Lanka had a very clean and independent judiciary, even under the 1972 Constitution.

**The Seventeenth Amendment of the 1978 Constitution establishes a Constitutional Council. Can you briefly describe the responsibilities of this council?**

From 2002 to 2005, the Constitutional Council oversaw appointments to the upper judiciary, the Elections Commission, the Police Commission, the Bribery Commission, and a number of other important public offices. While the president continues to make those appointments, they must be approved by the Constitutional Council, which is made up of the president, the prime minister, the leader of the opposition and a number of other people of various political colors. After 2005, a constitutional crisis arose because vacancies on the council were not being filled, but the president was continuing to make appointments by-passing the council.

The council was created to try to rectify what were thought to be political appointments to the judiciary and other key public offices. In my view, the problem and the remedy were ill-matched. What was really needed was a set of rules or constitutional institutions to guard the judiciary from other influences. There is a rule that says salaries cannot be reduced, but there are no rules about receiving benefits,

such as low-cost government land, tax-free cars or post-retirement appointments to commissions and ambassadorial positions. Those issues should have been addressed.

**The constitution does not allow for actions to be brought against the executive for non-performance of mandatory legal duties?**

The president is immune from suit during the time he or she holds office. That is not unique to Sri Lanka. It is in many countries' constitutions. However, in Sri Lanka you can sue any member of the executive who performs public duties. The writ of mandamus (an order from a superior court to a public officer to perform a mandatory statutory public duty) is provided for in the constitution and is used against officials in the executive branch of government and is granted regularly.

My personal belief with respect to the executive is that no one should be above the law, not even the head of state. You may need special mechanisms to ensure that the head of state is not slapped with thousands of suits from across the country. But in principle, everyone should be subject to the rule of law. It is the constitution that is supreme — not any institution or individual however high an office they might hold. Providing for accountability mechanisms that are effective is the key to a good constitution.

**Do you think it necessary that mechanisms, such as a writ of mandamus, be put into place to ensure the protection of fundamental rights?**

Under the current constitution, it is possible to raise fundamental rights violations either directly in the Supreme Court or vicariously in writ applications before other competent courts. Should such issues arise, those courts are obligated to refer the issue for decision by the Supreme Court.

**What has been the effect of Sri Lanka's two sets of emergency regulations issued under the Public Security Ordinance and the 1979 Prevention of Terrorism Act on the protection of fundamental rights?**

I think that the emergency regulations had a devastating effect on fundamental rights. We must balance this against the need to deal with terrorism, which was a real problem in Sri Lanka. I have

experienced terrorism, particularly as a lawyer dealing with controversial environmental issues. I have been harassed and scared.

Sri Lanka has been a working democracy. The government has struggled to maintain the democracy through terrorist threats. In that situation, you need to bring in laws and regulations, such as these emergency regulations, to deal with the problem. Some of the provisions could have been milder, but I can't honestly step back and say they were totally unnecessary. They certainly could have been crafted in ways that tried to minimize interference with rights and maximize remedies. For example, under these regulations a person could be arrested and detained for weeks without access to a court. But this is never an easy balancing act in the face of terrorism which has no rules and respects nobody.

So, while I think these regulations have hurt fundamental rights, the government had to take some action to deal with the realities of the threat of terrorism. For example, militant groups often exploded bombs in the city of Colombo in crowded places using suicide bombers. Many innocent civilians including children died in these bombings. They disrupted road traffic and railways by damaging infrastructure. They killed dozens of innocent unarmed villagers in their sleep. I'm not agreeing with all the government's actions to deal with these threats, but it is important to balance rights against the maintenance of wider public order and the need to fight terrorism and protect democracy.

Now that the war is over, there really is no need for the regulations. There is evidence that the regulations are being scaled back. The Minister for External Affairs, Professor G.L. Peiris, has said that the regulations will be further reduced over the next year or two. We should return to normal democratic civil government. The sooner we can do that, the better. I think the right steps are being taken, and I would urge the government to keep that momentum and accelerate the pace.

**Can you describe some of the issues that lawyers are currently facing in Sri Lanka? Are lawyers severely constrained by the threat of contempt of court?**

Due to the war situation, there were a lot of weapons in the market and a lot of ex-soldiers available for hit jobs for very cheap. A culture of violence has grown up side by side with the culture of

civilization. Therefore, lawyers have been intimidated and received violence from all sides — sometimes from opponents, political figures, etc. This is obviously not good and must be condemned

I don't think the threat of contempt of court is what constrains lawyers — rather these kinds of harassments are a bigger problem. Contempt of court has been occasionally used, but has not been that widespread.

**Now that Sarath Silva has retired and Chief Justice Asoka de Silva has been appointed, do you see any changes occurring within the judiciary?**

I know Asoka de Silva, the new chief justice quite well. He is a very erudite man and very respectable gentleman. He has a lot of experience. He served on the U.N. Criminal Court for Rwanda. He has a lot of legal and judicial experience. I have a lot of respect for him. Unfortunately, he is due to retire soon. He has already made some changes to put the judiciary back on track. He is trying to regain judicial respect and minimize corruption. Within his two years, there may not be a lot he can do, but hopefully the next appointee will carry on his good work. The next appointee could make or break the judiciary.

**Do you think the judiciary will gain more freedom in its ability to protect fundamental rights?**

I hope the judiciary will gain more freedom. I believe it should do that by sticking to doing what it does best and what the constitution mandates, which is to judge. It should not have these forays into political areas. Parliamentarians should fight the political battles. The judiciary needs to remain independent and engage in its constitutional duty of interpreting the laws and adjudicating disputes impartially.

**What recommendations would you make for the Supreme Court as it moves forward? Would you propose any amendments to the constitution to allow for better protection of fundamental rights?**

I believe that the human rights chapter in the constitution needs to be broadened. More rights should be included, including the right to a healthful environment and the right to life. There should also be a right to education. Sri Lankans have enjoyed the right to free

education for a while, so why can't it be a right in the constitution? We have nothing to lose. There are a lot of rights like that, that should be written in, including the right to participate in government decision-making and the right to information.

I hope if a new chapter is written, limits will be much smaller and that the courts will be allowed to broaden human rights and interpret them widely. There would also need to be checks and balances. As far as the Supreme Court goes, broadly speaking, the current constitution gives the court broad powers. One recommendation I have though is to empower the Supreme Court with the power of judicial review of legislation. It does have a pre-legislative judicial review. The judiciary may declare a bill unconstitutional, but an independent judiciary needs to have the power of judicial review of legislation — the right to strike down laws that are unconstitutional. That is the only way to ensure the constitution is upheld. I also think there should be additional provisions written in to ensure the Supreme Court is insulated and independent.

