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EDITORIAL NOTE

It is with great pride and renewed commitment that we present Volume 6, Issue I of the *KDU Law Journal*, published by the Faculty of Law of General Sir John Kotelawala Defence University, Ratmalana. Since the inception of its first volume in 2021, the Journal has steadily progressed in stature and scholarly influence, establishing itself as a credible platform for rigorous legal research in Sri Lanka and beyond. Over the past five years, KDULJ has demonstrated consistent academic growth and editorial refinement.

A defining milestone in this journey was its inclusion in the internationally renowned HeinOnline database in 2022, which significantly enhanced the Journal's global visibility and academic reach. This achievement not only affirmed the quality of scholarship published in KDULJ but also strengthened its role as a conduit between Sri Lankan legal scholarship and the wider international academic community.

The publication of each issue is the result of collaborative dedication rather than individual effort. The Editorial Committee gratefully acknowledges the unwavering support extended by the academic and administrative staff of the Faculty of Law, General Sir John Kotelawala Defence University. Their professionalism and collective spirit have been instrumental in maintaining the high standards of the Journal. We also extend our sincere appreciation to the panel of manuscript editors and distinguished peer reviewers whose expertise and careful evaluation ensure that each article meets internationally accepted academic standards.

As KDULJ continues to evolve, we remain committed to strengthening its scholarly impact, encouraging innovative research, and contributing meaningfully to the development of legal thought. We trust that this issue will stimulate critical reflection and constructive dialogue among academics, practitioners, and students alike.

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Combating the Shadow Fleets: Legal and Institutional Frameworks in Maritime Security

Thushani Shayanthan*

Abstract

In recent years, the emergence and growing operations of "shadow fleets" also known as "dark fleets" have presented significant challenges to maritime security and the rule of law at sea. The proliferation of shadow fleets remains unregulated, often involving clandestine maritime operations used to circumvent international sanctions, transport illicit goods, or conduct unauthorized activities including exploitation of resources, illegal arms transportation and oil smuggling. This paper examines the critical role of international legal instruments in countering these threats, focusing on frameworks such as the United Nations Convention on the Law of the Sea (UNCLOS), International Maritime Organization (IMO) regulations, and regional agreements. For this purpose, a qualitative research methodology is adopted to analyse the legal mechanisms relating to ship registration, flag state responsibility, port state control, maritime domain awareness, the study explores both the strengths and limitations of current legal regimes in addressing the opacity and evasion tactics employed by shadow fleets. The paper also considers the intersection of maritime law with sanctions enforcement, environmental protection, and maritime crime suppression. Ultimately, the paper argues for enhanced international cooperation, stronger compliance mechanisms, and adaptive legal tools to effectively deter and dismantle shadow fleet networks, ensuring the integrity and security of the global maritime commons.

Keywords: *shadow fleet, dark fleet, maritime security, maritime operations, fraudulent registration, IMO*

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Introduction

Maritime security has long been a cornerstone of international stability, global trade, and geopolitical strategy. In recent years, a new and complex threat has emerged in the form of "shadow fleets" also known as "dark fleets" which from clandestine maritime networks that operate beyond the reach of conventional legal and regulatory frameworks.[1,2] These fleets are composed of vessels that deliberately obscure their identities, ownership structures, and cargo operations to evade international sanctions, environmental regulations, and safety standards.[3] Often employed by states or private actors under economic or political pressure, shadow fleets undermine global maritime governance and pose significant risks to environmental safety, economic integrity, and international security.[4]

The rise of shadow fleet operations is particularly evident in the context of international sanctions regimes. Countries such as Iran, Venezuela, North Korea, and more recently Russia, have increasingly relied on opaque maritime practices to sustain oil exports and other restricted trade activities.[5,6,7,8] These operations typically involve

[1] Elisabeth Braw, 'The Threats Posed by the Global Shadow Fleet and How to Stop It' (Atlantic Council 2024)<https://www.atlanticcouncil.org/in-depth-research-reports/report/the-threats-posed-by-the-global-shadow-fleet-and-how-to-stop-it/> accessed 14 May 2025.

[2] Iva Parlov and Ulf Sverdrup, 'The Emerging "Shadow Fleet" as a Maritime Security and Ocean Governance Challenge', Maritime Security Law in Hybrid Warfare, vol Volume: 102 (Brill | Nijhoff 2024) <https://doi.org/10.1163/9789004707993_010> accessed 15 May 2025.

[3] ShipUniverse Editorial Team, 'Shadow Fleets Create Waves in Global Trade' <https://www.shipuniverse.com/news/shadow-fleets-create-waves-in-global-trade/>accessed25 May 2025.

[4] ibid.

[5] Victorian Craw, 'Aging, Stealthy, Suspected of Sabotage: What to Know about Russia's "Shadow Fleet"' The Washington Post (20 May 2025) <https://www.washingtonpost.com/world/2025/05/20/russia-shadow-fleet-sanctions-baltic-sea/?utm_source=chatgpt.com> accessed 20 May 2025.

[6] Braw (n 1).

[7] Marianna Parraga, 'Venezuela Resorts to Using Shadow Tankers to Supply Oil to Ally Cuba' *Insurance Journal* (27 June 2024) <https://www.insurancejournal.com/news/international/2024/06/27/781299.htm> accessed 24 May 2025.

[8] Reuters, 'US Targets Iran "Shadow Fleet" Operations with More Sanctions' *The Straits Times SPH Media Ltd* (11 April 2025) <https://www.straitstimes.com/world/middle-east/us-targets-iran-shadow-fleet-operations-with-more-sanctions> accessed 25 May 2025.

the use of aging, unregistered or reflagged vessels; the disabling of tracking systems; fraudulent documentation; and ship-to-ship transfers in international waters. They are all aimed at avoiding detection and enforcement.[9] As these practices grow in scale and sophistication, they challenge the effectiveness of existing legal instruments and the capacity of states and international institutions to ensure accountability at sea.

This research firstly identifies the cases reported as shadow fleets by nations recently and then explores the role of international legal instruments in countering the threats posed by shadow fleets to maritime security. It examines the legal framework provided by the United Nations Convention on the Law of the Sea (UNCLOS), as well as relevant the International Maritime Organization (IMO) conventions, the IMO's Committee reports and resolutions and regional enforcement mechanisms. The study aims to assess how these instruments are applied in practice, identify gaps in enforcement and jurisdiction, and propose legal and policy recommendations for strengthening the global maritime regulatory regime.

By critically analyzing the intersection of international law, maritime enforcement, and emerging security challenges, this research contributes to a growing body of scholarship on the legal dimensions of maritime security. In doing so, it underscores the urgent need for coordinated, adaptive, and legally sound approaches to address the evolving risks posed by shadow fleet activities in international waters.

[9] Braw (n 1).

Shadow Fleets Reported by Nations

Before analysing the legal framework for controlling and preventing shadow fleets, the research intends to identify past incidents related to the fleets reported by nations.

In October 2023, *Turba,* a 26 year old vessel drifted for two days in the busy Indian Ocean shipping lane off Indonesia[10] and it was kept out of the way of other traffic due to engine failure.[11] The incident created a further challenge to international community in identifying the owner of the ship.[12] However, it was reported that the satellite tracking data indicated that *Turba* was carrying Russian petroleum in the direction of Singapore.[13] Indonesian Naval Service Department revealed that when it was drifting, it was near but not within Indonesian maritime borders.[14] As it carried petroleum during adrift, it posed marine environmental risk in the Indian Ocean. This incident alarmed the international community that shadow fleets are in operation without disclosing ownership and create risk to marine environment.

In January 2025, the Panamanian flagged tanker called *Eventin,* carrying nearly 100,000 tonnes of Russian crude, suffered a total power blackout in the German Baltic Sea. It was unable to manoeuvre in rough winter weather.[15] Germany's Central Command for Maritime Emergencies took multiple tugs and the vessel was brought under

[10] Alaric Nightingale and Chandra Asmara, 'Oil Tanker Adrift in Indian Ocean Is Latest Reminder of Dangers of Shadow Fleet' *Insurance Journal* <https://www.insurancejournal.com/news/international/2023/10/11/743653.htm> accessed 22 April 2025.

[11] Andrew Janes and Julian Lee, 'Shadow Fleet Oil Tanker Drifter for Two Days in Indian Ocean' *Captain* (11 October 2023)<https://gcaptain.com/shadow-fleet-oil-tanker-drifted-for-two-days-in-indian-ocean/?utm_source=chatgpt.com> accessed 24 April 2025.

[12] ibid.

[13] Nightingale and Asmara (n 10).

[14] Janes and Lee (n 11).

[15] Daniel Bellamy, 'Germany Tugs Drifting Oil Tanker - Believed to Be Russian - to Safer Waters' euro news (11 January 2025)<https://www.euronews.com/2025/01/11/germany-tugs-drifting-oil-tanker-believed-to-be-russian-to-safer-waters?utm_source=chatgpt.com> accessed 24 April 2025.

control, and dragged to waters off Sassnitz without oil spill.[16] Germany's Foreign Minister, Annalena Baerbock, condemned the incident, and described the *Eventin* as Russia's shadow fleet which gives direct threat to European security and marine environment.[17] Consequently, German customs authorities seized the vessel and then General Customs Directorate has made a confiscation order to acquire the ownership of the vessel and its cargo of the vessel worth over 40 million euros.[18]

The below chart further provides a brief of shadow fleet incidents reported in the past two years:

Vessel name	**Period**	**Location**	**Cause of the event**	**Impact**	**shadow fleet operations**
Pablo	May 2023	South China Sea	Explosion after crude oil delivery	3 crews dead towage by Malaysia	Uninsured, having several names for the vessels, flags and registered owners in the past 4 years
Turba	October 2023	Indian Ocean near Indonesia	drift as a result of engine failure	Oil spill and marine pollution	Unknown owner

[16] 'German Foreign Minister Says Stricken Tanker in Baltic Sea Belongs to Russia's "Shadow Fleet"' Radio Free Europe / Radio Liberty (11 January 2025) <https://www.rferl.org/a/germany-baerbock-tanker-russia-oil-baltic-sea-ukraine/33271968.html?utm_source=chatgpt.com> accessed 24 April 2025.

[17] ibid.

[18] Yuliia Taradiuk, 'Germany Seizes Russian "shadow Fleet" Tanker in Baltic Sea, Der Spiegel Reports' The Kyiv Independent (21 March 2025) <https://kyivindependent.com/germany-seizes-russian-shadow-fleet-tanker-in-baltic-sea-der-spiegel-reports/?utm_source=chatgpt.com> accessed 25 May 2025.

Andromeda Star	March 2024	Danish Straits	Collision with cargo ship	No oil on board	Undisclosed owner Expired insurance Registered with the flag of convenience
Canis Power	May 2023	Danish Straits	Engine failure	Highlighted risks of marine pollution	Aging unmaintained tanker
Hafnia Nile & Ceres I	July 2024	Off Malaysia	collision	fire	turned off its tracking system, both uninsured
Eventin	Jan 2025	Baltic Sea	power blackout	seized and sanctioned by Germany	unknown owner

The table is developed by the author.

Following the incidents, some nations including the United States of America and European Union member States have taken certain measures including imposing sanctions to stakeholders of shadow fleets. The following paragraphs will discuss the measures taken by the nations individually or collectively to prevent the shadow fleets.

U.S. Sanctions on Iranian Oil Shadow Fleet (Post-2018)

Following the U.S. withdrawal from the Iran nuclear deal in 2018 and the reimposition of sanctions, Iran began using a fleet of aging tankers, often sailing under flags of convenience to transport oil covertly. Many ships disabled their Automatic Identification

Systems (AIS) to avoid detection and falsified documentation about cargo origin and ownership. In March 2025, the U.S. has imposed sanctions on Iran's Oil Minister along with three entities which provided services to ghost fleet vessels conducting ship to ship transfer operations outside port limits of Southeast Asia.[19] The State's actions were taken pursuant to Executive Order (E.O.) 13846, which targets transactions involving petroleum from Iran and E.O. 13902, which targets Iran's petroleum and petrochemical sectors.[20] However, the actions are being questioned based on State's jurisdiction. While the incident alarms the risk of environmental disasters from unseaworthiness vessels on one side, it poses the challenges in enforcing the UN or unilateral sanctions due to jurisdictional complexity.

Russian Oil Shadow Fleet and G7 Price Cap Evasion (2022–Present)

Since Russia's invasion of Ukraine in February 2022, the G7, EU, and Australia have implemented a $60 per barrel price cap on Russian crude oil to curb Moscow's revenues.[2122] In response, Russia has developed a "shadow fleet", a network of aging, reflagged oil tankers used to circumvent sanctions and maintain oil exports.[23]

By late 2024, the shadow fleet was responsible for transporting over 70% of Russia's seaborne oil exports.[24] This shift has significantly

[19] 'Sanctions on Iran's Oil Minister and Shadow Fleet to Exert Maximum Pressure' (US Department of State 2025) <https://www.state.gov/sanctions-on-irans-oil-minister-and-shadow-fleet-to-exert-maximum-pressure/> accessed 21 March 2025.

[20] ibid.

[21] Craw (n 5).

[22] 'G7 Vows to Clamp down on Russia's Oil Sanctions Evasion' The Guardian (26 October 2024)<https://www.theguardian.com/world/2024/oct/26/g7-vows-to-clamp-down-on-russias-oil-sanctions-evasion?utm_source=chatgpt.com> accessed 14 May 2025.

[23] ibid.

[24] Martin Fornusek, '70% of Russian Oil Shipped by Shadow Fleet, Posing Environment Risk, Report Says' The Kyiv Independent (27 May 2025) <https://kyivindependent.com/shadow-fleet-environment/?utm_source=chatgpt.com> accessed 27 May 2025.

undermined the effectiveness of the $60 per barrel price cap, allowing Russia to continue generating substantial revenue despite sanctions.[25] Estimates suggest that in 2024 alone, this evasion could have provided Russia with up to $9.4 billion in additional oil revenues.[26] Many vessels in the shadow fleet are poorly maintained and uninsured, posing significant environmental and safety hazards.[27] These risks are exacerbated by the fleet's operations in sensitive maritime areas like the Baltic Sea, where incidents have raised concerns about hybrid warfare tactics.[28] Bockmann MW, a maritime intelligence analyst criticizes that the UNCLOS is not adequate to respond the issues and IMO also failed to tackle the issues by preventing fraudulent flag registries and unflagged ships.[29] In May 2025, the EU adopted its 17th sanctions package, targeting over 130 entities and individuals linked to the shadow fleet, including Russian oil giant Surgutneftegaz and shipping firms in the UAE, Turkey, and Hong Kong.[30] These measures aim to reinforce the G7 price cap by disrupting the logistics and financial networks supporting the fleet.[31] However, Bockmann forecasts that irrespective of the sanctions, the fleets will cause catastrophic oil spills waiting to happen.[32]

[25] Alice Johnson, 'Russia's Shadow Fleet: A Growing Threat' <https://www.ibanet.org/Russia-shadow-fleet-a-growing-threat?utm_source=chatgpt.com> accessed 19 May 2025.
[26] ibid.
[27] Michelle Wiese Bockmann, 'A Flagless Fleet Is Threatening the Seas' FINANCIAL TIMES (22 May 2025) <https://www.ft.com/content/7a89f7ae-cf3b-4e53-88bb-b87916f3eeef> accessed 22 May 2025.
[28] Johnson (n 31).
[29] Bockmann (n 33).
[30] Julia Payne, 'EU Countries Adopt Four Sets of New Russia Sanctions' *Reuters* (20 May 2025) <https://www.reuters.com/business/energy/eu-countries-adopt-four-sets-new-russia-sanctions-2025-05-20/?utm_source=chatgpt.com> accessed 20 May 2025.
[31] ibid.
[32] Bockmann (n 33).

Present international legal framework to countering the shadow fleet threats

The above factual analysis reveals the fact that the shadow fleets often violate the maritime laws for unlawful oil transportation and cause adverse impact on marine environment and maritime security. Therefore, it is vital to identify the relevant maritime laws in the present regime to address the issues. For this purpose, the paper explores the relevant provisions of the UNCLOS and IMO regulations.

The United Nations Convention on the Law of the Sea (UNCLOS)

The UNCLOS does not explicitly address "shadow fleets". It is a modern term referring to vessels operating unlawfully to avoid regulation, sanctions, or detection. However, it contains several relevant provisions that can be applied to counter such threats under broader categories of flag state responsibility, freedom of navigation, maritime security, transparency of vessels operations and the suppression of unlawful activities at sea.

Articles 91 and 94 of the Convention refer the rules related to flag State Responsibility. Accordingly, States may grant their nationality to ships, but they must maintain a genuine link with the ship. The "genuine link principle" is often violated by shadow fleets using non-transparent ownership structures. Under Article 94, flag States are obliged to effectively exercise jurisdiction and control over ships flying their flag. Further it requires States to maintain of ships and ensure that vessels conform to international regulations concerning safety at sea, crew training, and pollution prevention. Also, it requires flag States to investigate any reports of non-compliance by ships flying

their flags, which can be relevant for flag States indirectly supporting shadow fleets.[33] It is to be pointed out that shadow fleets often exploit "flags of convenience" to evade these obligations, undermining flag state accountability.

The UNCLOS empowers port States to uphold international regulations by inspecting foreign vessels when they are voluntarily in port.[34] States can utilize this authority to refuse port entry to or detain vessels suspected of shadow fleet activities, particularly where doubts exist over a vessel's true identity, ownership, safety standards, or compliance history. Such port State controls serve as vital enforcement mechanisms, especially when flag State oversight is compromised or ineffective. Collaborative regional mechanisms, such as the development of harmonized inspection protocols under bilateral or multilateral agreements among port States, can further amplify the impact of the UNCLOS provisions by facilitating data sharing and joint operational actions.[35,36]

In addition, foreign warship may have the right to visit on the board of the vessel if it suspects the vessel concerned on the reasonable grounds of engaging in piracy, or slave trade or absence of nationality while the suspected vessels on the high seas.[37] However, the Convention does not refer the activities related to shadow fleets other than absence of nationality.

As far as controlling marine pollution, the UNCLOS establishes strong obligations regarding marine environmental preservation.[38] Shadow fleet activities often pose risks of marine pollution through

[33] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art 94 (5)
[34] UNCLOS (n 24) art 218
[35] Stephen C Nemeth and others, 'Ruling the Sea: Managing Maritime Conflicts through UNCLOS and Exclusive Economic Zones' (2014) 40 International Interactions 711.
[36] Xinmin Ma, 'China and the UNCLOS: Practices and Policies' (2019) 5 The Chinese Journal of Global Governance 1.
[37] UNCLOS (n 24) art 110
[38] UNCLOS (n 24) art 192 and 217

illicit oil or hazardous cargo transfers or substandard vessel conditions. It recognizes the jurisdiction to flag States and port States generally and coastal States in a limited extent. Article 217 mandates that flag States must ensure compliance by their vessels. Flag States are required to investigate any reports of non-compliance by ships flying their flags, which can be relevant for flag States indirectly supporting shadow fleets.[39] Coastal States can exercise enforcement jurisdiction over their territorial sea or exclusive economic zone for causing pollution in the zones.[40] Further, port States can have enforcement jurisdiction over vessels voluntarily within a port or at an off-shore terminal of a Port State in relation to violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.[41] These interconnected responsibilities provide a legal foundation to pursue enforcement actions against ships involved in environmentally harmful shadow fleet operations, regardless of where the infraction is detected.[42]

In addressing the shadow fleets, promoting international cooperation is essential to address illicit maritime activities. For this, collective surveillance, intelligence sharing, harmonization of registries, and participation in joint interdiction efforts can fill gaps left by the weaknesses of individual flag States. While the Convention provides dispute settlement mechanisms to address failures of individual States to uphold their duties, broader multilateral cooperation which is often crystallized in supplementary agreements and regional organizations, remains indispensable for the effective implementation of the Convention norms in combating shadow fleet challenges.

[39] UNCLOS (n 24) art 94(5)
[40] UNCLOS (n 24) art 220
[41] UNCLOS (n 24) art 218
[42] Ma (n 42).

Despite these provisions, the UNCLOS exhibits structural limitations. It was not designed with the contemporary tactics of shadow fleets such as complex corporate structures, use of aged or substandard ships, or advanced evasion tactics. While the Convention provides the foundational legal architecture, evolving practices including proliferation security initiatives and various regional mechanisms often supplement and operationalize its framework to meet enforcement demands.

Role of the IMO to combat shadow fleets

The International Maritime Organization (IMO), as the principal UN agency for regulating shipping, has undertaken several key actions. It has developed and implemented a suite of initiatives aimed at enhancing vessel traceability, strengthening regulatory enforcement, and promoting cooperative mechanisms. Central among these is the enhancement of ship identification schemes. Beyond technical and operational support, IMO Conventions, Regulations and resolutions have played a significant role in addressing shadow fleet challenges.

IMO Resolution A.1192 (33)[43]

The Resolution concerns on the challenges posed by "dark fleet" or "shadow fleet" particularly engaging in ship-to-ship (STS) transfer which they covert the cargoes' destinations or origins, or otherwise avoid oversight or regulation by flag or coastal States.[44] This is the first instrument defines "dark fleet" or "shadow fleet" as follows:

[m]eans ships that are engaged in illegal operations for the purposes of circumventing sanctions evading compliance with safety or environmental regulations, avoiding insurance costs or engaging in other illegal activities.

[43] IMO Resolution A.1192(33) 2023 (Resolution).
[44] ibid.

It provides non-exhaustive list of illegal activities including carrying out operations which are unsafe and non-complied international regulations and best practices, intentionally avoiding flag State and port State control inspections, operating without adequate liability insurance and concealing vessel identity or location by disabling tracking systems.[45] The resolution encourages flag States to ensure vessels under their registry that do not engage in any illicit activities such as STS transfer conducted to bypass sanctions or regulatory oversight.[46] They are also urged to mandate the reporting of STS operations and to maintain transparent corporate governance that ensure crew welfare and environmental protection. [47] It also recommends that port States become aware of any ships intentionally taking measures to avoid detection, such as switching off their Automatic Identification System (AIS) or Long-Range Identification Tracking (LRIT) Systems concealing their actual identity. It further advises port States to notify it to the Flag States and follow an initial investigation to verify whether the ship had stopped transmitting signals for legitimate reasons. Additionally, the resolution calls upon coastal States to monitor STS operations in their territorial sea and exclusive economic zone. Ultimately, the resolution enhances international cooperation by calling all the relevant States ability to monitor the "shadow fleet" conducts in the sea. However, it is to be noted that the resolution still remains as "soft law".

[45] ibid.
[46] ibid.
[47] ibid.

Final Report of the Study Group on Fraudulent Registration and Fraudulent Registries of Ships[48]

IMO's Legal Committee at its 109th session in 2022 established a study group to initiate a comprehensive study to address issues in connection with fraudulent registration and fraudulent registries of ships and recommend the possible measures to combat the activities.[49] The study group submitted the final report in 2024 containing an analysis on fraudulent registration, impact of fraudulent registration and analysis of international legal frameworks of its adequacy and recommendations.

The report distinguishes the status of flag "false" from a ship being part of a "dark fleet" or "shadow fleet". It states that any ship which transmits, broadcasts, displays, or otherwise engages in the misuse of flag details, which are confirmed by the flag administration as not registered legally, is designated as flag "false" in the Global Integrated Shipping Information System (GISIS) database.[50] GISIS is developed, maintained and administered by the IMO.[51] It is a comprehensive online hub for the collection, processing and sharing of shipping-related data including a wide range of modules those on contact points, ship and company particulars, maritime security and other various modules.[52] It further states from the document as noted by the Committee at its 110th session that a fleet of tankers primarily comprised of older ships, including some not inspected

[48] Legal Committee of the IMO, 'Final Report of the Study Groug on Fraudulent Registration and Fraudulent Registries of Ships' (2024) Final Report LEG 111/6 <https://wwwcdn.imo.org/localresources/en/MediaCentre/MeetingSummaries/Documents/FINAL%20REPORT%20-%20Study%20Group%20on%20Fraudulent%20Registration%20and%20Fraudulent%20Registries.pdf> accessed 21 July 2025.

[49] ibid 1.

[50] ibid 9.

[51] K Ritbik, 'Marine Insight' (What is IMO's Global Integrated Shipping Information System (GISIS)?, 23 January 2021) <https://www.marineinsight.com/maritime-law/what-is-imos-global-integrated-shipping-information-system-gisis/> accessed 25 May 2025.

[52] IMO, <IMO | Global Integrated Shipping Information System (GISIS)> accessed on 21 May 2025

recently, having substandard maintenance, unclear ownership and a severe lack of insurance, was currently operated "dark fleet" or "shadow fleet" to circumvent sanctions and high insurance costs.[53]

Further, the report identifies that absence of universally accepted express definition for 'fraudulent registration of a ship' and 'fraudulent registry' in treaties or other international instruments leads complex and diverse interpretations of relevant laws whenever the issues related to ship registration, flagging and ownership arise out.[54] It highlights that there is no binding international legal framework to regulate the ship registration.[55]In addition, it points out that the present international legal instruments including those of which discussed in the paper, may be considered indirectly to address the fraudulent registration and prevent fraudulent practices.[56]

With regards to the issues so far identified in the report, it also makes suggestions. Firstly it recommends to develop guidelines on ship registration including rigid mechanisms to deter fraudulent ship registration practices.[57] Secondly, it recommends certain measures for States including flag States, Port States and Coastal States: (a) to strengthen cooperation among States to combat fraudulent ship registration, (b) to invest in advanced technology solutions for surveillance of ship registration and ship activities, (c) to hold flag States accountable for ship registration negligence or oversight, (d) to encourage port States to play a more active role in identifying cases of fraudulent ship registration and notifying the relevant authorities including the IMO, (e) to strengthen the protection of seafarer during

[53] 'Addressing Ship-to-Ship Oil Transfers and Tankers in the "Dark Fleet"' <https://www.imo.org/en/mediacentre/meetingsummaries/pages/legal-committee,-110th-session.aspx> accessed 24 May 2025.
[54] Legal Committee of the IMO (n 54) 17.
[55] ibid 30.
[56] ibid.
[57] ibid.

the incidents, (f) to develop initiatives to promote greater transparency in ship registration and ownership records.[58]

From the outcome of the report, it is evident that fraudulent registration of ship and the ship activities are unsettled issues in international maritime law and it continues to threat the maritime security. It urges the international community to revise the existing international legal framework to address the issues.

International Convention for the Safety of Life at Sea (SOLAS)

The main objective of the Convention is to provide minimum standards for the safety of ships including construction, equipment, qualification of crews, communication and navigation systems and operation of ships.[59] Shadow fleet vessels often fail to comply with SOLAS standards including failure to possess valid SOLAS certificates, operating with outdated or poorly maintained safety equipment and / or employing underqualified crews. It also requires flag States and port States to conduct inspections to ensure compliance.[60] However, the shadow fleet vessels often use flags of convenience from States that do not enforce SOLAS standards, avoid major ports where inspections are routine and / or operate in jurisdictions with weak port State control.

[58] ibid 31-32.

[59] 'International Convention for the Safety of Life at Sea (SOLAS), 1974' <https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx> accessed 31 May 2025.

[60] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 chapter XI-2

International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/1978

MARPOL, adopted in 1973 and modified by the 1978 Protocol is a key treaty administered by the IMO. It aims to minimize pollution from ships, both accidental and operational. Shadow fleet vessels often disregard MARPOL regulations such as discharging oily bilge water at sea[61], burning high-sulfur fuel in Emission Control Areas[62], and illegally dumping garbage or sewage.[63] The vessels weaken global maritime governance. For example, they are registered in a country that do not enforce MARPOL compliance, they often avoid ports with rigorous Port State Control and they may lack valid certificate, for example of possessing International Oil Pollution Prevention Certificate.

Annex I of the MARPOL requires oil tankers to maintain equipment and structural integrity to prevent oil spills. For example, double hulls and oil discharging monitoring. The shadow fleets often using aging and poorly maintained tankers, violate these standards and making drifting extremely risky. If a shadow fleet tanker like *Turba* or *Eventin* (as discussed above) suffers engine failure to drift, the risk of collision or grounding increases potentially leading to oil spills that the MARPOL is intended to achieve.

Article 4 of the Convention obliges the flag States to ensure that vessels registered under the registries shall be in compliance with the MARPOL including maintenance and reporting. However, shadow fleet vessels often opt for States which adopt low standards on these aspects under the concept of flag of convenience. It is commonly

[61] International Maritime Organization, International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78 (IMO, 1978) 1973.
[62] ibid.
[63] ibid.

alleged that many foreign ship owners have made registrations of their ships in Panama avoiding the stricter marine regulations imposed by their own nations.[64]

The Convention also authorizes the Port States or Coastal States to inspect the ship whether the ship has discharged any harmful substances in violation of the Convention when it enters the port or off-shore terminals under its jurisdiction.[65] For example, Germany's intervention in the *Eventin* case was made possible under the Convention considering the MARPOL related safety concerns.

International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), 1988

The Convention was adopted in 1988 to criminalize acts that threaten maritime navigation, particularly terrorism and violence at sea.[66] Over time, its scope was expanded with 2005 Protocol to cover a broader range of unlawful activities. The Convention criminalizes intentional acts that damage or destroy a ship or its cargo in a manner to endanger safe navigation.[67] Article 6 allows for broad jurisdictional claims, including when an offence committed against or by a national, or on a ship flying a party State's flag. Therefore it adopts principles on State's jurisdiction based on territoriality, nationality and passive protective principles. The provisions hinder the shadow fleet vessels using of flags of convenience to avoid enforcement mechanisms.

[64] 'Why so Many Shipowners Find Panama's Flag Convenient' BBC News (5 August 2014) <https://www.bbc.com/news/world-latin-america-28558480> accessed 28 April 2025.

[65] International Maritime Organization, International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78 (IMO, 1978).

[66] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 (SUA Convention)

[67] SUA Convention (n 44) art 3

However, the SUA enforcement mechanisms depend on boarding, inspection and extradition, but these are made difficult by shadow fleet practices. For example AIS signal suppression.

Conclusion

The growing prevalence of shadow fleet operations presents a complex and evolving threat to maritime security and the integrity of the international legal order at sea. This paper has demonstrated how key legal instruments including the UNCLOS, SOLAS and the SUA Convention as well as IMO Resolution A.1192 (33) form a foundational framework for addressing such threats. However, shadow fleets exploit jurisdictional loopholes based on flags of convenience, regulatory fragmentation, and enforcement weaknesses inherent in these regimes.

While the Conventions provide substantial legal authority to regulate navigation, prevent pollution and suppress unlawful acts, their effectiveness is often hindered by inconsistent State implementation, the abuse of flags of convenience, and the opacity of ship ownership. Enhancing inter-state cooperation, strengthening port State control, expanding satellite-based vessel monitoring, and holding enabling actors such as insurers and ship registries accountable are critical steps forward.

As Final Report of the Study Group on Fraudulent Registration and Fraudulent Registries of Ships provides recommendations, it is pivotal for the international community that international legal framework be revised to address expressly the fraudulent registration of ship and related ship activities. It is recommended that the IMO with the support of its members should invest in advanced technology solutions as GISIS developed by the IMO. And also, international cooperation is essential among States to ensure the transparency mechanisms for ship

registration and ownership records.

Ultimately, battle against shadow fleets cannot be won by legal instruments alone. It requires the political will to enforce existing laws and the adaptation of those frameworks to combat the challenges. Enforcement of the legal instruments would only be possible if the regional and international cooperation among States is strengthened effectively as the EU recently adopted 17th Russia sanctions package as discussed above.

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Impact of International Labour Standards on Labour Rights Due Diligence: Progress and Challenges in Nepal

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Abstract

International labour standards, primarily developed by the International Labour Organization (ILO), are essential guidelines to ensure a fair, equitable and conducive working environment. These standards aim to promote rights at work, encourage decent employment opportunities, enhance social protection, and strengthen dialogue on work-related issues. The ILO, a specialized agency of the United Nations, has been promoting these standards since its inception in 1919, advocating for improving labour market governance across member countries. Nepal has been a member state since 1966 and has consistently worked to protect and promote labour rights. The National level Labour Force Survey Data of Nepal reveals that the formal sector constitutes 37.8 per cent while the informal sector comprises 62.2 per cent of the workforce. Within the informal sector, for instance, 65.6 per cent of the workforce is involved in the subsistence-level agriculture sector. Accordingly, the country faces higher employment rates driven by the agriculture sector, where hidden underemployment prevails. As a result, around 20 per cent of the population falls below the absolute poverty line. Though a significant portion of Nepal's workforce is employed in the informal sector, this sector is often outside the reach of formal labour regulations or not able to accommodate in the labour market governance. For the effective governance of labour market, Labour Rights Due Diligence (LRDD) is a

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fundamental process that covers a comprehensive range of practices and policies to identify, prevent, mitigate, and account for adverse impacts on workers' rights throughout the business operations and supply chains. The international instruments for both standard-setting and due diligence practices have developed rampantly, insisting States at the global level be a part of it. Nepal also has signed and ratified seven core international human rights instruments and eleven out of one hundred and ninety two conventions of ILO, conceding contemporary international human rights development. Despite this, Nepal faces ongoing issues in effectively protecting workers' rights, particularly within its extensive informal sector. Nepal, striving to enhance labour conditions, faces multifaceted obstacles, including legislative gaps, enforcement deficiencies, and socio-economic constraints. The researcher has adopted exploratory, descriptive, and analytical approaches under the doctrinal method to explore how international labour standards, as set by the ILO, influence national legislation and practices in Nepal. Overall, the paper's main purpose is to find out the intricacy and legal challenges of international labour standards to ensure compliance and effective regulation of LRDD in both sectors- formal and informal, of labour rights governance in Nepal. Thus, the paper has focused on gaps in endorsed legislations, and the effectiveness of mechanisms adopted to be in line with LRDD, and also highlights both the strides made and the persistent challenges that the labour rights governance is struggling with in Nepal.

Keywords: *Labour Standards, Due diligence, Workforce, Labour Market Governance, and Labour Rights*

Introduction

International Labour Standards (ILS) are legal instruments developed and ratified by the constituents[1] of the ILO that delineate globally acknowledged rights in the workplace. The three forms[2] of ILS are adopted by the ILO's constituents worldwide. Hence, it can also be taken as a representation of globally accepted principles and values. To safeguard the material well-being and personal dignity of workers, and maintain the fundamental principles of freedom and equality, these standards pertain to the basic human rights of workers and extend beyond the regulation of the material conditions of employment[3]. The understanding of ILS is not a recent development. The genesis of ILS is as old as the inception of the ILO[4] after the First World War and the continuation and development as a specialized agency of the United Nations Organization in the present context.

It is widely acknowledged in the field of economics that labour should be treated like any other commercial good and that the same laws and principles of supply and demand should apply to the labour market as they do to different markets[5], regardless of the labour rights and human rights instruments that have been developed. However, this understanding has gradually changed with the recognition that labour rights are inherently human rights[6], and explicitly mentioned in the

[1] Constituents refers to governments, employers and employee.
[2] Three forms of ILS refer to Conventions, Protocols and Recommendations.
[3] Kofi Addo, *Core Labour Standards and International Trade Lessons from Regional Context* (Springer Heidelberg New York Dordrecht London 2015)., Hensman, R. (2000), World Trade and Worker's Rights, to link or not to link? *Economic and Political Weekly, 8* April .
[4] History of the ILO; Created by the Treaty of Versailles in 1919, along with the League of Nations. <<: https://libguides.ilo.org/history-en :>> accessed on 17/10/2024.
[5] Addo (n 3).
[6] International Labour Standards and Human Rights, available at <<:https://www.ilo.org/resource/international-labour-standards-and-human-rights:>>accessed on 01/10/2024.; Also, the Principle 1 of the ILO Declaration of Philadelphia, 1944.

testaments of the ILO, including the International Bill of Human Rights. Thus, it becomes a critical component of any due diligence process. However, the concept of due diligence can be found in human rights law testaments. Nevertheless, the instrumentalization of the due diligence approach does not have a long history. Mainly, due diligence refers to the processes of the management tools by which business enterprises should ensure that they discharge their responsibility to respect human rights. The due diligence of labour rights is mentioned as the term 'Human rights due diligence' in the three main instruments[7] that jointly form a benchmark for responsible business conduct and are aligned and complement each other. Thus, the term 'Labour Rights Due Diligence' has not been explicitly mentioned in any legal instruments.

Currently, the concept of due diligence has gained significant importance and applicability. It is now understood as a standard of conduct required to fulfill an obligation[8]. As Ruggie explained, discharging the corporate responsibility to respect human rights, requires due diligence[9]. In the context of labour rights, due diligence plays a crucial role in recognizing and qualifying the status of peremptory norms of ILS as *jus cogens,* a concept that has been debated in labour jurisprudence discourse. It is becasue *jus cogens* refers to a fundamental principle of international law that is accepted and recognized by the international community as a

[7] UNGP on BHR, ILO MNE Declaration and OECD Guidelines.

[8] Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 900., Protect, Respect and Remedy: A Framework for Business and Human Rights, Report to the UN Human Rights Council (Framework Report), UN Doc. A/HRC/8/5,7 April 2008, available at <<:https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf. :>>

[9] ibid.

norm from which no derogation is permitted.[10] When we delve into the conceptual understanding of ILS, human rights due diligence and labour rights due diligence, it becomes clear that these are not separate discourses, but rather complement each other to ensure decent work, advance social justice and respect the dignity of the workforce. Importantly, they work together to create an accountable business environment. In essence, ILS provide the substantive standards, while LRDD offers the procedural mechanism through which businesses operationalize the labour rights and account for how they address adverse impacts. Thus, this synergy between ILS and LRDD together forming a comprehensive system for labour governance.

In the context of Nepal, the same principle applies to ILS and LRDD as of universal norms. However, the data reveals the gap between the development and adoption of laws and the application of laws to both formal and informal economy sectors. The compliance of ILS in national legislation and the effective regulation of LRDD are discussed in the following paragraphs.

Nepal's Commitment to International Labour Standards

Nepal has constitutional provisions, including the Treaty Act of 1990, which is the specific law governing international customary norms, treaties, and agreements in Nepal. The Constitution affirms that the State must effectively implement the provision of the international treaties to which Nepal is a party[11]. According to Article 126(1) of the Constitution of Nepal (2015), all courts and

[10] Article 53 of the Vienna Convention on Law of Treaties, 1969. Chapter V, Peremptory norms of general international law (jus Cogens) <<: https://legal.un.org/ilc/reports/2019/english/chp5.pdf#:~:text=A%20peremptory%20norm%20of%20general%20international%20law,law%20(jus%20cogens)%20having%20the%20same%20character. :>>

[11] Constitution of Nepal, 2072 (2015) Art. 51(m).

other judicial bodies are empowered to exercise justice-related authority under the constitutional provisions, different laws, and the recognized principles of justice. Moreover, Article 128 of the Constitution stipulates that any interpretation of the law or legal principles established by the Supreme Court during a lawsuit is binding on the Government of Nepal, all offices, and courts. Accordingly, Nepal has assured its commitment to the application of international instruments, for which Nepal is a state party.

As of December 2025, 192 Conventions[12], 209 Recommendations,[13] and 5 Protocols[14] have been developed and adopted by the ILO, covering a more comprehensive range of labour issues across multiple jurisdictions. Nepal has signed and ratified eleven out of one hundred and ninety-one Conventions[15]. These data replicate that Nepal needs to catch up or conduct further research to find out the applicability of other labour instruments endorsed by the ILO in the Nepali labour market governance.

The ILO endorses the instruments like Conventions, Protocols and Recommendations, also recognized as labour standards. Among which, the Conventions are instruments that create legal obligations after ratification by a State. Recommendations are not open to ratification but are considered to guide a member State's policy, legislation, and practice. Whatever the features of instruments, whether Convention or Recommendation, the State abides by international labour standards as legal and moral obligations, respectively.

[12] NORMLEX, International System on Labour Standard, Up-To-Date Conventions and Recommendations <<:https://www.ilo.org/dyn/normlex/en/f?p=1000:12020> (accessed on 10/12/2025).

[13] Ibid (accessed on 10/12/2025)

[14] NORMLEX, International System on Labour Standard, Protocols <https://www.ilo.org/dyn/normlex/en/f?p=1000:12020 > (accessed on 10/12/2025).

[15] 'Ratification Status for Nepal' << www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103197 >> (accessed on 26/09/2024).

It has further reaffirmed and outlined in the Declaration of Fundamental Principles and Rights at Work of 1998, amended in 2022[16] (*hereinafter,* ILO Declaration, 1998) that all member States, regardless of whether they have ratified the corresponding 'core' ILO Conventions[17], are obligated by virtues of their membership in the Organisation to uphold, advance, implement, in good faith and conformity with the Constitution, the principles concerning the fundamental rights that those Conventions enclose[18]. In this article, the author has referred the ILO Declaration, 1998[19] as a framework to examine Nepal's legislation compliance with the ILO instruments to which it is a State party. This approach is adopted because the fundamental principles and rights at work, as mentioned in Article 2 of the ILO Declaration, have been recognized as an integral and unquestioned element of the human rights corpus[20].

Elimination of All Forms of Forced or Compulsory Labour: The ILS of forced labour include the Forced Labour Convention, 1930 (No.29) (*hereinafter*, 'Convention No.29'), the Abolition of Forced Labour Convention, 1957 (No. 105), and Protocol of 2014 to the Forced Labour Convention, 1930 (Po 29). Including these, the 1998 Declaration and the ILO MNE Declaration have also

[16] https://www.ilo.org/ilo-declaration-fundamental-principles-and-rights-work>> (accessed on 26/09/2024). Core labour rights and principles refer to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment.

[17] www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.> (accessed on 15/ 01/2024). Conventions referring to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation; and a safe and healthy working environment.

[18] Ibid.

[19] Ratification Status for Nepal (n15), Article 2, of the Declaration of Fundamental Principles and Rights at Work of 1998, amended in 2022.

[20] ILO Declaration on Fundamental Principles and Rights at Work, 1998 (Adopted at the 86th Session of the International Labour Conference(1998) and amended at the 110th Session (2022)).<<https://www.ilo.org/sites/default/files/2024-04/ILO_1998_Declaration_EN.pdf >> Also, Hector Bartolomel De La Cruz, Geraldo Von Potobsky & Lee Swepston, The International Labour Organization: The International Standards System and Basic Human Rights (1996) Cambridge University Press ,127-129.

enlisted the provisions to combat forced labour in business practices. Among the Conventions and Protocol, Nepal is a state party to both conventions[21] but not to the Protocol. Both fundamental conventions[22] prohibit all forms of forced or compulsory labour. It is to be noted that the Constitution of Nepal (2015)[23], Labour Act, 2017[24]; Muluki (National) Criminal Code, 2017[25] (*hereinafter,* Muluki Criminal Code, 2017); Prison Act, 1963[26], Bonded Labour (Prohibition) Act, 2002 and Bonded Labour (Prohibition Rules),2010; Human Trafficking and Transportation (Control) Act, 2007 are the significant instruments govern to suppress and combat the forced labour that are in align to some extent with both conventions. However, these are insufficient to abolish forced labour from the informal and formal economy sectors regarding wage payment, contract renewal of workers and supply chain context. Nepal needs to be the party to a Protocol of Convention No.29 because the Convention was adopted with 'transitional provisions' that are no longer applicable[27]. The Protocol to the Convention deleted the transitional provisions from Article 3 to Article 24. Thus, the Convention No.29 is only partially

[21] Nepal is a State party to the Forced Labour Convention, 1930 (No.29) in 2002, and to the Abolition of Forced Labour Convention, 1957 (No. 105) in 2007. <<https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0:NO:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F>> (accessed on 12/10/2024).

[22] Article 2 of the Forced Labour Convention, 1930 (No.29) stated that, "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

[23] Article 29(4) of Constitution of Nepal 2015 guarantees that no person shall be forced to work against his or her will. Also, the proviso of article 29(4) of the Constitution of Nepal empowers the State to require the citizens to perform compulsory service for public purpose.

[24] Section 4 of Labour Act 2017 forced labour as "means any work or service performed by any worker against his/her will as a result of a threat of taking any action having financial, physical or mental impact if he/she does not perform such work." Section 4(1) of the Act prohibits direct or indirect employment of any person in forced labour. Excluding work or service performed as civil obligation when required; work or service performed as a consequence of conviction by a court of law; and work or service to be performed in the interest of public.

[25] Section 162 of Muluki Criminal Code, 2017 has prohibited forced labour. The offender is liable for imprisonment up to three months or a fine up to NPR 5,000 or both.

[26] Section 10 of Prison Act 1963 prohibits engagement of any prisoner or detainer in any work against his/her will. However, it allows Government of Nepal to engage them in any work for their health, economic progress or improvement.

[27] Co29 – Forced Labour Convention, 1930 (No.29)<<: https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 :>> (accessed on 14/10/2024).

functional. The legally binding Protocol 29 on Forced Labour enlisted prevention, protection and compensation measures to eliminate all forms of forced labour, including trafficking in persons. Article 2(e) of the Protocol enables the public and private sectors to exercise due diligence in preventing and addressing the hazards associated with forced or compulsory labour. Thus, Nepal must ratify the Protocol for proper compliance with ILS in the Nepalese labour legislation.

Elimination of Discrimination in Employment and Occupation:

The Declaration of Philadelphia[28] and the ILO Declaration, 1998[29] have enshrined the principle of eliminating discrimination in employment and occupation as a peremptory norm in the labour jurisprudence. The fundamental instruments of elimination of discrimination in respect of employment and occupation of ILS encompass the Equal Remuneration Convention, 1951 (No. 100), also known as C100 and the Discrimination (Employment and Occupation) Convention, 1958 (No.111), also known as C111. Nepal is a party to both conventions[30]. Article 1 of C100 affirms that discrimination in employment and occupation refers to the practices that put some workforce in a position of exclusion or disadvantage in the labour market or workplace due to their race, religion, colour, sex, political beliefs, national origin, social origin, or any other characteristic that has the effect of nullifying or impairing equality of opportunity or treatment in the workplace. The convention also implies that there shall be no direct or indirect discrimination in employment and occupation. Direct discrimination means unequal treatment by the State directly from laws, regulations and policies. Conversely, indirect discrimination refers to a situation when neutral

[28] Article 2(a) of the ILO Declaration of Philadelphia, 1944 states, "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity,"

[29] Article 2(d) of The ILO Declaration on Fundamental Principles and Rights at Work of 1998 enshrined that the elimination of discrimination in respect of employment and occupation.

[30] In 1976 to C100 and in 1974 to C111; available at <<https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0:NO:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F>> (accessed 14/10/2024).

rules and practices have adverse effects on a disproportionate number of members of a particular group irrespective of whether or not they meet the job requirements, and in practice, lead to discrimination. It should be noted that discrimination is not always intentional, and a company needs to be made aware that its policies or practices are discriminatory. So, the mechanism must be developed to monitor and guide all businesses irrespective of their size, purpose and locality.

Being the party of both conventions, the Constitution of Nepal (2015) guarantees the right to equality[31] as the fundamental right. It prohibits all forms of discrimination[32], including any form of untouchability or discrimination at the workplace based on caste[33]. In the same way, Muluki (National) Civil Code, 2017 (*hereinafter*, Muluki Civil Code, 2017); Labour Act, 2017; Right to Employment Act, 2018; and Right to Employment Regulation, 2018 are the significant instruments that prohibit discrimination in employment and occupation. The provisions enlisted in these legislations are broadly comply with the Conventions of ILS. Nevertheless, the implied challenges exist at the time of recruitment in private businesses, such as wages, in granting maternity leave, and so on. The acceptance and execution for labour rights of labour rights due diligence[34] needs to be improved in Nepal.

Freedom of Association and Collective Bargaining: Freedom of association and collective bargaining are fundamental rights of the workforce and are closely linked. These rights are encompassed

[31] Article 18(1) of the Constitution of Nepal (2015).
[32] Article 18(2) of the Constitution of Nepal (2015).
[33] Article 24 of the Constitution of Nepal (2015).
[34] Paragraph 10 of the MNE Declaration affirms that, " enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at work".

in the basic instruments of ILS, namely; Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), (*hereinafter,* Convention No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No.98), (*hereinafter,* Convention No. 98). Nepal is party to only Convention No. 98 in 1996[35]. After five years of the Philadelphia Declaration, Convention No. 98 came to supplement certain aspects of Convention No. 87, particularly protection against acts of anti-union discrimination, protection against acts of interference in the internal affairs of workers' and employers' organization; and the promotion of collective bargaining[36]. Hence, it has emphasized that the guarantee of freedom of association can only ensure meaningful collective bargaining. Although, Nepal is a party to only Convention No. 98, the legislative framework relating to freedom of association and collective bargaining is in alignment with the Philadelphia Declaration, the ILO Declaration, 1998, and Convention No. 98. The Constitution of Nepal (2015)[37]; Labour Act, 2017[38]; and Trade Union Act, 1992[39] are the primary legislation to ensure freedom of association and collective bargaining against forced labour, function as a critical instrument to uphold non-discrimination and equality, and also aid to guarantee the fundamental rights at work for all.

[35] Ratifications of fundamental instruments by country <<https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0:NO:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F>> (accessed on 14/10/2024).

[36] International Labour Organization (2012). Giving Globalization a Human Face, p. 67. <<:https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf >>

[37] Article 17 (2)(d) and 34(3) of the Constitution of Nepal (2015) enlisted the provisions that the rights to form a trade union, to participate in it, and to organize collective bargaining.

[38] Section 8 of Labour Act 2017 recognizes the right to form a trade union, to participate in its activities and to acquire its membership or get affiliated with or involved in other union activities.

[39] The enactment of Trade Union Act, 1992 is to protect and promote the professional and occupational rights of the persons engaging in self-employment and the workers working in various industry, trade, profession or service in enterprises or outside the enterprise

Elimination of Child Labour: The ILO has prioritised abolishing child labour since its establishment. Though it has been recognized and developed as a separate discourse in the ILO instruments, it is closely intertwined with other rights and discourses adopted in the ILS[40]. Minimum Age Convention, 1973 (No.138) and Worst Forms of Child Labour Convention, 1999 (No.182) are the fundamental instruments adopted as ILS[41]. The conventions, together, constitute the most authoritative international normative framework for the elimination of child labour[42]. Nepal is a party to conventions[43] and internalisation in the Nepalese legal framework. However, notable success is yet to be achieved. Constitution of Nepal (2015)[44]; Muluki Civil Code, 2017[45]; Labour Act, 2017[46], Labour Regulation, 2018[47]; Act Relating to Children, 2018[48]; Child Labour (Prohibition and Regulation) Act, 2000[49] and Child Labour (Prohibition and Regulation) Rules, 2006 are the primary legislative framework compatible with the conventions referring to ILS to abolish all forms of child labour and protect the rights of the child. Above all, the effectiveness and strides in eradicating of all forms of child labour from a country are discussed in the following sub-headings.

[40] Labour Standards <<https://normlex.ilo.org/dyn/normlex/en/f?p=1000%3A12000%3A%3A%3A%3A%3A%3A>> (accessed on 14/10/2024).

[41] Ratifications of Fundamental Instruments by country <<https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F>> (accessed on 14/10/2024).

[42] International Labour Organization (2012). Giving Globalization a Human Face, p.148. <<https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf >>

[43] Nepal is party to the Minimum Age Convention, 1973 (No.138) in 1997 and Worst Forms of Child Labour Convention, 1999 (No.182) in 2002.

[44] Article 39(4) of the Constitution guarantees that no child shall be employed to work in any factory, mine or engaged in similar other hazardous work.

[45] Section 2(e) of Muluki Civil Code 2017 defines a child as a minor who has not attained the age of eighteen years

[46] Section 5 of the Labour Act, 2017 affirms that no child shall be engaged in work against law.

[47] Rule 56(2) and Schedule 10 of Labour Regulation, 2018 requires the employer to submit the Labour Audit Report indicating whether children under the age of 18 years have been employed in work.

[48] Section 2(j) of Act relating to Children, 2018 defines children as 'persons who have not attained the age of eighteen years.'

[49] Section 3(1) of the Child Labour (Prohibition and Regulation) Act prohibits engagement of minor who has not attained 14 years of age in labour.

Occupational Safety and Health: The Philadelphia Declaration of 1944 referred to occupational safety and health in paragraph III(g), which affirms that promoting 'adequate protection for the life and health of workers in all occupations' is a 'solemn obligation of the ILO'[50]. The ILO Declaration, 1998 declares to all members of ILO that even if States have not ratified the Conventions relating to the prescribing principles concerning the fundamental rights that are subject to Article Two, an obligation to respect, promote and realize, in good faith and accordance with the Constitution. The clause of "a safe and healthy working environment" was added in 2022 with the amendment of the Declaration. Including this, the ILS incorporate the Occupational Safety and Health Convention, 1981 (No.155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187). Nepal is not a party to both Conventions. Also, it should be noted that Nepal is not a State party to the Social Security (Minimum Standards) Convention, 1952 (No.102) and other social security instruments[51] endorsed by the ILO.

Though, Nepal is not a party to any ILO instrument explicitly relating to occupational safety and health, it is interesting to note that Nepal has endorsed specific provisions in the Constitution, including other legislations, Directives and Standard formation like the Contribution-Based Social Security Act, 2017 (*hereafter*, CBSSA, 2017); the Contribution-Based Social Security Regulation, 2018; Labour Act, 2017; Labour Regulation, 2019, and Social Security Scheme Operational Procedures, 2018 with Second Amendment, 2021. The author has not dealt with the impact and compatibility of ILS relating to occupational safety and health because Nepal is neither party to any fundamental Conventions nor other instruments

[50] Para.III(f) of Declaration Concerning the aims and purposes of International Labour Organisation, 1944 (Declaration of Philadelphia).

[51] International Labour Standards<<: https://normlex.ilo.org/dyn/normlex/en/f?p=1000:12000;>> (accessed on 21 10 2024)

endorsed by ILO about occupational safety and health.

Growth in the Application of the Measures of LRDD

Nepal, the party of ILO's fundamental instruments of the ILS, has significantly impacted on legislative and policy advancements. However, the practical implementation of these standards needs to be more consistent. The challenges and inconsistencies are dealt with in the following sub-title four. The Constitution of Nepal (2015) has enshrined the right to employment and the right to labour as fundamental rights, and these rights extend to all workers, regardless of their employment status.

Similarly, the Labour Act 2017 has provisions for the rights, interests, facilities and safety of workers and employees of various sectors. It sets the minimum standards to ensure decent work for employers and employees. Fundamentally, the labour Act 2017 applies to all business entities regardless of the number of workers, covering the workers' rights in the informal economy. Nevertheless, workers' rights in the informal economy have not been addressed in a microscopic approach. Indeed, the Labour Act of 2017 has replaced the former Labour Act of 1992, and has come up with a more progressive clause in relation to a probation period[52], outsourcing[53], working hours and wages[54] of overtime[55], safety and health issues[56], leave and holidays, benefits, disciplinary action and so on. These provisions replicate the compliance of fundamental instruments.

It is interesting to note that Nepal is neither a State party to the ILO Convention No. 102, nor other fundamental instruments relating to

[52] Section of Labour Act, 2017.
[53] Section 58 of Labour Act, 2017.
[54] Section 31 of Labour Act, 2017.
[55] Section 30 of Labour Act, 2017.
[56] Section 74 and Section 116 of Labour Act, 2017.

occupational safety and health, and social security instruments[57] endorsed by the ILO. However, the enactment of the CBSSA, 2017, and Contribution-Based Social Security Regulation, 2018 have covered Medical Treatment, Health & Maternity Protection Scheme and Accident and Disability Protection Scheme guaranteed by CBSSA, 2017. However, the coverage is incomplete because the CBSSA 2017 has covered only seven[58] of the nine contingencies set out in the Convention No. 102.

In addition to these, Nepal has enacted several labour laws, including the Right to Employment Act, 2018; Child Labour (Prohibition and Regulation) Act, 2000; Bonded Labour Prohibition Act, 2002; specific provisions on the Muluki Civil Code, 2017; Muluki Criminal Code, 2017; Human Trafficking and Transportation (Control) Act, 2064, The Act Relating to Children, 2018, Trade Union Act, 1992; National Action Plan (NAP) on Business and Human Rights,2023 in align with United Nations Guiding Principles (UNGPs) on Business and Human Rights (BHR), and several other Rules and Regulations to govern the labour market of every sector. The abundant legislation reflects Nepal's strong commitment to ensuring international labour standards. Also, the credit goes to the contribution-based social security mechanism in reducing the poverty gap from twenty-five per cent in 2011 to just over 20 per cent in 2023. However, more than sixty per cent of the workforce is in the informal economy; thus, more efforts are still required to integrate and harmonize this category of the workforce in the formal economy of Nepal.

[57] International Labour Standards on Social Security, Declaration concerning the aims and purposes of the International Labour Organization (ILO), annex to the Constitution of the ILO, Section III,<<https://www.ilo.org/static/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf >> (accessed on 15 10 2024)

[58] Social Security Schemes to be Operated, Article 10 of the Contribution-Based Social Security Act, 2017

Including legislative advancement, the initiatives for establishing and growing institutional mechanisms are admirable, though not satisfactory regarding requirements and universal standards. Department of Labour and Occupational Safety, also known as 'Department of Labour', is established as a policy implementation body under the Ministry of Labour, Employment and Social Security. The Central Labour Advisory Council, Minimum Wage Fixation Committee, Labour Relations Committee and Labour Coordination Committee operate under the Labour Act 2017, comprising representatives from the government, employers and employee organizations for tripartite consultation in Nepal. Also, there are 11 labour offices in total across the country to regulate employment relations for both informal and formal economy sectors. The Labour Office[59] has the authority to resolve disputes about an employee's and employer's employment relationship as the first trial of jurisdiction. It has been responsible for inspecting and evaluating businesses or factories, regulating occupational health and safety policies in workplaces, implementing productivity-boosting measures, reviewing employee attendance records, employee compensation and benefits, conducting investigations and initiating compensation actions for accidents at work[60]. The labour office is equipped with a labour inspector[61] to inspect labour audits prepared by the employers. Comparing the workload, the number of offices for across the country, and, the available human resources and other resources are insufficient to function efficiently and reach out to each sector of the informal and formal economies. Besides these, trade unions[62] also have legal recognition with the role of monitoring the implementation of laws and raising awareness among the employees regarding their rights and benefits from the services provided to the workforce.

[59] Section 94 of the Labour Act, 2017.
[60] Ibid.
[61] Section 95 of the Labour Act, 2017.
[62] Chapter 2 of the Trade Union Act, 1992.

Legislative Gaps and Challenges Pertaining to Institutional Mechanisms

For endorsing the ILS efficiently in compliance with the national legislations, institutional mechanisms are the significant tools or measures for effectuating labour rights due diligence. Despite Nepal's strong commitment to international fundamental instruments adopted by the ILO and efforts to align its national laws with universal standards, the country still faces acute challenges in effectively implementing and enforcing labour rights protections. No doubt, Nepal is ahead in compliance with the ratifying instruments and the enactment of legislation, policies and regulations; however, it is adequate to the workforce of the formal economy to some extent, but the workforce of the informal economy is stagnant.

Nepal's legislative framework needs to catch up in ensuring decent work for the informal economy workforce, because most of Nepal's workforce is employed in the informal economy. The coverage of the informal sector within the Labour Act, 2017 is incomplete due to the coverage of limited sectors of informal economy.[63] Still more sectors of this domain must be protected to ensure a conducive working environment like, horticulture, floriculture, other commercial farming, highway's motel business and so on. To this end, the government of Nepal needs to identify, assess, and develop a mechanism to reduce the inconsistencies and gaps in the legislation and enforcement mechanisms, as well as revolutionise the efficient mechanism to cover the broader labour market.

[63] Chapter 13 of the Labour Act, 2017 has covered only the rights relating to tea-estate labours, constructions labours, transport labours, tourism labours, domestic labours, labours of social enterprise and enterprise which is incorporated in foreign country and operates business in Nepal.

The economic market of workforces is more comprehensive, covering the formal economy, informal economy, self-employed, gig workers and foreign migrant workers. Moreover, within the informal economy, more challenges relating to forced or compulsory labour and child labour are prevalent in construction work[64], agriculture[65], manufacturing[66], private households[67], transportation and storage[68], etc. Many of the workforce are employed in the informal economy, but the national mechanism is reluctant to integrate them into the labour governance system. This scenario reveals the ineffective existence of labour rights due diligence in Nepal. It is also necessary to note that the capacity of institutional mechanisms, jurisdiction, and available resources for effectuating a decent working environment in both economic sectors are insufficient. For instance, the policy implementing authority, i.e., the Department of Labour, is located at Kathmandu only, and there are only eleven labour offices with limited human resources to work across the country in every sector of the economy. Thus, it also impacts employees' accessibility to seek remedial measures. More importantly, the offices are overburdened with the basic tasks from lacking a proper national digitalization system of the workforce in due course of labour audit, ensuring social security mechanisms to all, providing information to the concerned authority, monitoring wage differences on the same value of work, gender pay gap and so on.

Despite relatively a comprehensive legal framework adopted in line with the ratifying international instruments, however, several gaps and contradictions remain in different clauses of legislation. Fundamentally,

[64] Nepal Labour Force Survey Report (*in thousands)*, 2018; Construction: 978.
[65] Nepal Labour Force Survey Report (*in thousands)*, 2018; Agriculture, Forestry and Fishing: 1523.
[66] Nepal Labour Force Survey Report (*in thousands)*, 2018; Manufacturing: 1072.
[67] Nepal Labour Force Survey Report (*in thousands)*, 2018; Private households: 73.
[68] Nepal Labour Force Survey Report (*in thousands)*, 2018; Transportation and storage: 322.

the definitional inconsistencies in 'child'[69] versus 'minor'[70] have ambiguous understanding in the enacted legislations. Likewise, the minimum age for hazardous work does not forbid children having the age of 17 from doing hazardous or riskful work[71], it is incompatible with international standards.

The fundamental challenge in Nepal is the failure to formalize the informal economy efficiently in the mainstream of labour governance. This has heightened the poverty gap among the working people and raised the question of the existence, applicability and scope of international labour standards on labour rights due diligence in the least developed country like Nepal. The quest for equity of workers' rights in Nepal's informal economy is undoubtedly complex, but it is a crucial endeavour. More efforts are employed in the due diligence of the formal economy, as Nepal is firmly committed to compliance with ratifying instruments that belongs to the ILS. However, there is a need for the ILS to adopt a more scientific approach in applying due diligence to the informal economy sector and other sectors of the bussinesses.

Conclusion

The paper's key findings indicate that international standards have brought about legislative reforms and increased employers' and legislators' knowledge of workers' rights in Nepal. Though ILS and LRDD are complementary to each other, their full realisation is hindered by structural problems like inadequate enforcement mechanisms, scarce resources, and socioeconomic impediments.

[69] Section 2(j) of Act relating to Children, 2018 defines children as 'persons who have not attained the age of eighteen years.' Also, Section 5 of the Labour Act, 2017 affirms that no child shall be engaged in work against law.

[70] Section 2(e) of National Civil Code 2017 defines a child as a minor who has not attained the age of eighteen years. Also, Section 3(1) of the Child Labour (Prohibition and Regulation) Act prohibits engagement of minor who has not attained 14 years of age in labour.

[71] Section 3(2) of the Child Labour (Prohibition and Regulation) Act 2000.

This has mainly existed in the informal economy, which adversely impacts the vicious circle of poverty in working-class families. Thus, applying due process of the systematic integration approach to assimilate the workforce of the informal economy to the mainstream of formal economic governance and adhering to the social security mechanism should be the government's utmost priority.

To enhance the impact of ILS, it is crucial to include the digitalization of data, transforming the informal economy into the mainstream of formal labour market governance, increasing transparency and accountability in labour audit and labour inspection, and fostering a culture of persistent improvement in labour practices at every sector of the economy. Indeed, the LRDD must take crucial steps in every context of business activity. Thus, ILS and LRDD must go together to ensuring a responsible business conduct.

Hence, the paper underscores the necessity of integrating of ILS with tailored domestic legal mechanisms to ensure meaningful improvements in labour rights in Nepal. Also, there is a need of multifaceted approach to LRDD, particularly in the diversity of the informal economy, incorporating strong legal frameworks, effective enforcement mechanisms, and active participation from all stakeholders. This active participation is not just a requirement but a responsibility that all stakeholders, including governments, businesses, civil society, and trade unions, should feel involved in.

In conclusion, Nepal faces significant challenges in the effectuation of LRDD in the informal economy because it is not adequately addressed in the legislative framework. The ILS adopted by the ILO also needs to apply a microscopic approach covering the diversity of the economy in the least developed country like Nepal.

Also, the indigenous challenges require continued commitment and cooperation from all stakeholders to ensure sustainable and equitable labour practices.

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Worker or Independent Contractor? Judicial Approaches to Employment Status in the Gig Economy

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Abstract

The rapid expansion of the gig economy, particularly platform-based work mediated by apps, has fundamentally altered traditional employment relationships worldwide. As courts grapple with determining whether gig workers are employees or independent contractors, legal classification has become central to accessing labour protections. This paper examines judicial approaches to worker classification in the gig economy, focusing on the evolution of common law tests such as the control test, integration test, economic reality test, and mutuality of obligations. Drawing on landmark decisions from the United Kingdom, United States, and Australia, the study explores how foreign jurisdictions have responded to emerging forms of work. The advocacy of bodies like the Transport Workers' Union (TWU) in Australia further illustrates the importance of collective action in shaping regulatory frameworks. While Sri Lankan courts have creatively applied these tests to protect non-platform gig workers, platform-based workers remain excluded from statutory protections. The paper calls for proactive legal reform in Sri Lanka, suggesting that insights from global jurisprudence and advocacy movements offer a roadmap to address the classification challenges posed by the evolving nature of work in the platform economy.

Keywords: *Contract of employment, Employee, Gig economy, Independent contractor, Worker classification.*

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Introduction

In recent years, the world of work has undergone substantial transformations, with both workers and employers increasingly favouring contingent relationships over traditional employer-employee models. This shift has been further accelerated by the COVID-19 pandemic, which has contributed to a notable rise in gig workers. In Sri Lanka, for instance, the own-account workforce in the non-agricultural sector accounted for 56.7% in the first quarter of 2023[1]. Similarly, in the United States, a 2023 survey estimated that approximately 59 million workers were classified as independent workers, representing 36% of the U.S. workforce[2]. This statistic underscores the growing demand for contingent labour.

The gig economy refers to a labour market characterised by short-term contracts or freelance work instead of permanent employment[3]. While gig work can occur both online and offline, platform-based work, such as ride hailing, food delivery, freelance digital services, and on-demand domestic tasks has seen significant growth. Gig workers frequently fall outside traditional labour law protections. While the International Labour Organization (ILO) has not yet adopted a specific convention addressing gig workers' rights, existing ILO conventions and recommendations such as R198[4],

[1] **Department of Census and Statistics, Sri Lanka Labour Force Statistics Quarterly Bulletin, First Quarter 2023** (2023) http://www.statistics.gov.lk/Resource/en/LabourForce/Bulletins/LFS_Q1_Bulletin_2023.pdf accessed 2 May 2025.

[2] Statista Research Department, 'Freelance Workforce Distribution in the United States as of 2023' (25 October 2024) Statista https://www.statista.com/statistics/685553/distribution-of-freelance-workforce-us/ accessed 2 May 2025.

[3] Oxford English Dictionary, 'Gig Economy' https://www.oed.com/search/advanced/Entries?q=gig+economy+&sortOption=Frequency accessed 31 April 2025.

[4] International Labour Organization, 'Recommendation No. 198: Employment Relationship' (2006) https://www.ilo.org/global/publications/official-documents/WCMS_163153/lang--en/index.htm accessed 2 May 2025.

R202[5], and R204[6] can be interpreted as offering relevant protection for those engaged in non-standard forms of employment, including gig economy workers.

The classification of workers whether as employees or independent contractors carries major legal consequences, especially in relation to labour protections, social security, tax liabilities, tort obligations, and ownership rights. However, this classification process is often complex and ambiguous, creating challenges for both employers and workers. In some cases, employers intentionally misclassify workers to avoid regulatory responsibilities.

Statutory definitions of "employee" or "workman" in many jurisdictions lack precision in identifying the true nature of the employment relationship. Judicial systems have responded by developing various tests such as the control test, integration test, economic reality test, and mutuality of obligation test to determine employment status. However, the application of these tests depends on the specific context and facts, making consistent classification difficult. For example, a worker who is classified as an employee for one legal purpose may be deemed an independent contractor for another[7].

The rise of atypical work, driven by technological innovation and globalisation, further complicates worker classification. Traditional tests may not fully address the evolving characteristics of labour in the gig economy. While several foreign jurisdictions have begun to adapt their legal frameworks, often in response to landmark litigation, Sri Lanka has yet to engage meaningfully with the classification challenges posed

[5] International Labour Organization, 'Recommendation No. 202: Social Protection Floors' (2012) https://www.ilo.org/global/publications/official-documents/WCMS_197780/lang--en/index.htm accessed 2 May 2025.

[6] International Labour Organization, 'Recommendation No. 204: Transition from the Informal to the Formal Economy' (2015) https://www.ilo.org/global/publications/official-documents/WCMS_405303/lang--en/index.htm accessed 2 May 2025.

[7] S Deakin and G S Morris, *Labour Law* (4th edn, Hart Publishing 2012).

by platform-based gig work. Recent comparative legal scholarship further illustrates the fragmented yet evolving judicial responses to platform worker classification across Europe. Christina Hießl, in her forthcoming article[8], analyses over 150 decisions from jurisdictions including the UK, Germany, Spain, France, and the Netherlands, identifying a shift away from rigid contractual interpretations towards a more functional analysis based on control, integration, and economic dependence. Her study reveals an emerging trend among European courts to de-emphasise self-employment labels and focus instead on the practical realities of work arrangements within digital platforms. This comparative perspective highlights not only the diversity of legal reasoning across jurisdictions but also the growing judicial awareness of the inadequacies of traditional classification models in the context of algorithmic management and flexible gig work. Such insights offer valuable direction for jurisdictions like Sri Lanka, which are only beginning to encounter the legal complexities posed by platform labour.

While Sri Lankan courts have effectively addressed the misclassification of non-standard workers, as commended by ILO[9], they have yet to address the legal status of platform workers. Given the growing prevalence of platforms such as Uber Sri Lanka, PickMe, Uber Eats, PickMe Food, and freelance services like Worky, it is imperative that Sri Lanka's judiciary and legislators prepare to handle these emerging issues. At present, these workers are classified as independent contractors and are excluded from all statutory labour protections. Against this backdrop, this paper explores judicial approaches in the UK, US, and Australia concerning gig worker

[8] Christina Hießl, *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions* (SSRN, 9 September 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211423 accessed 9 June 2025

[9] RKS Sureshchandra, *The Employment Relationship (Scope) in Sri Lanka* (International Labour Organization, n.d.) https://ilo.org/wcmsp5/groups/public/ed_dialogue/dialogue/documents/genericdocument/wcms_205382.pdf accessed 2 May 2025

classification, aiming to identify lessons for Sri Lanka as it prepares for future regulatory challenges.

Methodology

This research adopts a doctrinal methodology, analysing statutory provisions and case law from Sri Lanka and selected jurisdictions to explore judicial tests, namely the control test, integration test, economic reality test, and mutuality of obligation test, used to differentiate employees from independent contractors in the gig economy. The study is grounded in primary legal sources such as legislation and court decisions, supplemented by secondary materials including journal articles and policy reports. It critically evaluates the adequacy of existing legal tests in capturing the realities of modern labour arrangements and seeks to contribute to ongoing discourse on gig worker classification.

Discussion

Gig workers are generally treated as independent contractors rather than employees. These workers are often labelled using various terms, home-workers, e-workers, on-call workers, part-time workers, field workers, or outsourced workers. Platform-based workers represent the most recent and problematic category, performing work mediated by digital apps such as Uber, PickMe, Uber Eats, DoorDash, Upwork, Fiverr, Freelancer, TaskRabbit, and others.

Despite being categorised as independent contractors or own-account workers, the terminology used in contracts is not decisive in determining legal status. Legislative interpretation of the term “employee” must therefore remain flexible to ensure the protection of gig workers and uphold the purpose of labour legislation. Courts continue to apply common law tests to determine worker status,

but these may not suffice on their own. Scholars have proposed several regulatory reforms, including enforcing existing laws more robustly, expanding the definition of "employment," creating a new legal category such as "independent worker," extending rights to "workers" beyond traditional employees, and rethinking the definition of "employer"[10].

Summary of Existing Common Law Tests

The classification of a worker as an employee or independent contractor has evolved through various judicial tests under common law, reflecting the changing nature of work and employment relationships. The following summarizes the key tests currently applied by courts in common law jurisdictions:

Control Test: The control test, originating from *Yewens v. Noakes*[11], defines an employee as someone under the employer's authority regarding how work is performed. Over time, the emphasis shifted from actual control to the *right* to control. However, this test struggles to apply to skilled or professional workers, as seen in *Hillyer v. Governors of St. Bartholomew's Hospital*[12]. In such contexts, employers often lack the expertise to direct work methods. While the test remains relevant, especially for vicarious liability, it requires flexibility, such as evaluating the degree of control over time, place, and means of work execution[13]. The test's usefulness persists, but it is insufficient as a standalone criterion in modern work arrangements.

[10] Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420 https://futurework.org.au/wp-content/uploads/sites/2/2017/08/Gig_Symposium_PrePub_Stewart_Stanford.pdf accessed 7 June 2025.

[11] (1880) 6 QBD 530

[12] (1909) 2 KB 820

[13] *Ready Mixed Concrete Ltd. v. Minister of Pensions and National Insurance* (1968) 2 QB 497

Integration (Organization) Test: First articulated by Lord Denning in *Stevenson, Jordan and Harrison v. Macdonald & Evans*[14], this test assesses whether the worker is integrated into the business or merely an accessory. A worker performing tasks essential to business operations is more likely to be considered an employee[15]. However, the test is not definitive. In *Ready Mixed Concrete*[16], despite the worker's central role in the business, the economic risk and contractual terms indicated contractor status. Similarly, in *WHPT Housing Association Ltd v. Secretary of State for Social Services*[17], organizational fit did not override independent contractual obligations. Thus, while helpful for analyzing professional roles, integration alone is inadequate for complex or outsourced work arrangements.

Economic Reality Test: Originating from *U.S. v. Silk*[18] and adopted in UK cases like *Ready Mixed Concrete*[19] and *Market Investigations*[20], this test focuses on economic dependence. It examines factors such as ownership of tools, method of payment, capacity for profit/loss, and financial risk assumption. If a worker manages their own business risks and stands to profit independently, they are likely a contractor. Conversely, if they rely economically on one employer with limited autonomy, they are likely an employee. This test offers a holistic and commercially realistic approach, especially in contexts involving high-skilled freelancers or gig workers.

[14] (1952) 1 TLR 101
[15] *Beloff v. Pressdram Ltd* (1973) 1 All ER 241
[16] *Ready Mixed Concrete Ltd (n* 12)
[17] (1981) ICR 737
[18] (1946) 331 U.S. 704
[19] *Ready Mixed Concrete Ltd (n* 12)
[20] *Market Investigations Ltd v. Minister of Social Security* (1969) 3 All ER 732

Mutuality of Obligations Test: This modern test identifies whether the employer is obligated to provide work and the worker to accept it, indicating an ongoing employment relationship[21]. Without such mutual obligations, the relationship is typically classified as a contract for services. However, courts have acknowledged implied mutuality in cases of consistent engagement, suggesting flexibility in interpreting long-term agency relationships[22]. Nonetheless, rigid application can disadvantage casual or agency workers and obscure employer accountability, particularly where economic and managerial control lies with the end-user.

Each common law test contributes a valuable dimension to assessing employment status, but none is conclusive on its own. Courts often apply a multi-factorial approach, considering all tests collectively while giving appropriate weight based on the work context. This flexible and contextual method is particularly essential in today's labour market, where non-standard and gig work arrangements challenge traditional employer-employee boundaries.

Recent Developments in Foreign Jurisdictions

United States: In *Dynamex Operations West Inc. v Superior Court of Los Angeles*[23], the California Supreme Court adopted the "ABC test" to determine employment status under wage orders. This test presumes a worker is an employee unless the employer proves (A) the worker is free from control, (B) the work is outside the employer's usual business, and (C) the worker is engaged in an independent trade or business. This decision significantly impacted platform companies, as they often fail to satisfy criterion B. Although the attempt to codify the ABC test into law was unsuccessful due to

[21] See *Airfix Footwear Ltd v. Cope* (1978) ICR 1210; *O'Kelly v. Trusthouse Forte Plc* (1983) ICR 728
[22] See *Dacas v. Brook Street Bureau (UK) Ltd* (2004) IRLR 358
[23] 4 Cal.5th 903 (2018)

opposition from platform companies, it resulted in the creation of a third category of workers, independent contractors with limited labour protections[24].

United Kingdom: A cornerstone in employment law of gig economy is a landmark UK Supreme Court case of *Uber BV vs Aslam and others*[25]. In this case, the UK Supreme Court held that Uber drivers are "workers" under UK employment law, entitling them to rights such as minimum wage and paid holiday. The Court found that Uber exercised significant control over the drivers by setting fares, dictating contractual terms, limiting communication with passengers, and penalising drivers for rejecting rides. It emphasised that the drivers were in a position of subordination and dependency, with limited autonomy to improve their economic position. Importantly, the Court ruled that drivers were working not only while transporting passengers but also while logged into the app and available for assignments. Rejecting Uber's contractual characterisation of the drivers as independent contractors, the Court prioritised the practical reality of the relationship over the contractual labels, thereby reinforcing worker protections in the gig economy.

Australia: The Transport Workers' Union (TWU) is one of Australia's oldest and most influential trade unions, representing workers across the transport and logistics sectors, including aviation, road transport, waste collection, and food delivery. In recent years, the TWU has taken a leading role in advocating for the rights of gig economy workers, particularly those engaged by digital platforms like Uber, Deliveroo, and DoorDash. The union campaigns for the recognition of platform-based workers as employees or dependent

[24] See California Assembly Bill 5, Ch 296 (2019); and *Vazquez v Jan-Pro Franchising International, Inc* (2021) 10 Cal 5th 944

[25] (2021) UKSC 5

contractors entitled to minimum pay, job security, insurance, and safety protections. Through litigation, political lobbying, and public advocacy, the TWU has sought to expose exploitative practices in the gig economy and promote structural reforms, such as the introduction of a "road transport reform tribunal" with jurisdiction over digital platform work. The union's activism has been central to national debates on the evolving nature of work and the need for modernised labour protections in Australia[26].

In *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd*[27], the Fair Work Commission held that Ms Gupta, an Uber Eats delivery driver, was an independent contractor and therefore not entitled to protections under the Fair Work Act 2009, including claims for unfair dismissal. The Commission highlighted her freedom to choose work hours, accept or reject assignments, and use multiple delivery platforms as indicators of an independent contracting relationship. Despite the outcome, this case became a focal point for advocacy by the Transport Workers' Union (TWU) of Australia, which supported Ms Gupta and used the case to campaign for stronger protections for gig workers. The TWU argued that the decision exposed gaps in Australia's labour law framework, particularly the inability of current legal tests to adequately address the realities of digital platform work and called for legislative reform to establish minimum standards for all transport workers, regardless of classification[28].

[26] Transport Workers' Union of Australia, 'TWU is the Union for Gig Workers' (*TWU Official Site*, 8 June 2025) https://www.twu.com.au/ accessed 8 June 2025.

[27] [2020] FWC 4862 (Austl)

[28] Victorian Joint Parliamentary inquiry, *Report XX: Amita Gupta Uber Eats case and gig economy* (Parliament of Australia) paras 5.18–5.23 https://www.aph.gov.au/... accessed 9 June 2025

Multi-Test Approach in Sri Lankan Case Law

In Sri Lanka, the term 'workman' is consistently defined across key labour statutes, typically referring to individuals engaged under a contract of service. Legislation such as the Industrial Disputes Act[29], Trade Unions Ordinance[30], Termination of Employment of Workmen (Special Provisions) Act[31], Workmen's Compensation Ordinance[32], Employees Provident Fund Act[33], Employees Trust Fund Act[34], and Payment of Gratuity Act[35] consistently recognize only those employed under a contract of service as workmen. This legislative approach excludes independent contractors or self-employed individuals working under contracts for services from statutory labour protections.

Judicial interpretation has reinforced this legislative approach. In *The Times of Ceylon Ltd. v Nidahas Karmika Saha Velenda Sevaka Vurthiya Samithiya*[36] and *Perera v Marikkar Bawa*[37], the courts clarified that individuals working under a contract for services fall outside the scope of the Industrial Disputes Act. While some scholars argue that Sri Lanka's labour legislation contains broad definitions of "employee" and "employer", the practical application of these provisions continues to be limited to conventional employer-employee relationships[38]. As a result, the judiciary relies heavily on common law tests to determine the real nature of work relationships.

[29] Industrial Disputes Act No. 43 of 1950, s 48
[30] Trade Unions Ordinance No. 14 of 1935, s 2
[31] Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971, s 18
[32] Workmen's Compensation Ordinance No. 19 of 1934, s 2
[33] Employees Provident Fund Act No. 15 of 1958, s 47
[34] Employees Trust Fund Act No. 46 of 1980, s 44
[35] Payment of Gratuity Act No. 12 of 1983, s 20
[36] (1960) 63 NLR 126
[37] (1989) 1 Sri LR 347
[38] Sureshchandra (n 9)

Sri Lankan courts have effectively employed a multi-test or composite approach, drawing from the control test, integration test, economic reality test, and mutuality of obligations to distinguish between contracts of service and contracts for services. These tests are often applied in combination, with context-specific weight given to different factors depending on the case.

In *Raj Diamonds (Pvt) Ltd v Commissioner of Labour*[39], the Court of Appeal applied the control test and held that workers engaged in cutting and polishing diamonds were not independent contractors, but employees under the Employees' Provident Fund Act. Despite being labelled as "sub-contractors", the level of supervision and integration into the company's operational structure evidenced an employment relationship.

Similarly, in *Navarathne Bandara Herath v Mahinda Madihahewa*[40], the court focused on who exercised control over workers recruited through a so-called "labour contractor." By evaluating the source of payment, the authority to recruit and dismiss, and the overall managerial control, the court concluded that the contractor was, in fact, the employer, highlighting how the control test can expose disguised employment.

In *Instant Marketing (Pvt) Ltd v Ranaweera*[41], the court examined the status of freelance sales agents who purchased goods at discounted prices and resold them. Although these agents were not paid a salary, the company's control over credit approvals, allocation of sales territories, and provision of vehicles suggested a high degree of employer involvement. This structure was seen as an attempt to evade statutory obligations, and the court recognised the disguised

[39] Court of Appeal No.721/93, decided on 16.11.1994
[40] Court of Appeal No.1810/2003, decided on 30.01.2007
[41] Court of Appeal No.300/93, decided on 25.01.1995

employment relationship.

In *Celltel Lanka Ltd v Commissioner of Labour*[42], the court employed a composite approach, applying the control, integration, and economic reality tests to determine whether a "consultant" with flexible working hours and conditions was in fact an employee. Despite the outward autonomy, the provision of a company vehicle and the nature of the role showed integration into the company's business operations, thus supporting employee classification.

The decision in *Rev. Father Alexis Benedict of Youth Fisheries Training Project v Denzil Perera*[43] involved trained fishermen engaged in deep-sea fishing activities. The court found that their work was essential to the functioning of the training project, and that their economic dependence on the project supported a finding of employee status. The integration and economic dependency aspects of the relationship were central to the court's reasoning.

In *Perera v Marikkar Bawa*[44], the court considered whether a "head cutter" who used his own tools and hired his own assistants was an employee. Despite these features, the court found that his departmental leadership role indicated integration into the employer's business, thereby justifying employee classification.

The case of *Sri Lanka Insurance Corporation v Commissioner of Labour*[45] addressed whether a motor vehicle assessor who was paid per claim constituted an employee. The court found that despite the per-task payment structure, the assessor's long-term engagement, regular work, and alignment with the employer's business objectives indicated an employment relationship, applying a combination of tests.

[42] Court of Appeal No.1342/98
[43] Court of Appeal No.549/1982
[44] (1989) 1 Sri LR 347
[45] Court of Appeal No.52/2006, decided on 13.02.2008

In *Associated Newspapers of Ceylon Ltd v Illyas*[46], a canvasser paid a monthly retainer and commissions, was required to report daily and follow specific instructions. The court emphasised the existence of control and regular supervision, leading to the conclusion that he was an employee.

An interesting criterion emerged in *W.K.P. Indrajith Rodrigo v Central Engineering Consultancy Bureau*[47], where the court introduced the concept of "job satisfaction" as a potential indicator of employment status. The court reasoned that satisfaction derived from participating in a well-defined organisational structure could imply employee status, even in the absence of traditional economic incentives.

In *ACR Wijesundara v Sri Lanka Insurance Corporation Ltd*[48], the Supreme Court applied the integration test to assess whether a motor assessor was part of the employer's core business. The court held that even though the worker was allowed to undertake other assignments, his consistent integration into the insurance assessment process indicated an employment relationship.

These cases illustrate the Sri Lankan judiciary's proactive and often innovative application of common law tests to prevent disguised employment and misclassification. The International Labour Organization has acknowledged Sri Lanka's legal system as one that effectively distinguishes between dependent and independent workers[49].

While this judicial practice has helped protect the rights of many atypical workers, including those engaged in outsourced, freelance, or contract work, the framework has not yet extended to platform-based gig workers. These individuals continue to operate without formal recognition under labour statutes, leaving them vulnerable to exploitation. The application

[46] Court of Appeal No.599/94, decided on 23.08.1995
[47] Supreme Court. Appeal No. 57/2004
[48] Supreme Court Appeal No. 99/2010 decided on 28.06.2017
[49] Sureshchandra (n 9)

of the multi-test approach to the platform economy remains a necessary and urgent development in Sri Lankan jurisprudence.

Conclusion

As the gig economy continues to reshape the global labour market, the challenge of accurately classifying workers has taken on renewed urgency. Judicial systems in jurisdictions such as the UK, US, and Australia have moved toward recognising the need for greater protection of platform-based workers, either through novel judicial reasoning or union-driven policy advocacy. Sri Lanka's judiciary has shown commendable adaptability in applying common law tests to protect non-traditional workers; however, it has yet to confront the complex classification issues posed by platform work. With the rapid expansion of digital labour platforms in Sri Lanka, the time is ripe for legal reform. Courts, legislators, and regulatory authorities must collaborate to develop a nuanced, flexible, and inclusive framework that reflects the realities of modern work arrangements. Drawing lessons from international case law and the efforts of advocacy bodies like the TWU, Sri Lanka must act proactively to prevent the emergence of a legally vulnerable class of workers excluded from the protections that employment law is meant to ensure.

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Pre-Employment Health Questions and the Right to Equality: A Comparative Analysis of Sri Lanka and the United Kingdom

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Abstract

This article examines the legal and human rights implications of pre-employment health inquiries in Sri Lanka, in comparison with the United Kingdom. The research is premised on the concern that, in settings where adequate legal safeguards are not in place, such inquiries can be used as a tool to discriminate against candidates with disabilities. Sri Lanka currently lacks a coherent regulatory structure governing pre-employment health inquiries. This regulatory gap leaves applicants with disabilities particularly vulnerable to discrimination. In contrast, the United Kingdom have introduced legal restrictions on pre-employment questions that seek disability related information without objective justification, recognising that such measures are essential to preventing discriminatory practices fostering inclusive employment opportunities. This study seeks to answer the research question: What legal and policy measures has the United Kingdom adopted to prevent discrimination through pre-employment health inquiries, and what lessons can Sri Lanka draw to strengthen its laws in line with the Convention on the Rights of Persons with Disabilities (CRPD)?Adopting a qualitative comparative methodology, the article analyses legislative frameworks, policy instruments, and case law in both jurisdictions. It concludes by proposing targeted legal and institutional reforms to promote inclusive, rights-based recruitment practices in Sri Lanka.

Keywords: *disability rights, employment discrimination, recruitment practices, human rights law, Sri Lanka*

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Introduction

Pre-employment health inquiries refer to verbal or written questions posed by employers to gather information about a candidate's medical condition during the recruitment process.[1] While such inquiries may be legally permissible when strictly necessary, such as to assess whether an applicant can perform the essential functions of a position or to determine reasonable accommodations, they must be narrowly tailored to the inherent requirements of the job. In contrast, requesting personal information that lacks direct relevance to job performance, including health or disability status, may constitute discrimination and raise serious concerns under international human rights law.[2]

In Sri Lanka, job applicants are routinely subjected to personal and intrusive questions during interviews. Common queries such as "Are you married?", "Expecting children?", or "Do you have a disability?" reflect a culture of unchecked employer discretion fostered by the absence of a regulatory framework that defines and limits the scope of pre-employment inquiries. This legal vacuum permits hiring decisions to be shaped by stereotypes, assumptions, and personal biases rather than professional qualifications and competencies, often to the detriment of candidates with disabilities.

This article argues that such practices are inconsistent with Sri Lanka's international human rights obligations, particularly under the United Nations Convention on the Rights of Persons with Disabilities (CRPD)[3] and contravenes fundamental principles of equality and non-

[1] Joseph Pachman, 'Evidence base for pre-employment medical screening' (2009) 87(7) Bulletin of the World Health Organization 529–534, 529.

[2] Committee on the Rights of Persons with Disabilities, General Comment No 8 (2022) on the right of persons with disabilities to work and employment (Art 27 of the Convention), UN Doc CRPD/C/GC/8 (2022).

[3] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3,

discrimination. The argument rests on two key premises. First, while employers may require health-related information to determine whether the applicant can perform the inherent requirements of the job or to identify any reasonable adjustments necessary to enable the applicant to perform effectively,[4] any inquiries that go beyond that threshold amount to discrimination. Second, the lack of a specific and enforceable legal framework in Sri Lanka facilitates exclusionary recruitment practices that disproportionately affect Persons with Disabilities from meaningful access to employment.

This article conducts a comparative analysis with the United Kingdom to examine how legal frameworks can limit discriminatory practices in recruitment and promote equal access to employment for Persons with Disabilities.

Pre-Employment Health Inquiries under International Human Rights Law

The right to work, together with the principles of equality and non-discrimination, constitutes the normative core of the international human rights framework governing pre-employment health inquiries. While states retain regulatory discretion in shaping recruitment policies, international law imposes binding obligations that constrain discriminatory practices and require the promotion of inclusive employment. Pre-employment health questions that seek personal health information without objective justification raise serious concerns under multiple international instruments. Given the scope of this article, the analysis is structured under three subheadings: (1) the Convention on the Rights of Persons with Disabilities; (2) Core Human Rights instruments; and (3) standards developed by the

4 Laura Davis, 'You Cannot Ask That! Unmasking the Myths about "Illegal" Pre-employment Interview Questions' (2011) 12 ALSB Journal of Employment and Labour Law <http://castle.eiu.edu/alsb/Archives/JELLvol12/You%20Can't%20Ask%20That%20final%20edit.pdf> accessed 26 May 2025.

International Labour Organization (ILO).

The CRPD: From Individual Impairment to Societal Transformation

As the most comprehensive and authoritative instrument on the rights of Persons with Disabilities, CRPD recognises disability as an evolving concept and acknowledges that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.[5] The CRPD is significant for several reasons. Rooted in a rights-based approach, it moves beyond the medical model by recognising disability as an evolving concept rather than offering a fixed definition. This flexibility enables the Convention to encompass a broad and evolving range of conditions over time, allowing State Parties to adopt definitions of disability that reflect their respective legal and social contexts. Significantly, the CRPD conceptualises disability as arising from the interaction between an individual's impairments and external attitudinal and environmental barriers. This framing underscores that full and effective participation requires the removal of societal barriers, thereby shifting the focus from 'fixing' the individual to transforming society.

The CRPD recognises the right to work as a foundational right essential to the realisation of many other human rights.[6] Persons with Disabilities who are excluded from employment opportunities often become trapped in a cycle of poverty, undermining their ability to access other rights guaranteed under the CRPD.[7] Thus, article 27 obliges States Parties to

[5] Ibid 2, preamble para (e) and art 1.

[6] Dianah Msipa, 'The Right to Work and Employment in Southern Africa: A Commentary on How Selected Employment Laws Fare Against Article 27 of the CRPD' (2016) 4 African Disability Rights Yearbook 283.

[7] Exclusion from employment limits access to other CRPD rights, including equality (Art 5), accessibility (Art 9), independent living (Art 19), habilitation and rehabilitation (Art 26), and an adequate standard of living and social protection (Art 28). See Committee on the Rights of Persons with Disabilities, General Comment No. 8, supra note 3.

'safeguard and promote the realisation of the right to work with regard to all matters concerning all forms of employment, including recruitment'. Article 5 further reinforces the right to equality and non-discrimination, placing a positive obligation on states to ensure that PERSONS WITH DISABILITIES enjoy legal protection on an equal basis with others. Article 22 is particularly relevant in the context of pre-employment health inquiries, as it guarantees the right to respect for privacy concerning "personal, health and rehabilitation information". This provision sets a clear human rights standard against intrusive recruitment questions and supports the view that requiring disability disclosure without compelling justification may breach international human rights norms.

The Committee on the Rights of Persons with Disabilities has stressed that denying employment opportunities on the basis of perceived or actual disability, or requesting medical information not relevant to job performance, constitutes a violation of Articles 5 and 27.[8] The Committee has urged states to adopt explicit legal prohibitions on such practices and ensure monitoring mechanisms to safeguard inclusive hiring.

From Invisibility to Recognition: Protection Against Pre-Employment Health Inquiries Under Core Human Rights Instruments

The Universal Declaration of Human Rights (UDHR), adopted in 1948, laid the foundational principles of contemporary international human rights law.[9] However, it made no explicit reference to disability, reflecting the limited equality paradigm in its time. This omission persisted in the International Covenant on Civil and Political Rights (ICCPR) (1966) and International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), which, despite including general non-discrimination clauses (Arts 2 and 3), did not explicitly list disability as a protected

[8] ibid.
[9] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

ground.[10] It was only with the adoption of the CRPD in 2006 that this long-standing normative gap was formally addressed.[11]

Nonetheless, prior to the CRPD, interpretive developments had already initiated to broaden the application of earlier treaties. For example, article 26 of the ICCPR, affirms the right to equal protection before the law and prohibits discrimination on any ground, a provision that has been read expansively to encompass disability.[12] Article 17, which safeguards the right to privacy, has been interpreted to cover breaches in employment contexts, such as unjustified personal inquiries during recruitment.[13] Complementing these protections, the ICESCR affirms the right to work (Art 6), just and favourable conditions of work (Art 7), and requires that these rights be exercised without discrimination (Art 2(2)).

In its General Comments Nos. 18[14] and 20,[15] the Committee on Economic, Social and Cultural Rights (CESCR) explicitly recognised disability as a prohibited ground of discrimination and clarified that indirect discrimination including ostensibly neutral policies that disproportionately disadvantage Persons with Disabilities must also be prohibited.

Pre-employment health inquiries exemplify such covert screening mechanisms, which violate the obligation to ensure substantive equality.[16] Accordingly, States must go beyond formal equality and take proactive steps

[10] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(2); both covenants also share identical art 3 provisions on equality between men and women.

[11] CRPD (N 3) preamble and art 1.

[12] ICCPR (n 3) art 26.

[13] ibid art 17; see also Human Rights Committee, General Comment No 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (art 17), UN Doc HRI/GEN/1/Rev.9 (Vol I) (8 April 1988).

[14] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 18:The Right to Work (art 6), UN Doc E/C.12/GC/18 (6 February 2006) paras 12–13.

[15] CESCR, General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2), UN Doc E/C.12/GC/20 (2 July 2009) paras 8, 10, 28.

[16] ibid para 10.

to identify and dismantle systemic barriers that impede equal participation in employment.

ILO Instruments and the Gradual Inclusion of Disability

Labour-specific instruments adopted under the International Labour Organization (ILO) complement broader human rights frameworks by articulating normative standards for equality and non-discrimination in employment. Nonetheless, the historical omission of disability in key ILO conventions reflects a persistent gap in recognising disability rights within international labour law.

ILO Convention No. 111 defines discrimination as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin" which impairs equality of opportunity or treatment in employment or occupation.[17] Notably, disability is not listed among these protected grounds, despite the Convention's foundational role in establishing the principle of equality in employment. This omission underscores the limited visibility of disability in early labour standards. However, through subsequent interpretive practice, the ILO has extended the scope of Convention No. 111 to include disability-related discrimination.[18] General Surveys and supervisory comments issued by the ILO Committee of Experts have affirmed that the Convention's list of grounds is not exhaustive and that disability-based exclusion can fall within its broader protective purpose.[19]

[17] ILO, Convention concerning Discrimination in Respect of Employment and Occupation (No 111) (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31, art 1(1)(a).

[18] ILO, Equality at Work: Tackling the Challenges – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (ILO 2007) 51–52.

[19] ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization (Report III (Part 1B), ILC 101st Session, 2012) paras 735–737.

Still, the absence of an explicit reference to disability in a binding core convention contributes to uncertainty in domestic implementation. In response, ILO Convention No. 159 was adopted to address the specific challenges faced by Persons with Disabilities in accessing the labour market.[20] It obliges states to develop and implement national policies aimed at vocational rehabilitation and inclusion of Persons with Disabilities in mainstream employment.

Despite their promise, these instruments remain underutilised. Ratification rates for Convention No.159 are modest, and domestic implementation often lacks comprehensive legislative or institutional frameworks.[21] Moreover, as a stand-alone disability-specific instrument, Convention No. 159 lacks the broader equality mandate of Convention No. 111, limiting its systemic impact unless implemented alongside proactive non-discrimination measures.

In recent years, the ILO has taken more assertive steps towards aligning its standards with the rights-based model of the CRPD. Its guidelines on the inclusion of Persons with Disabilities in the labour market underscore the need for affirmative action, workplace accommodation, and removal of structural barriers, going beyond the reactive model of passive non-discrimination.[22] This supports a growing shift in international labour norms from an individual-deficit approach to a structural and inclusive model grounded in substantive equality.[23]

[20] ILO, Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) (No 159) (adopted 20 June 1983, entered into force 20 June 1985) 1401 UNTS 2.

[21] ILO, Ratifications of C159 - Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No 159) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312304> accessed 29 May 2025.

[22] ILO, Inclusion of PWDs in the Labour Market: A Guide for Employers (ILO 2015) 6–8.

[23] ILO, Global Report on Persons with Disabilities and the Labour Market (2023) <https://www.ilo.org/global/publications/WCMS_868213/lang--en/index.htm.>

The Sri Lankan Context: Unregulated Territory and Deep-Rooted Biases

Sri Lanka lacks a specific legal or policy framework regulating the types of questions employers may pose at the pre-employment stage.[24] Consequently, job applications remain susceptible to intrusive and discriminatory inquiries, particularly concerning disability. In the absence of enforceable safeguards, such practices continue to reflect and entrench prevailing social prejudices, with limited avenues for redress. This section explores the issue through three interrelated dimensions: (1) the inadequacy of existing legal protections, (2) institutional inertia and entrenched cultural norms, and (3) the disconnect between Sri Lanka's international commitments and domestic implementation.

Existing Legal Protections and Their Limitations

The Sri Lankan Constitution affirms the principles of equality before the law and equal protection of the law,[25] with Article 12(4) explicitly enabling affirmative actions for Persons with Disabilities. Yet, in the absence of self-executing provisions or dedicated implementing legislation, these constitutional guarantees remain largely aspirational.[26]

The Protection of the Rights of Persons with Disabilities Act (PRPDA), defines person with a disability as "any person who, as a result of any deficiency in his physical or mental capabilities, whether congenital or not, is unable by himself to ensure for

[24] M.M.S.M. Mudannayake and T.D. Weerasinghe, 'Role of Human Resource Management in Recruitment and Providing Decent Work for Persons with Disabilities in Sri Lanka' (2021) 16(2) Kelaniya Journal of Human Resource Management 37 <https://kjhrm.sljol.info/articles/10.4038/kjhrm.v16i2.93>

[25] Constitution of the Democratic Socialist Republic of Sri Lanka 1978, art 12(1).

[26] D S R Jayawardena, 'Protection of the Rights of the People with Disabilities in Sri Lanka: Need for New Legislation' (2015) Proceedings of the 8th International Research Conference, General Sir John Kotelawala Defence University, <https://ir.kdu.ac.lk/bitstream/handle/345/1381/law-029.pdf?sequence=1>

himself, wholly or partly, the necessities of life.[27] Inter alia, the Act explicitly prohibits discrimination against Persons with Disabilities in employment.[28] However, its protections are narrowly framed and limited in enforceability.[29] The Act lacks a precise definition of discrimination in the hiring context, does not provide substantive guidance on the implementation of reasonable accommodations, and offers no effective mechanisms for addressing discriminatory practices during pre-employment inquiries.

The National Policy on Disability (2003) adopts a rights-based narrative and calls for equality in employment. However, as is typical of many Sri Lankan policies, it lacks binding legal effect, particularly on private sector employers.[30] Without enforceable standards, job applicants with disabilities are frequently required to disclose their health status without any assurance of confidentiality, fairness, or non-discrimination.

In practice, both job application forms and interviews across the public and private sectors routinely include disability-related questions.[31] Often unrelated to specific job requirements, these inquiries function as informal screening tools - pre-emptively exclude candidates based on outdated assumptions about capability, reliability, or social "fit."

Institutional Inertia and Cultural Norms

The absence of regulatory oversight reflects deeper institutional inertia and societal complacency toward disability inclusion. Employers face

[27] *Protection of the Rights of Persons with Disabilities Act* No 28 of 1996, s 37.

[28] ibid, s 23.

[29] ibid s 24. Although the Act permits affected individuals to seek redress through the High Court, this remedy is often impractical due to procedural barriers and lack of institutional support.

[30] M A N Chandratilaka and Prasadini Gamage, 'Disability in the Workplace: Legal Barriers Affecting Human Resources Management Practices and Workplace Accommodation for the Persons with Disabilities in Sri Lanka – A Review of Literature' (2021) 7(II) Vidyodaya Journal of Management 177 <journals.sjp.ac.lk/index.php/vjm/article/view/5100> accessed 31 May 2025.

[31] Mudannayake and Weerasinghe (n 24).

no prohibitions against posing discriminatory or intrusive questions, nor are there binding guidelines limiting permissible inquiries or requiring objective justification. Consequently, exclusionary practices continue unchecked, often masked as routine administrative procedures.

Awareness of rights among job seekers with disabilities remains limited, and while institutions such as the Human Rights Commission have issued guidance on recruitment discrimination, their ability to address subtle and indirect discriminatory practices is constrained by limited statutory authority and institutional resources.[32] Challenging such practices demands legal literacy, time and personal confidence resources that are often inaccessible to many applicants with disabilities.

Moreover, cultural attitudes reinforce these systemic barriers. In Sri Lankan society, disability is still too often perceived through a lens of charity, dependency, or reduced productivity.[33] In such context, disclosure of a health condition or disability during hiring is rarely met with an offer of reasonable accommodation instead, it often results in disqualification.[34]

Disconnect Between International Commitments and Domestic Practice

Sri Lanka ratified the CRPD in 2016, thereby committing to uphold the full spectrum of rights in all areas of life, including employment.[35] Despite this binding commitment, Sri Lanka has made minimal progress in aligning domestic law and administrative

[32] Human Rights Commission of Sri Lanka (HRCSL), Draft General Guidelines and Recommendations on Providing Employment for Persons with Disabilities and Disability-Friendly Work Environment (12 December 2024) <https://www.hrcsl.lk/wp-content/uploads/2024/12/GENERA2.pdf >accessed 31 May 2025.

[33] D S R Jayawardena (n 26).

[34] P.S.T.N. de Seram, 'Employability and Disability' (2024) 1(1) Student Journal of Social Work 15, available at: <https://nisd.ac.lk/wp-content/download/sjsw/2024/Vol1/sjsw_2024-2_Article.pdf>

[35] United Nations, 'Sri Lanka ratifies the Convention on the Rights of Persons with Disabilities' (10 February 2016) <https://www.un.org/development/desa/disabilities/news/news/sri-lanka-ratifies-the-crpd-total-ratifications-162.html> accessed 31 May 2025.

practices with the CRPD framework. Pre-employment health inquiries remain largely unregulated, and there has been no serious attempt to define when such questions are permissible, what standards should apply, or how violations can be challenged. Legal reforms have focused primarily on employment quotas, often tied to the aspirational goal of securing public sector jobs,[36] without addressing the foundational barrier posed by unchecked disability-related questioning at the recruitment stage. In such absence of clear legal safeguards, disability disclosure remains a risk rather than a right for applicants.

The United Kingdom: Regulating Employer Power Through Law

Unlike Sri Lanka's largely unregulated terrain, the United Kingdom offers a robust and detailed legal framework that actively regulates the use of pre-employment health and disability inquiries. Central to this is the Equality Act 2010 (EqA), a comprehensive piece of legislation that aims to shift recruitment practices from discretion-based filtering to rights-based protection. This section analyses the UK approach under three interrelated dimensions: (1) the legal prohibition of pre-employment health inquiries, (2) the definition and scope of disability protection, and (3) enforcement mechanisms and cultural transformation.

Legal Prohibition of Pre-Employment Health Inquiries

Section 60 of the EqA forms the cornerstone of the UK's regulatory framework, broadly prohibiting employers from making pre-employment inquiries about an applicant's health or disability

[36] Human Rights Commission of Sri Lanka, Round Table Discussion on Ensure and Secure Public Sector Jobs for Persons with Disabilities (7 August 2023) <https://www.hrcsl.lk/round-table-discussion-on-ensure-and-secure-public-sector-jobs-for-persons-with-disabilities/> accessed 31 May 2025.

prior to extending a job offer. This prohibition applies throughout the recruitment process and extends to indirect inquiries made through third parties including former employers. This prevents early exclusion of applicants with disabilities, ensuring merit-based hiring. Section 60 is not absolute. It provides narrowly defined exceptions that balance the employer's operational needs with the applicant's rights. Employers may inquire about health only when necessary to determine (a) the applicant's ability to perform an intrinsic job function, (b) whether reasonable adjustments are required, or (c) for diversity monitoring or positive action purposes.[37]

Further guidance is provided in the employment code issued by the Equality and Human Rights Commission (EHRC).[38] This Code encourages employers to avoid not only disability-related questions but also inquiries about marital status, childcare plans, or future family responsibilities emphasizing a competency-based, non-intrusive hiring process.

Defining Disability and Scope of Protection

The EqA adopts a broad and inclusive definition of disability, covering both physical and mental impairments that substantially and long-term affect day-to-day activities. "Substantial" denotes an effect that is more than minor or trivial, while "long-term" refers to impairments lasting at least 12 months. Recent Employment Tribunal decisions have broadly interpreted this definition, including conditions such as long-COVID,[39] menopausal symptoms,[40] and morbid obesity.[41]

The Act also recognizes progressive conditions, those that

[37] *Equality Act* 2010, s 60(6)(a)–(d).

[38] Equality and Human Rights Commission, Equality Act 2010 Code of Practice: Employment Statutory Code of Practice (2011) paras 10.3–10.7 <https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice> accessed 1 June 2025.

[39] *Burke v Turning Point Scotland* [2022] EAT 4112457/2021.

[40] *Rooney v Leicester City Council* [2021] EAT 000079/DA.

[41] *Kaltoft v Billund Kommune* (Case C-354/13) [2014] ECLI:EU:C:2014:2463.

worsen over time, such as cancer, multiple sclerosis, and HIV.[42] Importantly, this broad framing ensures that individuals with evolving or invisible impairments are not left outside the protective umbrella. However, conditions arising from substance addiction are specifically excluded.[43]

Enforcement Mechanisms and Cultural Shift

Legal protection under the Equality Act is not merely symbolic; it is backed by effective enforcement pathways. Applicants who are asked impermissible pre-employment health questions and subsequently rejected may bring a disability discrimination claim before an Employment Tribunal. In such cases, the burden shifts to the employer to prove that the rejection was unrelated to disability.[44]

Alternatively, complaints can be filed with the Equality and Human Rights Commission, which holds investigatory and enforcement powers.[45] Even if the applicant is not disabled but is perceived to be,[46] legal protection still applies.

These legal developments reflect a broader cultural shift in the UK labour market, where many employers in the public and corporate sectors have adopted anonymised recruitment, structured interviews, and competency-based assessments to mitigate bias. The Public Sector Equality Duty under Section 149 of the EqA further requires public bodies to proactively eliminate discrimination and promote inclusion in all areas of policy and practice, including hiring.

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[42] Equality and Human Rights Commission, Equality Act 2010: Employment Statutory Code of Practice (2011) para 6.6.

[43] *Equality Act* 2010, sch 1, para 5(1).

[44] Ibid, s 136

[45] Equality and Human Rights Commission, 'Enforcement and Compliance'<https://www.equalityhumanrights.com/en/enforcement-and-compliance> accessed 31 May 2025.

[46] *Equality Act* 2010, s 13(1).

Nonetheless, challenges persist, particularly in small and medium-sized enterprises and informal sectors, where compliance and awareness are uneven.[47] Still, the UK experience demonstrates how legal prohibition, institutional support, and cultural transformation can work in tandem to reshape recruitment norms.

Comparative Analysis: Between Silence and Safeguards

The preceding sections reveal a stark divergence between Sri Lanka's regulatory vacuum and the United Kingdom's structured legal approach to pre-employment health inquiries. While both jurisdictions recognize disability rights as a matter of principle, only one translates that recognition into enforceable standards capable of protecting applicants at the most vulnerable stage of employment the point of entry.

Legal Frameworks: Absence Versus Articulation

Sri Lanka's normative framework on disability and employment remains aspirational rather than operational.[48] Although constitutional equality provisions and anti-discrimination clauses exist, they lack direct enforceability and specificity in the recruitment context. PRPA prohibits employment discrimination in general terms but does not articulate what constitutes such discrimination during hiring.[49] Notably, it fails to address the legality or limits of pre-employment health inquiries.

By contrast, the UK has enacted Section 60 of the EqA, which explicitly prohibits such inquiries unless they fall within narrow and clearly defined exceptions. This provision is not a marginal clause; it is a central tool to ensure that decisions are made based on merit, not

[47] T. Masupe and G. Parker, 'Equality Act 2010: Knowledge, perceptions and practices of occupational physicians' (2013) 63(3) Occupational Medicine 224.
[48] D S R Jayawardena (N 26).
[49] PRPA (n 27) s 23.

on perceived medical or disability status.[50] The law's clarity gives it preventive as well as remedial power, a feature sorely missing in the Sri Lankan regime.

Scope of Disability and Conceptual Clarity

Another key distinction lies in how each jurisdiction defines and interprets the concept of disability. Although the PRPA provides a statutory definition, it adopts a narrow, medical model centred on permanent physical or mental impairments.[51] This framing fosters fragmented interpretation and reinforces the medicalisation and moral judgment of disability in recruitment processes.

In contrast, the EqA adopts a functional and inclusive definition that encompasses both visible and invisible conditions, including progressive and fluctuating impairments.[52] This clarity not only expands the protective scope but also guides employers in understanding their legal responsibilities. It also reflects a shift from viewing disability as a deficit to recognising it as a dimension of human diversity.

Enforcement and Accountability

Sri Lanka's lack of specific regulation means that applicants have no legal avenue to challenge intrusive or exclusionary pre-employment questions. Institutional mechanisms such as the Human Rights Commission are not empowered or equipped to address such complaints.[53] Even where discrimination occurs, remedies are more aspirational than actionable.

The UK system, by contrast, provides multiple layers of accountability: direct redress through employment tribunals,[54] oversight by the Equality

[50] *Equality Act* 2010, s 13(1).
[51] PRPA (n 27) s 37.
[52] *Equality Act* 2010, s 6(1).
[53] HRCSL (n 31).
[54] *Equality Act* 2010, s 120.

and Human Rights Commission,[55] and sectoral duties imposed under the Public Sector[56] Equality Duty. These mechanisms reinforce each other to prevent violations and ensure compliance.

Moreover, the UK's legal clarity also generates cultural incentives. Employers, particularly in regulated sectors, are encouraged to move toward anonymised and competency-based recruitment practices. This has fostered a degree of internalisation of inclusion norms, a development absent in the Sri Lankan context, where disclosure still functions as a gatekeeping mechanism.

From Disclosure to Discrimination

At the heart of this comparison lies a deeper tension: the disclosure dilemma. In Sri Lanka, applicants with disabilities are expected, often informally but pervasively, to disclose their disability status to receive accommodations.[57] However, this act of disclosure frequently leads to rejection rather than support, especially in a system with no legal safeguards. As the Sri Lankan section argued, disability disclosure becomes a risk rather than a right.

The UK framework, through legal restriction and cultural re-narration, has attempted to decouple disclosure from discrimination. While gaps remain particularly in small businesses and informal sectors the law provides a protective boundary that ensures disclosure does not automatically translate into disadvantage.[58]

Conclusion and Recommendations

This article interrogates the often overlooked yet structurally significant role of pre-employment health inquiries in perpetuating

[55] Equality and Human Rights Commission (n 44).
[56] *Equality Act* 2010, s 149.
[57] P.S.T.N. de Seram (n 33)
[58] Masupe and Parker (n 46)

labour market exclusion for Persons with Disabilities. It has argued that, while Sri Lanka has enacted constitutional and legislative guarantees of equality, these remain ill-equipped to confront the specific dynamics of discrimination during recruitment. In particular, the absence of legal limits on employer inquiries into disability status constitutes a critical regulatory gap, one that undermines both privacy and fairness, and places the burden of disclosure on applicants without offering corresponding protections.

Although Sri Lanka's Protection of the Rights of Persons with Disabilities Act includes a statutory definition of disability and prohibits discrimination, the definition remains narrowly medical and insufficiently capacious to reflect the diverse realities associated with disability. Furthermore, the Act does not prohibit or even meaningfully regulate employer discretion in eliciting health information. This lacuna enables the continued use of disability inquiries as a pretext for exclusion, particularly within competitive or informal labour markets. In such a context, disability disclosure becomes a risk rather than a right for applicants.

By contrast, the United Kingdom provides an instructive example of how legislative design can recalibrate the recruitment process toward substantive equality. The UK's approach demonstrates that legal clarity, combined with effective oversight and public guidance, can reshape not only employer behaviour but also social expectations surrounding disability and employment.

In light of these findings, the following recommendations are proposed to advance a more inclusive and legally coherent framework in Sri Lanka:

1. Enact Statutory Limitations on Pre-Employment Health Inquiries

Legislation should be introduced to expressly prohibit employers from seeking health or disability-related information prior to issuing a conditional job offer. Any permissible exceptions should be narrowly defined, such as those related to intrinsic job functions or the need to facilitate reasonable accommodations.

2. Reform the Definition of Disability

While the existing definition within the Protection of the Rights of Persons with Disabilities Act is a necessary starting point, it requires significant revision. A shift towards a more inclusive, functional, and socially grounded definition aligned with the CRPD and comparable jurisdictions would enable a broader range of impairments to receive protection.

3. Develop a National Code of Practice on Inclusive Recruitment

A binding or quasi-binding Code of Practice should be formulated to provide interpretative guidance to employers on permissible conduct during recruitment. The Code should incorporate model application formats, outline best practices for anonymised and competency-based assessments, and clarify the legal limits on disability-related inquiries.

4. Enhance the Mandate and Capacity of Enforcement Bodies

Institutions such as the Human Rights Commission of Sri Lanka and the Department of Labour must be strengthened to identify and adjudicate subtle and structural forms of discrimination in recruitment. These bodies should be authorised to receive complaints related to pre-employment inquiries and empowered to impose sanctions or provide remedial relief.

5. Promote Rights Awareness Among Stakeholders

A national public education initiative should be undertaken to inform employers, job applicants, and human resource professionals of their respective rights and obligations. Such efforts should aim to disrupt entrenched stigma, promote informed hiring practices, and reinforce the principle of non-discrimination at the point of entry into the workforce. Together, these measures are essential to advancing a fair and inclusive recruitment framework for persons with disabilities in Sri Lanka.

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Strengthening Renewable Energy Governance in Sri Lanka: Legal Reforms for A Resilient and Sustainable Future

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Abstract

Sri Lanka stands at a critical juncture in its transition toward sustainable energy, compelled by the dual imperatives of ensuring energy security and addressing environmental degradation. As the continued reliance on fossil fuels exacerbates domestic economic burdens and ecological risks, the legal and regulatory landscape governing renewable energy emerges as a pivotal area for reform. This article critically examines the principal legislative instruments shaping Sri Lanka's renewable energy governance namely, the Sri Lanka Sustainable Energy Authority Act, the Sri Lanka Electricity Act, and the Public Utilities Commission Act. It further contextualizes Sri Lanka's commitments within international legal frameworks, particularly the United Nations Framework Convention on Climate Change and the Sustainable Development Goals. Through doctrinal and jurisprudential analysis, the article argues that while notable progress has been achieved, substantial legal reform and institutional consolidation are necessary to foster resilience, enhance investor confidence, and secure a sustainable energy future.

Keywords: *Renewable Energy, UNFCCC, SDGs, Sri Lanka, Energy Governance*

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Introduction

As of 2023, the national electricity generation in Sri Lanka is reported to be heavily dependent on fossil fuels, with coal accounting for approximately 37% of the energy mix, followed by hydropower at 32% and oil-based generation at 18%.[1] In contrast, renewable energy sources such as solar, wind, and biomass collectively contributed only about 13% to the national grid, despite the considerable untapped potential for clean energy development in Sri Lanka. This imbalance highlights the urgent need for an effective regulatory framework to facilitate the transition towards sustainable energy in Sri Lanka.[2] With its developing economy, reducing dependence on fossil fuels is not merely an environmental imperative but also a strategic economic necessity, particularly in light of volatile global energy prices and the adverse health and environmental externalities associated with carbon-intensive energy systems.

In this context, the primary purpose of this article is to assess the extent to which the existing legal and regulatory framework in Sri Lanka effectively supports the transition to renewable energy. The article also examines the extent to which these domestic legislative instruments are compatible with Sri Lanka's international legal obligations under the United Nations Framework Convention on Climate Change[3] and the 2030 Sustainable Development Goals[4]. In order to address this research question, the article adopts a doctrinal

[1] International Energy Agency, World Energy Outlook 2023 (IEA, 2023) <https://iea.blob.core.windows.net/assets/86ede39e-4436-42d7ba2aedf61467e070/WorldEnergyOutlook2023.pdf> accessed 29 May 2025.

[2] Mohan Munasinghe (ed), *Sustainable Sri Lanka 2030 Vision and Strategic Path: Report of the Presidential Expert Committee on Sustainable Development* (Presidential Secretariat 2019) 118.

[3] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Herein after referred to as the UNFCCC.

[4] UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1<https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf> ; Herein after referred to as the SDGs.

and jurisprudential approach, analysing statutory frameworks and judicial decisions to evaluate the effectiveness of Sri Lanka's renewable energy governance. The findings of this study are presented across eight sections. Following the introduction, the discussion proceeds through an examination of the domestic renewable energy law framework and its international legal obligations. The article concludes with proposed recommendations on strengthening renewable energy governance in Sri Lanka.

Literature review

The transition towards renewable energy in Sri Lanka has emerged as a significant step towards sustainable development, particularly as a climate vulnerable developing country. The existing legal literature broadly recognises that renewable energy governance is not merely a technological or economic challenge, but one that is deeply embedded in legal and policy frameworks. The scholarly work also highlights both progressive ambitions and persistent structural weaknesses in the governance of renewable energy, emphasizing the timely need for comprehensive legal reform.

V. Pathmanandakumar, in his work "*From Policy to Practice: The Role of Sri Lankan Environmental Legislation on Sustainable Development Journey"* analyses the Sri Lankan environmental protection law framework and its alignment with sustainable development principles.[5] While the article does not focus exclusively on renewable energy, it stresses the ambit of environmental governance tools such as Environmental Impact Assessments under the National Environmental Act No. 47 of 1980.[6] Pathmanandakumar argues that despite an extensive legal framework, weak enforcement and fragmented institutional coordination undermine the practical

[5] V Pathmanandakumar, 'From Policy to Practice: The Role of Sri Lankan Environmental Legislation on Sustainable Development Journey' (2024) 2(1) Colombo Geographer 17, 18–20.

[6] National Environmental Act No. 47 of 1980.

realisation of sustainability goals.[7] This observation is highly relevant to renewable energy projects, which often face regulatory delays, inconsistent approvals, and inadequate integration of environmental safeguards.

Meanwhile, Eng. Parakrama Jayasinghe's in his contemporary piece of "*The Importance of Renewable Energy for Future Energy Security and Economic Growth*", provides a comprehensive overview of the Sri Lankan energy and its macroeconomic implications.[8] Jayasinghe highlights the persistent dominance of petroleum and coal in electricity generation, despite policy commitments to expand renewable energy. He links this imbalance to rising fuel import costs, foreign exchange volatility, and fiscal stress, arguing that renewable energy is not merely an environmental necessity but a strategic imperative for national energy security.[9] However, the work also implicitly reveals governance gaps, particularly in long-term planning, tariff structures, and regulatory certainty, which continue to discourage large scale investments on renewable energy.

At the policy level, "*The Sustainable Sri Lanka 2030 Vision and Strategic Path report*", edited by Mohan Munasinghe, represents one of the most authoritative national frameworks addressing sustainability and energy transition in Sri Lanka.[10] The report adopts the Balanced Inclusive Green Growth model[11] and explicitly identifies renewable

[7] ibid 19.

[8] P Jayasinghe, 'The Importance of Renewable Energy for Future Energy Security and Economic Growth' (Institution of Engineers Sri Lanka, *Official E-Newsletter*, Issue 61, June 2024).

[9] ibid, "…*The vast resources of Solar and Wind energy are natures gift to us with no fuel requirements. Even the Dendro Energy, most attractive being a firm source of energy available 24/7 throughout the year, uses only locally grown sustainable fuel wood. Thus, the cost of fuel flows right back to the rural farmers with a multitude of other spin off benefits*…"

[10] Mohan Munasinghe (ed), *Sustainable Sri Lanka 2030 Vision and Strategic Path: Report of the Presidential Expert Committee on Sustainable Development* (Presidential Secretariat 2019).

[11] The Balanced Inclusive Green Growth (BIGG) model is a sustainable development framework that concurrently addresses economic growth, environmental sustainability, and social equity. It moves beyond GDP-focused growth to prioritize resource efficiency, biodiversity, and improved living standards, specifically aiming to reduce poverty while staying within planetary boundaries.

energy expansion as essential to achieving climate resilience and economic stability. One of the report's key recommendations is the creation of an enabling environment for domestic entrepreneurship to develop and deploy green technologies, with the objective of reducing Sri Lanka's dependence on non-renewable energy sources and its exposure to volatile commodity markets, particularly oil.[12] In the report Mr. Munasinghe and the Presidential Expert Committee has recognized policy ambition alone is insufficient without enforceable legal mechanisms and effective regulatory institutions.[13] Nevertheless, the report stops short of offering detailed legislative reform proposals specific to renewable energy governance, leaving a gap in the literature that legal scholarship must address.

The report on *"Supporting Renewable Energy Pilot Projects in Sri Lanka"* by the Asian Development Bank[14] provides valuable insights into the structural weaknesses exposed by the 2022 economic crisis[15] in Sri Lanka. The report identifies cost reflective tariffs, unbundling of the Ceylon Electricity Board, and the introduction of a new Electricity Act as critical reforms underway.[16] It also discusses pilot initiatives such as agrivoltaic projects and digital grid research labs as innovative responses to land scarcity and grid instability. From a governance perspective, the Bank has also highlighted the need for

[12] Mohan Munasinghe (ed), *Sustainable Sri Lanka 2030 Vision and Strategic Path: Report of the Presidential Expert Committee on Sustainable Development* (Presidential Secretariat 2019) 72, "…*Create a suitable environment for domestic entrepreneurship to explore "green technology" in order to reduce Sri Lanka's dependence on non-renewable energy sources and volatile consumer product markets such as oil*".

[13] ibid 105, "…*While policymaking and decision-making should be evidence-based, resort to their ad-hoc practice has resulted in the introduction of a number of polices with short-term objectives. As such, policies have been imposed without analyzing the real need of the system, creating adverse impacts on the long-term development of the education sector in the country"*

[14] Asian Development Bank, *Supporting Renewable Energy Pilot Projects in Sri Lanka* (ADB 2024).

[15] The 2022 Sri Lankan economic crisis was the country's worst financial collapse since independence, driven by acute foreign exchange shortages, unsustainable debt, and policy mismanagement. In April 2022, Sri Lanka announced a default on foreign debt, causing severe shortages of fuel, food, and medicine. The 2nd quarter GDP figure for 2022 displayed a sharp contraction of 8.4% led by the industrial sector, which was impacted from nationwide power outages..

[16] ibid 6.

legal certainty, transparent procurement processes, and regulatory independence to attract private and foreign investment into renewable energy.[17]

Chamil Edirimuni's article titled, *"Digitalization and Decarbonization of Sri Lanka's Electric Power System: A Way Forward for Sustainability"* draws on Elinor Ostrom's theory[18] of polycentric governance.[19]

Edirimuni argues that decentralised, participatory regulatory structures are better suited to managing complex energy systems incorporating renewable sources.[20] The article advocates for smart grids, advanced metering infrastructure, and distributed energy resources, but crucially situates these technological solutions within a governance framework that requires adaptive legal and regulatory mechanisms. This contribution is particularly significant for legal reform debates, as it challenges the traditionally centralised model of energy governance in Sri Lanka and calls for a more pluralistic regulatory approach.

In the work "*Is Sri Lanka Ready for the Long Road to Sustained Recovery?"* P. K. G. Harischandra emphasises that long term economic stability depends on structural reforms, institutional strengthening, and

[17] ibid, *"…Streamline regulatory frameworks: Simplifying the regulatory environment for renewable energy projects is essential. Clear, stable, and transparent processes for project approvals will encourage greater investment from both the private sector and international stakeholders"*

[18] "*Polycentric" connotes many centers of decision making that are formally independent of each other. Whether they actually function independently, or instead constitute an interdependent system of relations, is an empirical question in particular cases. To the extent that they take each other into account in competitive relationships, enter into vari- ous contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behavior. To the extent that this is so, they may be said to function as a "system*."

[19] C Edirimuni, 'Digitalization and Decarbonization of Sri Lanka's Electric Power System: A Way Forward for Sustainability' (2024) 11(9) International Journal of Inventive Engineering and Sciences 1.

[20] ibid 2, "*…Ostrom's concepts suggest that sustainable energy systems should be managed through decentralized, interactive governance structures, aligning resource management with user needs and ecological constraints*"

governance transparency.[21] While the article does not focus exclusively on energy law, it underscores the risks posed by volatile global energy prices and climate-related shocks.[22] This reinforces the argument that renewable energy governance must be embedded within well drafted legal frameworks that support fiscal sustainability, social protection, and climate adaptation.

Across the existing literature on renewable energy in Sri Lanka the most recurring theme is the disconnect between ambitious renewable energy targets and the effectiveness of its legal and institutional frameworks. Scholars and policy analysts consistently identify challenges such as fragmented regulatory authority, inconsistent policy implementation, lack of investor confidence, and inadequate integration of environmental and energy laws. While existing statutes and policies acknowledge sustainability principles, there is limited analysis as to how renewable energy governance can be strengthened through targeted legal reforms.

The Legal Architecture of Renewable Energy in Sri Lanka

The Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007

The Sri Lanka Sustainable Energy Authority Act, No. 35 of 2007[23] forms the legislative bedrock of renewable energy governance in Sri Lanka. It establishes the Sri Lanka Sustainable Energy Authority under Section 5, mandating it to promote, facilitate, and develop indigenous renewable energy resources.[24] These include, inter alia, solar, wind, biomass, and small-scale hydropower systems sources that are critical to achieving long-term energy sustainability.

[21] P K G Harischandra, 'Is Sri Lanka Ready for the Long Road to Sustained Recovery?' (Central Bank of Sri Lanka, Information Series Note, July 2025).
[22] ibid 8.
[23] Sri Lanka Sustainable Energy Authority Act No 35 of 2007.
[24] ibid s 5.

A key feature of the Act is Section 12, which empowers the Minister to declare Energy Development Areas geographically demarcated zones identified as suitable for renewable energy investments.[25] This designation mechanism aims to provide regulatory certainty and attract both domestic and foreign investment by offering spatial and legal clarity. Additionally, Section 14 outlines the procedure for obtaining project permits, which includes compliance with environmental safeguards, technical specifications, and sectoral development plans.[26]

The Act also emphasizes the promotion of energy efficiency and conservation, codified under Part IV, which mandates the SLSEA to develop policies and programs that encourage responsible energy consumption across all sectors of the economy. This reflects a holistic approach to sustainable energy governance, extending beyond generation to encompass demand side management.

Although the SLSEA Act provides a strong legislative framework, implementation has encountered practical challenges. In the case of *Ravindra Gunawardena Kariyawasam Vs. Central Environment Authority and Others (Chunnakam Power Station Case)*[27], the Supreme Court though adjudicating a dispute concerning a thermal power plant highlighted the increasing willingness of the judiciary to uphold environmental standards in energy projects. The case highlighted the necessity of demanding environmental impact assessments and a precautionary approach to energy development. Its rationale may be interpreted to support similar scrutiny in the context of renewable energy, especially where ecological integrity is at risk.

[25] ibid s 12.

[26] ibid s 14.

[27] SCFR No 141/2015 (SC, 4 April 2019).

However, despite its expansive mandate, the operational effectiveness of the Authority is hindered by administrative delays in permit issuance, insufficient enforcement mechanisms, and overlapping institutional responsibilities.[28] These limitations weaken investor confidence and constrain the pace of renewable energy deployment. To address these issues, legislative amendments introducing statutory timelines, enforcement powers, and clearer inter agency coordination protocols would significantly enhance the regulatory power of the authority and its contribution to the Sri Lankan energy transition.

The Sri Lanka Electricity Act, No. 36 of 2024

The Sri Lanka Electricity Act marks a significant milestone in the evolution of the energy sector in Sri Lanka, introducing comprehensive reforms aimed at liberalizing the electricity market and accelerating the integration of renewable energy sources. The Act is designed to foster competition, enhance regulatory transparency, and align national energy governance with global sustainability commitments.

A pivotal feature of the Act is Section 7, which establishes the National Electricity Advisory Council.[29] This multi stakeholder body is mandated to provide strategic policy advice, assess infrastructure investment needs, and facilitate coordination among public and private sector actors in the development of renewable energy. Institutionalizing policy consultation, the Council is expected to play a key role in shaping a coherent national electricity policy.

[28] Sri Lanka Sustainable Energy Authority, Annual Report 2022 (*SLSEA*, 2023) <https://www.parliament.lk/uploads/documents/paperspresented/1728988681099291.pdf> accessed 29 May 2025.

[29] Sri Lanka Electricity Act No. 36 of 2024, s 7.

In parallel, Section 15 significantly expands the regulatory authority of the Public Utilities Commission of Sri Lanka.[30] The Commission is empowered to oversee all aspects of electricity generation, transmission, and distribution, with particular emphasis on licensing, tariff regulation, and enforcement of technical and environmental compliance standards. This provision strengthens the institutional foundation necessary for managing a dynamic and increasingly decentralized electricity sector.

To incentivize investment in clean energy, Section 22 introduces a range of fiscal measures, including tax exemptions, concessional loans, and other financial incentives.[31] These mechanisms are designed to reduce entry barriers and stimulate private sector participation in solar, wind, and other renewable energy projects. Additionally, Section 28 establishes a legally binding obligation on utility providers to progressively increase the proportion of renewable energy in the national energy mix, supporting target of achieving 70% renewable electricity generation by 2030.[32]

Judicial interpretation of the Act has reinforced its regulatory mandates. In the case of *Ceylon Electricity Board v. Public Utilities Commission of Sri Lanka*[33], the court affirmed the statutory authority of the Public Utilities Commission of Sri Lanka[34] to set and review electricity tariffs, underscoring the independence and regulatory legitimacy of the Commission. Likewise, in the case of *Environmental Foundation Ltd. v. Minister of Power & Renewable Energy*[35] the Supreme Court reiterated the necessity of environmental impact assessments as a legal prerequisite for energy projects, reflecting the commitment of the Sri Lankan Judiciary to integrating environmental safeguards into energy governance.

[30] ibid s 15.
[31] ibid s 22.
[32] ibid s 28.
[33] SCFR No 58/2022 (SC, 12 June 2023).
[34] Hereinafter referred to as the PUCSL.
[35] SCFR No 204/2020 (SC, 3 August 2022).

All in all, the Electricity Act of 2024 can be regarded as a critical legal instrument in driving the Sri Lankan clean energy transition.

The Public Utilities Commission of Sri Lanka Act, No. 35 of 2002

The Public Utilities Commission of Sri Lanka Act establishes the Public Utilities Commission of Sri Lanka[36] as an autonomous regulatory authority with the mandate to oversee public utilities, including electricity, water, and petroleum. The Act aims to ensure transparency, efficiency, accountability, and consumer protection within utility sectors through independent regulation.

Under Section 3, the PUCSL is designated as the central regulatory body responsible for supervising the functioning of all public utilities.[37] This foundational provision positions the Commission as a key institutional actor in ensuring that the development and delivery of utility services, particularly electricity are aligned with public interest, sustainability, and regulatory best practices.

Section 7 empowers the PUCSL to issue, renew, and revoke licenses for electricity service providers.[38] This licensing function plays a vital role in regulating the entry and conduct of market participants, including those engaged in renewable energy generation. It enables the Commission to enforce compliance with technical performance standards, environmental safeguards, and operational reliability requirements.

Further, Section 12 grants the PUCSL the authority to determine and regulate electricity tariffs, ensuring a balanced approach that considers both consumer affordability and investor viability.[39] This tariff-setting power is critical in maintaining financial stability in

[36] Herein after referred to as the PUCSL.
[37] Public Utilities Commission of Sri Lanka Act No. 35 of 2002, s 3.
[38] ibid s 7.
[39] ibid s 12.

the energy sector while promoting fairness and transparency in pricing.

In the meantime, section 15 mandates the PUCSL to uphold quality, safety, and service standards across the utilities it regulates.[40] This includes the development and enforcement of regulatory codes to ensure that electricity infrastructure whether traditional or renewable, meets international benchmarks for reliability and environmental sustainability.

These strong and eminent statutory powers of the PUCSL have been reaffirmed by the Sri Lankan judiciary as a strong and regulatory legitimacy. In the case of *Ceylon Electricity Board v. PUCSL*[41], the judiciary upheld the power of the Commission to independently determine tariff structures, thereby shielding it from undue political interference and reinforcing the principle of regulatory autonomy. Additionally, in the case of *Environmental Foundation Ltd. v. PUCSL,*[42] the courts recognized the obligation of the Commission to integrate environmental considerations into its licensing decisions, affirming their dual responsibility for both economic and ecological governance.

Despite its robust mandate, the effectiveness of the PUCSL has occasionally been constrained by institutional overlap, limited enforcement mechanisms, and political pressure.

International Commitments and Legal Obligations

The renewable energy governance of Sri Lanka cannot be reviewed in isolation from its international legal obligations. As a party to key global environmental treaties and multilateral frameworks, the country is under a legal duty to align its domestic energy policies

[40] ibid s 15.
[41] SCFR No 74/2020 (SC, 15 December 2021).
[42] SCFR No 198/2018 (SC, 22 July 2020).

with its international commitments. The evolving landscape of international climate law, particularly the UNFCC and the 2030 SDGs, has significantly shaped national legislative and regulatory developments, including aforementioned legal provisions. Hence, this section of the article will examine the normative influence of these international instruments on domestic energy law in Sri Lanka.

UNFCCC

Sri Lanka ratified the UNFCCC in 1993 and became a party to the Paris Agreement in 2016.[43] Under this regime, Sri Lanka has articulated its Nationally Determined Contributions, most recently updated in 2021, wherein it pledged to reduce national greenhouse gas emissions by 14.5% unconditionally and 30% conditionally by 2030.[44] These commitments rely heavily on scaling up renewable energy deployment, improving energy efficiency, and transitioning to low carbon infrastructure.

Although the 2024 Electricity Act and the SLSEA Act do not explicitly incorporate treaty obligations, they must now be interpreted and operationalized in a manner consistent with the objectives of the Paris Agreement. For instance, the legally mandated renewable energy targets under Section 28 of the Electricity Act directly complement Sri Lanka's international climate pledges. Likewise, the promotion of energy efficiency under Part IV of the SLSEA Act reinforces the emission reduction targets established under the Paris Agreement.

[43] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1, Decision 1/CP.21.

[44] Sri Lanka, Update of Nationally Determined Contributions: Sri Lanka (2021) <https://unfccc.int/sites/default/files/NDC/2022-06/Sri%20Lanka%20Updated%20NDC%202021.pdf> accessed 29 May 2025.

SDGs - 2030

The SDGs, adopted under the 2030 Agenda for Sustainable Development, offer another critical framework influencing renewable energy legislation.[45] SDG 7 commits states to ensuring universal access to affordable, reliable, sustainable, and modern energy, while SDG 13 calls for urgent action to combat climate change and its impacts.[46] Sri Lanka has mainstreamed SDG implementation into its national policy frameworks, and this is reflected in statutory measures such as the fiscal incentives under Section 22 and the performance mandates under Section 28 of the Electricity Act. These legal provisions contribute directly to achieving SDG 7 and SDG 13, by creating enabling conditions for clean energy investments and by reinforcing the integration of sustainability into energy sector governance.

Bridging the Domestic-International Divide

Despite its international commitments, Sri Lankan legal framework continues to exhibit a disconnect between treaty obligations and statutory enforcement mechanisms. Currently, international climate treaties exert only indirect influence on national legislation, as there is no express statutory requirement for legal harmonization. This gap undermines legal certainty for investors and weakens the state's credibility in meeting its global obligations. In order to address this gap, the SLSEA Act and Electricity Act should be amended to explicitly reference and incorporate Sri Lanka's obligations under the UNFCCC and SDG frameworks.

[45] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (21 October 2015) UN Doc A/RES/70/1.

[46] ibid Goals 7 and 13.

Comparative Emissions and Economic Viability

From both environmental and economic standpoints, the case for prioritizing renewable energy over fossil fuels in Sri Lanka is increasingly compelling. Fossil fuel-based electricity generation, particularly from coal, remains a significant contributor to greenhouse gas emissions. On average, coal fired power emits approximately 820–1,000 grams of CO_2 per kilowatt-hour (g CO_2/kWh).[47] In stark contrast, renewable energy technologies demonstrate vastly lower lifecycle emissions: wind energy emits only 11–12 g CO_2/kWh, solar photovoltaic systems between 40–50 g CO_2/kWh, and hydropower around 24 g CO_2/kWh.[48]

These emission differentials are especially important given Sri Lanka's legal commitments under the UNFCCC, the Paris Agreement, and its national energy targets, including the goal of achieving 70% renewable energy generation by 2030. Legislative instruments such as the 2024 Electricity Act and the 2007 SLSE Act, should be interpreted and implemented in light of this data, reinforcing the imperative to prioritize low-carbon technologies as a matter of legal compliance and climate responsibility.

Economically, renewable energy is becoming increasingly cost-competitive. According to the International Renewable Energy Agency, the levelized cost of electricity for solar and wind ranges from USD 40–50 per MWh, compared to USD 60–70/MWh for new coal-fired power plants.[49] These figures undermine the long-standing perception of

[47] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Mitigation of Climate Change* (Contribution of Working Group III to the Fifth Assessment Report of the IPCC, Cambridge University Press 2014) 1321.

[48] National Renewable Energy Laboratory (NREL), *Life Cycle Greenhouse Gas Emissions from Electricity Generation* (2012) NREL/TP-6A20-57187, 6.

[49] International Renewable Energy Agency (IRENA), Renewable Power Generation Costs in 2021 (*IRENA* 2022)<https://www.irena.org/publications/2022/Jul/Renewable-Power-Generation-Costs-in-2021> accessed 29 May 2025.

fossil fuels as the cheaper option and justify the financial incentives embedded in Section 22 of the Electricity Act to stimulate investment in renewables.

Grid Integration and Technical Challenges

While Sri Lankan legal and regulatory frameworks have made notable strides in supporting the deployment of renewable energy, the technical realities of integrating variable energy sources into the national grid remain a significant challenge. One of the most prominent incidents underscoring these difficulties was the 2025 blackout, which was partially attributed to the uncoordinated injection of excess electricity from rooftop solar installations during periods of low demand.[50] This event brought to light the operational vulnerabilities associated with non-dispatchable renewable energy sources, which cannot be controlled by grid operators to match fluctuations in real-time demand.

A central issue in this context is the so-called "*duck curve*"[51] a phenomenon where peak solar generation during midday leads to a surplus of electricity, followed by steep demand ramps in the evening when solar output declines. This mismatch between generation and consumption creates grid instability, manifested in frequency fluctuations, voltage surges, and system congestion. Without adequate mitigation strategies, such instability could compromise both the reliability and safety of the power system.

Addressing these challenges requires a combination of technological innovation and regulatory reform. The deployment of smart inverters capable of providing real-time voltage and frequency regulation can improve grid responsiveness. Additionally, the integration of energy

[50] Ceylon Electricity Board, *Technical Report on the National Grid Failure – April 2025* (*CEB* 2025) <https://www.ceb.lk/reports/grid-failure-2025.pdf> accessed 29 May 2025.

[51] US Department of Energy, *The Rise of the Duck: Managing Solar Power Variability* (*Office of Energy Efficiency & Renewable Energy*, 2020) <https://www.energy.gov/eere/articles/rise-duck-managing-solar-power-variability> accessed 29 May 2025.

storage systems, such as lithium-ion batteries, enables excess solar energy to be stored and dispatched during peak demand periods. Demand-side management mechanisms, including dynamic pricing and load-shifting incentives, can also help align energy consumption patterns with the timing of renewable energy generation. In extreme cases, curtailment strategies temporarily limiting solar output during low demand intervals may be necessary to maintain grid stability.[52]

From a legal perspective, existing regulatory instruments must be updated to facilitate the adoption of these solutions. This includes the revision of grid codes, interconnection standards, and performance-based regulations to ensure that new technologies and decentralised energy systems can be integrated smoothly and reliably into the national grid. Legal reform in this area is not merely a technical necessity but a strategic imperative to ensure that the increasing share of renewable energy.

Institutional Barriers and Policy Inconsistencies

Despite the presence of a robust statutory foundation for renewable energy development, Sri Lanka's legal and regulatory landscape continues to be hampered by institutional fragmentation and inconsistent policy implementation. Although the Sri Lanka Sustainable Energy Authority and the Public Utilities Commission of Sri Lanka are entrusted with critical regulatory functions under their respective statutes, the division of responsibilities between these entities often results in overlapping mandates, regulatory ambiguity, and procedural inefficiencies.

One of the most pressing challenges is the lack of a coordinated licensing regime. Investors in renewable energy projects frequently encounter protracted approval processes due to multiple, and at times conflicting, procedural requirements imposed by different institutions. These licensing delays and bureaucratic obstacles undermine investor confidence, create

[52] International Energy Agency, Status of Power System Transformation 2019: Power System Flexibility (*IEA*, 2019) <https://www.iea.org/reports/status-of-power-system-transformation-2019> accessed 29 May 2025.

project uncertainties, and increase transaction costs. The absence of a single-window clearance mechanism exacerbates the situation, preventing streamlined decision-making and efficient regulatory oversight.[53]

In addition, political interference in tariff determination, particularly in cases where tariff decisions conflict with short-term political objectives, further weakens the credibility and independence of regulatory bodies. While the PUCSL Act No. 35 of 2002 endows the Commission with tariff-setting authority under Section 12, its practical enforcement is often compromised by external influence, eroding stakeholder trust and undermining the long-term financial viability of renewable energy investments.

Another critical gap is the lack of a dedicated judicial or quasi-judicial forum for resolving renewable energy disputes. In the absence of a specialised Renewable Energy Dispute Resolution Tribunal, project developers and investors are left with limited recourse when facing regulatory inconsistencies or administrative delays. As a result, disputes remain unresolved or are subject to prolonged litigation, which further discourages private sector participation in the sector.

Recommendations

Strengthening Sri Lanka's renewable energy governance will require not only the preservation of its existing statutory foundations but also a forward-looking legal reform agenda capable of addressing persistent regulatory bottlenecks and aligning domestic frameworks with international standards. While the SLSEA Act, the Electricity Act, and the PUCSL Act collectively provide a comprehensive legal basis for renewable energy promotion, their effectiveness is presently undermined by procedural inefficiencies, institutional overlaps, and policy uncertainty.

[53] M Vidanalage and C Fernando, 'Barriers to Renewable Energy Investment in Sri Lanka: Legal and Institutional Perspectives' (2021) 5 South Asian Energy Review 71, 73.

This section outlines key legislative and regulatory reforms necessary to realise Sri Lanka's clean energy transition.

First, the 2007 Sustainable Energy Authority Act should be amended to incorporate statutory timeframes for permit approvals and introduce investor protection clauses. These amendments would enhance procedural transparency and reduce uncertainty for project developers. A binding timeline for license processing, combined with clear legal remedies for unreasonable delays, would significantly improve the investment climate for renewable energy.[54]

Second, the Electricity Act, No. 36 of 2024, should be updated to explicitly define grid integration obligations and dispatch protocols for variable renewable energy sources. As the share of non-dispatchable technologies such as solar and wind increases, the absence of detailed statutory provisions on priority dispatch, curtailment procedures, and interconnection rights may lead to regulatory disputes and technical inefficiencies. Codifying these rules would strengthen grid stability and ensure fair access to the market for renewable energy producers.[55]

Third, the independence and regulatory authority of the Public Utilities Commission of Sri Lanka must be reinforced through statutory safeguards against political interference. As was revealed in the case of *Ceylon Electricity Board v. PUCSL*, the frequent politicisation of tariff decisions and institutional budgetary constraints weaken its autonomy. Reforms could include fixed-term appointments for

[54] OECD, *Policy Guidance for Investment in Clean Energy Infrastructure* (2015) 22–23; ICLEI, *Permitting for Sustainable Energy Projects* (2024) 3; Asian Development Bank, *Supporting Renewable Energy Pilot Projects in Sri Lanka* (2024) 7.

[55] D Wijeratne, 'Institutional Barriers to Renewable Energy Development in Sri Lanka: An Empirical Assessment' (2022) 14 Sri Lanka Journal of Energy Law and Policy 101, 108; E James, 'Grid Access and Priority Dispatch: Legal Barriers to Utility-Scale Renewables' (September 2025) 12 International Journal of Energy Law and Policy 45, 48–50; E Ejuh Che et al, 'The Impact of Integrating Variable Renewable Energy Sources into Grid-Connected Power Systems: Challenges, Mitigation Strategies, and Prospects' (2025) 18 Energies 689, 5–8; World Bank, Grid Integration Requirements for Variable Renewable Energy (World Bank 2019) 11.

commissioners, financial autonomy, and enhanced judicial oversight of executive encroachments.[56]

Fourth, the enactment of a dedicated Renewable Energy Investment Code is strongly recommended. Such an instrument could consolidate rules related to fiscal incentives, tax relief, risk guarantees, and foreign exchange repatriation, thereby providing clarity and predictability to both domestic and foreign investors.

Finally, statutory harmonisation across the SLSEA Act, the Electricity Act, and the PUCSL Act are critical to eliminating jurisdictional ambiguities and ensuring coordinated governance.[57] This may include the establishment of a joint regulatory framework, inter-agency coordination mechanisms, and the adoption of model regulations to guide consistent interpretation and application.[58]

Conclusion

Sri Lankan commitment to a renewable energy future is underpinned by a progressively evolving legal framework comprising the Sri Lanka Sustainable Energy Authority Act, the Sri Lanka Electricity Act, and the Public Utilities Commission Act. Collectively, these legislative instruments provide a promising foundation for guiding the transition toward a low-carbon, resilient, and sustainable energy system. However, the success of this transition is contingent not merely upon the existence of enabling laws, but on their effective implementation, institutional synergy, and alignment with the international legal obligations. Despite notable advancements, persistent regulatory

[56] Public Utilities Commission of Sri Lanka Act, No. 35 of 2002 s 14(1); Institution of Engineers Sri Lanka, *Full Report of Review of Power Sector Reform Bill* (3 June 2024) 5; 'The much-needed independent regulator for utility industries in Sri Lanka', *Daily FT* (19 January 2021); UNIDO, *Structure, Composition and Role of an Energy Regulator* (UNIDO 2009).

[57] *See*, Public Utilities Commission of Sri Lanka Act, No 35 of 2002 ss 2, 14; Sri Lanka Sustainable Energy Authority Act, No 35 of 2007 ss 4–6; Electricity Act, No 36 of 2024.

[58] United Nations Development Programme, *Institutional and Regulatory Frameworks for Sustainable Energy* (2018) 21–23; T Prosser, 'Regulatory Coordination and Institutional Design in Energy Law' (2014) 23 Journal of Energy and Natural Resources Law 345, 352–354.

fragmentation, procedural inefficiencies, and inadequate enforcement mechanisms continue to constrain the full realization of renewable energy objectives. To move forward, Sri Lanka must undertake strategic legal reforms aimed at closing implementation gaps, streamlining institutional responsibilities, and embedding environmental and economic resilience into its energy laws. Integrating grid management provisions, strengthening regulatory independence, and institutionalizing investor protections will be critical to ensuring both the scalability and sustainability of renewable energy initiatives.

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Empowering the Supreme Court of Sri Lanka with Internal Review Powers in the Interest of Justice

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Abstract

Although the finality of judicial decisions is a key feature of the legal system, cases involving grave error or injustice prompt a closer examination of how this principle functions at the highest judicial level. This study examines whether the Supreme Court of Sri Lanka should be constitutionally empowered to internally review its own final judgments in exceptional situations where grave errors or injustices have occurred, and whether such a mechanism can be introduced without undermining the finality of judicial decisions. The paper analyses the existing limitations of the Sri Lankan constitutional framework, particularly in matters where the Supreme Court exercises original or exclusive jurisdiction, such as fundamental rights applications, election petitions, and professional misconduct involving Attorneys-at-Law. It also evaluates comparative practices, with specific reference to India's internal review mechanism under Article 137 of its Constitution, and assesses the feasibility of adopting a similar and contextually appropriate model for Sri Lanka. Using a doctrinal and comparative legal methodology, the study examines relevant constitutional provisions, case law, and scholarly commentary. It proposes constitutional and procedural reforms aimed at enabling the Supreme Court to correct its own errors in rare and clearly defined circumstances. The study contributes to the existing literature by presenting internal judicial review not as a challenge to finality, but as an enhancement of justice, procedural integrity, and public trust in the legal system.

Keywords: *Fairness, Finality in litigation, Internal Review Mechanism, Rule of Law, Supreme Court of Sri Lanka.*

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Introduction

This paper examines the need to empower the Supreme Court of Sri Lanka with internal review powers, particularly in cases where a manifest miscarriage of justice may result from the absence of such a mechanism. While judicial finality is essential for certainty and closure in legal proceedings, it must be balanced with the principles of fairness, accountability, and the rule of law. The research begins with a conceptual and theoretical framework that explores the doctrine of finality in judicial decision-making, the principles of fairness and procedural justice, and the role of remedies in a rights-based legal framework. It then analyses the existing legal and constitutional position of the Supreme Court of Sri Lanka, highlighting its limitations in reviewing its own judgments. A comparative analysis follows, focusing on internal review mechanisms in India, particularly under Article 137 of the Indian Constitution. The study then applies these insights to the Sri Lankan context, proposing for the extension of internal review powers to the Supreme Court. Finally, it proposes specific constitutional and legislative reforms to operationalize this mechanism, concluding with a discussion of expected challenges and the broader implications for judicial accountability and public confidence in the legal system.

Conceptual and Theoretical Framework

The discourse on introducing internal review mechanisms within the Supreme Court of Sri Lanka needs a careful engagement with several interrelated legal and constitutional implications. This section outlines the conceptual and theoretical framework for the inquiry. It begins by examining the principle of finality in

judicial decision-making, particularly as it is embedded within Sri Lanka's Constitutional structure. It then engages with the broader jurisprudential imperatives of fairness and justice, and considers the theoretical basis and relevance of internal review mechanisms in the Supreme Court, situated within constitutional law theory and judicial accountability.

Finality of Judgments and its Legal Foundations

The concept of 'finality in litigation,' derived from the Latin maxim *interest reipublicae ut sit finis litium* ('it is in the public interest that there be an end to litigation'[1]), refers to the principle that a judicial determination, once made by a court of final jurisdiction, is conclusive and binding. Its primary purpose is to ensure legal certainty, avoid perpetual litigation, and uphold the integrity of the judiciary. This principle is deeply rooted in most legal systems and is particularly entrenched in the constitutional architecture of Sri Lanka.

In *Nagabhushana v State of Karnataka and others*, the Supreme Court of India noted that this concept is based on public policy principle and 'seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties.'[2] In the absence of such a principle great injustice might result under the colour and pretence of law in as much as there will be no end of litigation and a malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions.

1 Black's Law Dictionary] defines the maxim *interest reipublicæ ut sit finis litium* as: "It is in the interest of the state that judgments already given not be rescinded." See, Bryan A Garner (ed), *Black's Law Dictionary* (9th edn., Thomson Reuters 2009) 5317 (Appendix B).

2 2011 (3) SCC 408, [15]

Calcutta High Court in *Indu Bhusan Jana v Union of India and others*[3] clearly noted the true nature of the principle as follows:

> *"Upon an order attaining finality, it matters little as to whether it was erroneous. A party aggrieved by an order has to work out his remedies within the legal framework. If an issue or the entire lis is concluded upon a finding being rendered and such finding remains unchallenged, it is no longer open to the party to undo the effect thereof at any subsequent stage or collaterally unless it is demonstrated that the finding was obtained by fraud or the Court lacked jurisdiction to pass the order. The hierarchy in the judiciary exists to afford litigants to climb up the ladder in pursuit of justice and to right a wrong committed at a lower level. But if a litigant accepts an order, he does it to his prejudice and binds himself thereby."*

Van de Velden observes that English legal system upholds the finality of judgments by preventing courts lacking appellate or revision jurisdiction from reassessing the legality or correctness of final judgments.[4] This precludes collateral attacks which attempt to indirectly challenge a final judgment in separate or subsequent proceedings. In English law, finality is enforced primarily through the doctrine of 'abuse of process,' which treats such collateral attacks as a misuse of court procedures.[5]

[3] 2008 SCC OnLine Cal 626; AIR 2009 Cal 24.

[4] J van de Velden, *Finality of Litigation: Preclusion and Foreign Judgments in English and Dutch Law, and a Suggested Approach* (DIV internal thesis, University of Groningen 2014).<https://pure.rug.nl/ws/portalfiles/portal/13227539/Complete_dissertation.pdf>accessed 30 May 2025

[5] See, *Hurst v Green and others* [2022] EWHC 2895 (Ch).

This English preclusion law is underpinned by two long-standing common law maxims: *interest reipublicae ut sit finis litium* ('it is in the public interest that there should be finality of litigation')[6] and *nemo debet bis vexari pro eadem causa* ('no person should be troubled twice for the same cause').[7] These principles are operationalised through several mechanisms. Once a final judgment is given, the court considers as *functus officio* which has discharged its role and lacks jurisdiction to revisit the matter.[8] In subsequent proceedings, the doctrine of *res judicata* applies, which includes the merger doctrine (preventing reassertion of adjudicated causes of action) and *estoppel per rem judicatam* (prohibiting contradiction of prior findings). Where these doctrines do not apply, 'abuse of process' doctrine serves as a safeguard against re-litigation. Notably, Sri Lankan courts have acknowledged these principles, as seen in *Paris v Florence*.[9]

Principles of Fairness and Justice in Judicial Decision-Making

The principles of fairness and justice are core values in any legal system, guiding both the process and substance of judicial reasoning. Procedural fairness requires that courts ensure unbiased hearings, transparency in reasoning, and equitable treatment of all parties.[10] Substantive justice, meanwhile, concerns the correctness of legal outcomes, ensuring that judicial decisions uphold rights, reflect reasoned application of law, and are not tainted by error or arbitrariness.[11]

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[6] Black's Law Dictionary (n 1).

[7] *Fraser v HLMAD Ltd* [2006] EWCA Civ 738.

[8] J van de Velden (n 4) 74 and 140.

[9] [1987] 1 Sri LR 141.

[10] Tom R Tyler, 'What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law & Society Review* 105-6.

[11] Geoffrey W G Leane, 'Testing Some Theories About Law: Can We Find Substantive Justice within Law's Rules?' (1994) 19 *Melbourne University Law Review* 925.

In the absence of mechanisms to revisit flawed judgments, the pursuit of justice risks being overshadowed by the administrative convenience of finality. As the constitutional guardian and the apex judicial authority, the Supreme Court bears the responsibility of maintaining a careful balance between ensuring finality in adjudication and upholding the demands of justice, particularly when judicial error threatens the fairness of a decision.

The Need for Remedies and International Standards

The foundational legal maxim *ubi jus, ibi remedium* – where there is a right, there must be a remedy, emphasises that rights without enforcement mechanisms are illusive. In the context of judicial error, this principle becomes especially relevant to the argument for empowering courts of last resort with internal review mechanisms. Where a judgment of the Supreme Court of Sri Lanka, acting either in its appellate or original jurisdiction, leads to a miscarriage of justice, the absence of a remedy amounts to not only contravening domestic constitutional values but also violating international legal obligations.

International human rights law provides normative support for such rights–centered mechanisms. Article 8 of the Universal Declaration of Human Rights (UDHR) affirms that *"everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."* Similarly, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), to which Sri Lanka is a party, requires State Parties to ensure that individuals have access to *"an effective remedy"* for rights violations, and to develop judicial mechanisms capable of enforcing such remedies.

These instruments reflect a broader jurisprudential imperative that justice must not only be done, but must be, in a broader context, capable of correction when wrongly denied. Without such safeguards, finality in litigation may harden into inflexibility, shielding error from redress. The legal system thus risks fostering injustice under the guise of procedural closure.

Constitutional Law Theory and Judicial Accountability

The proposal to empower the Supreme Court of Sri Lanka with internal review powers must be situated within the broader constitutional law theory concerning the rule of law, separation of powers, and judicial accountability. While the doctrine of finality serves the rule of law by promoting certainty and closure, it should not become an instrument of injustice or judicial impunity in the absence of meaningful judicial accountability.

Judicial accountability is a cornerstone of constitutional democracy. While judicial independence must be safeguarded from political interference, such independence does not place judges beyond the reach of accountability. The introduction of an internal review mechanism does not undermine judicial independence; rather, it reinforces the judiciary's legitimacy by ensuring that even the highest court adheres to the same standards of fairness, consistency, and integrity that it demands from lower courts. From a theoretical perspective, the supremacy of the constitution over all state actors, including the judiciary, underscores that no organ of the State, however final its authority, stands above fundamental democratic norms such as fairness, proportionality, accountability, and rationality.

Legal and Constitutional Position of the Supreme Court of Sri Lanka

Finality in the Sri Lankan Constitutional Context

In Sri Lanka, the finality of judgments is enshrined in Article 118 of the Constitution, which states that *"the Supreme Court of the Republic of Sri Lanka shall be the highest and final superior court of record."* This reflects a deliberate constitutional choice to vest ultimate judicial authority in the Supreme Court, excluding any further review or appeal of its decisions. Article 118(c) further emphasises this by establishing that the Supreme Court exercises final appellate jurisdiction which rules out any collateral challenge against its rulings.

This interpretation has been consistently upheld in Sri Lankan case law. In *Ganeshanathan v Vivienne Goonewardene and others*, the Supreme Court held that it had no jurisdiction to revise its own decisions, as no provision in the Constitution or any statute conferred such power. The Court emphasized that it is the final superior court of record and that its judgments are final, whether right or wrong, as a matter of legal policy.[12]

However, *Jeyaraj Fernandopulle v Premachandra de Silva and others*,[13] decision represents a limited and arguably aberrant departure from this settled position. In that case, the Court acknowledged that,

[12] [1984] 1 Sri LR 321, 328.
[13] [1996] 1 Sri LR 70.

in exceptional circumstances, it could rely on its inherent powers to prevent manifest injustice[14] Subsequent jurisprudence, particularly *Electroteks Network Services (Pvt) Ltd v Dialog Broadband Network (Pvt) Ltd*, reaffirmed that inherent powers are only ancillary to existing jurisdiction and cannot be invoked to create a new jurisdiction for revising judgments.[15]

These rulings affirm that the current Constitutional and legal framework in Sri Lanka does not provide for internal review mechanisms within the Supreme Court. The judicial stance, reflected in the above cases, is that there exists no statutory authority enabling the Supreme Court to revise or review its own final decisions.[16]

The Tension between Finality and Justice

While the doctrine of finality upholds the values of stability and certainty in the legal system, it does not imply that courts are incapable of making mistakes. The absence of an internal review mechanism within the Supreme Court risks resulting in miscarriage of justice in cases involving procedural irregularities, factual misunderstandings, or legal misapplications. Importantly, the doctrine of finality aims to prevent re-litigation of matters already adjudicated by a court of last resort. However, in Sri Lanka, the Supreme Court not only serves as a final appellate court but also frequently acts as a 'court of first

[14] The Sri Lankan courts on certain occasions, where mistake was so obvious, have used the *per incuriam* concept: *Police Officer of Mawalla v Galapatha* (1915) 1 CWR 197; *Ranmenika v Tissera* (1962) 65 NLR 214; *Kariawasam v Priyadharshani* [2004] 1 Sri LR 189. The SC's power to review a judgment of its own passed in appeal where it appears that fresh evidence has been discovered since such judgment was pronounced: *Loku Banda v Assen* (1897) 2 NLR 311. Clerical mistake or error from an accidental slip or omission can be rectified: *Marambe Kumarihamy v Perera* (1919) VI CWR 325; *Padma Fernando v T. S. Fernando* (1956) 58 NLR 262. The SC has inherent power to set aside its order by way of remedying the injustice caused to the petitioner and grant relief: *Palitha v OIC Police Station, Polonnaruwa and others* [1993] 1 Sri LR 161.

[15] *Electroteks Network Services Private Limited v Dialog Broadband Network (Private) Limited* (SC/MISC/03/201, SC Minutes of 19.05.2023) 9.

[16] See further, *Ajith Dissanayake v Sri Lanka Savings Bank Limited* (SC Revision No. 10/2016, SC Minutes of 22.09.2023)

instance'[17] in specific categories of matters. These include, *inter alia*, fundamental rights petitions, election petitions, contempt of court matters, and professional misconduct proceedings against Attorneys-at-Law. Since, in such matters, where litigants have no access to a higher judicial forum for appeal or review, the principle of finality should not be interpreted as a bar to further scrutiny. Rather, this unique institutional position highlights the necessity of establishing an internal review mechanism within the Supreme Court itself. Such a mechanism would serve to enhance the Court's ability to correct errors and reinforce public confidence in the administration of justice.

Even in appellate matters, decisions made *per incuriam* may remain uncorrected due to the Supreme Court's lack of authority to revisit its own judgments. Although the Court occasionally addresses such errors when similar issues arise in later cases, this reactive approach leads to extended periods of legal uncertainty. This concern became particularly evident in *Indrani Mallika v Siriwardene and Others.*[18] In this case, the Court declared a previous decision[19] as *per incuriam* more than a decade after it had been delivered. The earlier ruling was revisited only because a similar legal issue arose in a subsequent case. This delayed correction highlights the inherent risk of relying solely on future litigation to rectify judicial errors. In the absence of an internal mechanism to promptly identify and correct such decisions, legal uncertainty and potential injustice may persist for extended periods. Therefore, enabling the Supreme Court to act *suo motu* or through a structured internal review process would enable it to address *per incuriam* decisions proactively, without waiting for similar cases to

[17] A court of first instance is the initial court where a legal case is heard and decided. It is the court that has original jurisdiction, meaning it is the first to examine the facts, hear evidence, and issue a judgment.

[18] *Indrani Mallika v Siriwardane and others* (SC/Appeal/160/2016, SC Minutes of 02.12.2022).

[19] *Karunawathie v Piyasena* [2011] 1 Sri LR 171.

arise.

Comparative Analysis of Internal Review Mechanisms

The Indian Supreme Court, under Article 137 of the Constitution, is authorized to review its own judgments. This internal corrective jurisdiction allows the Court to address instances where errors in its decisions have resulted in a miscarriage of justice. In addition to this review power, the Supreme Court has developed, through judicial interpretation and precedent, a unique procedural innovation known as the "curative petition." This tool serves as an extraordinary remedy in cases of grave injustice that have persisted despite the exhaustion of all ordinary remedies.

This section examines these mechanisms by exploring their constitutional foundations, procedural structure, judicial evolution, and how they may inform the development of similar corrective mechanisms within the judicial system of Sri Lanka.

The Constitutional and Procedural Foundations of Review

Article 137 of the Indian Constitution provides that *"subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."* This provision grants the Court a distinct and limited jurisdiction to reconsider its own decisions. The rationale behind this authority is the recognition that judicial fallibility, even at the highest level may sometimes be affected by oversight or legal error that could undermine the interests of justice.[20]

[20] Muteti Mutisya Mwamisi, 'The Indian Supreme Court and Curative Actions' (2007) Indian J. Const. L. 207 <http://www.commonlii.org/in/journals/INJlConLaw/2007/10.pdf> accessed 12 July 2024.

In *Sow Chandra Kanta and another v Sheikh Habib,*[21] Justice Krishna Iyer emphasised this review is a serious step, warranted only by glaring omissions or grave errors. Explaining the scope and ambit of the review jurisdiction of the Supreme Court, Justice Krishna Iyer stated that:

> *"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."*

Article 145(1)(e) of the Indian Constitution complements the review power granted under Article 137 by authorising the Supreme Court to frame its own procedural rules for conducting such reviews. This includes setting the conditions and time limits for filing a review petition. Notably, these rules require the approval of the President of India before they take effect. The procedural framework is codified in the Supreme Court Rules, 2013/2014, particularly under Order XLVII.[22]

A review petition filed under Article 137, read with Order XLVII, must be based on specific grounds as outlined in Order XLVII Rule 1 of the Code of Civil Procedure. These grounds include: (i) discovery of new and important matter or evidence which, despite due diligence, was not within the petitioner's knowledge or could not be produced at the time of judgment; (ii) a clear error apparent

[21] [1975] 3 SCR 933.

[22] Supreme Court of India, *Supreme Court Rules, 2013*, Rule No. 287 dated 29 May 2014, Part IV (Order XLVII) Review <https://images.assettype.com/barandbench/import/2014/07/Supreme-Court-Rules-2013.pdf> accessed 28 May 2025.

on the face of the record; or (iii) any other sufficient reason.[23]

Such a petition must be filed within thirty days from the judgment date,[24] certified by an Advocate on Record as the first application based on admissible grounds.[25] The Court disposes of the petition, often by circulation without oral arguments. The application should, as far as practicable, be circulated to the same Judge or Bench that delivered the original judgment or order.[26] If the Court finds an error, it may reverse or modify its decision. No further application for review shall be entertained in the same matter once an application for review has been made and disposed of.[27]

Curative Petitions

In addition to its review power, Supreme Court of India has developed the practice of entertaining "curative petitions" as an extraordinary judicial remedy. This procedural innovation was established in the landmark case of *Rupa Ashok Hurra v Ashok Hurra and Another*,[28] where the Court held that, in the interest of justice, it could revisit final judgments *even after the dismissal of a review petition*. The curative petition is intended for cases of gross miscarriage of justice, especially those involving violations of natural justice, such as a party not being heard or instances of judicial bias.

While Article 137 allows for the review of judgments to correct errors apparent on the face of the record or to consider new and important evidence, curative petitions are meant for the "rarest of rare cases" where a judgment has resulted in a gross miscarriage

[23] Supreme Court of India, *Handbook on Practice and Procedure and Office Procedure* (2017) <https://cdnbbsr.s3waas.gov.in/s3ec0490f1f4972d133619a60c30f3559e/documents/misc/practice.pdf_0.pdf> accessed 28 May 2025. Also see, *Kamlesh Verma v Mayawati* (2013) 8 SCC 320.
[24] (n 22) Rule 2.
[25] (n 22) Rule 1 para 2.
[26] (n 22) Rule 3.
[27] (n 22) Rule 5.
[28] (2002) 4 SCC 388.

of justice due to a violation of natural justice principles, such as a party not being heard or bias in the proceedings. Justice Quadri, in stating his opinion in *Rupa Ashok Hurra*,[29] noted that the Supreme Court, as the apex court in the judicial hierarchy, should balance the principles of finality and justice in its judgments. He recognised that, in rare cases, reconsideration of a final judgment may be necessary to correct miscarriages of justice, particularly when violations of natural justice or judicial bias are involved.

In a curative petition, the petitioner must specifically state that the grounds mentioned were included in the review petition, which was subsequently dismissed by circulation.[30] The curative petition must be accompanied by a certificate from a Senior Advocate, confirming that the petition meets the requirements outlined in the *Rupa Ashok Hurra* case.[31] Additionally, a certificate from the Advocate on Record must be provided, stating that it is the first curative petition filed in the impugned matter.[32] Initially, a bench of the three most-senior judges, along with the original judgment judges if available, scrutinises the petition.[33] If deemed necessary, it warrants a full hearing to ensure no gross injustice remains.[34] Unlike review petitions, which must be filed within thirty days and are often disposed of by circulation without oral arguments, curative petitions do not have a fixed timeframe but are expected to be filed within a reasonable time and without undue delay.[35]

[29] (n 28).
[30] (n 22) Rule 2(1).
[31] (n 22) Rule 2(2).
[32] (n 22) Rule 2(3).
[33] (n 22) Rule 4(1).
[34] (n 22) Rule 4(3).
[35] (n 22) Rule 3.

The philosophy underlying the curative jurisdiction also finds support in Article 142 of the Constitution, which empowers the Supreme Court to pass such orders as are necessary "for doing complete justice" in any cause or matter before it. This constitutional mandate highlights the Court's duty to ensure that justice prevails, even when procedural limitations might otherwise prevent relief. The scope and purpose of Article 142 have been articulated in several landmark decisions. In *A.R. Antulay v R.S. Nayak*,[36] the Supreme Court invoked its inherent and constitutional powers under Article 142 to recall an earlier order passed per incuriam, which had deprived the accused of his statutory right to a trial before the competent Special Judge. Recognizing that its own mistake had resulted in a miscarriage of justice, the Court held it possessed the authority to correct such an error to uphold the rule of law and maintain the integrity of the judicial process. Likewise, in *Union Carbide Corporation v Union of India*,[37] the Supreme Court relied on Article 142 to approve a controversial settlement between the Union of India and the corporation. The Court justified this exercise of power by stating that the imperative to provide immediate relief to the vast number of victims constituted an exceptional circumstance, allowing it to bypass lengthy litigation to achieve what it deemed 'complete justice.' These cases collectively illustrate that the principles underpinning review and curative petitions are rooted in the same constitutional philosophy reflected in Article 142, which ensures that the finality of judicial decisions does not stand in the way of justice.

Therefore, India's judicial architecture reflects a nuanced balance between the finality of judgments and the imperative of justice. The Supreme Court, while being the ultimate authority in the judicial hierarchy, retains the capacity to correct its own errors in exceptional circumstances. The mechanisms of review and curative petitions embody the idea that

[36] 1988 (2) SCC 602.

[37] 1991 (4) SCC 584.

judicial authority is strengthened not by closing all avenues of redress, but by preserving one final opportunity to ensure that justice is truly done.

Application to Sri Lanka: Extending Internal Review Power

In Sri Lanka's legal system, the Supreme Court holds original jurisdiction over critical matters such as fundamental rights petitions, election-related disputes, contempt of court, and issues of professional misconduct involving Attorneys-at-Law. Despite the gravity of these cases, the Constitution and procedural framework currently offer no mechanism for internal review once a final judgment has been delivered. The absence of such a mechanism, risks locking in errors and undermines the broader goal of justice. This section explores the rationale and potential framework for introducing internal review procedures in Sri Lanka's Supreme Court, drawing comparative insights from the Indian experience.

Internal Review in the Case of Original Jurisdiction of the Supreme Court

Sri Lanka's Constitution vests the Supreme Court with exclusive original jurisdiction in several crucial areas:

- Fundamental rights[38]
- Jurisdiction in (Presidential) election and referendum petitions[39]
- Jurisdiction in respect of breaches of Parliamentary privileges[40]
- Contempt of court[41]
- Professional misconduct involving Attorneys-at-Law[42]

Decisions in these matters are final and not subject to appeal or review. However, these areas can have serious implications for individual rights, democratic values, and the rule of law. Errors, omissions, or procedural

[38] Article 118(b) and Article 126.
[39] Article 130.
[40] 1978 Constitution of Sri Lanka, Article 131.
[41] Article105(3).
[42] 1978 Constitution of Sri Lanka, Article 136(1)(g).

irregularities, whether resulting from oversight, misapplication of law, or the absence of a full hearing, can cause irreparable harm to litigants in the absence of a constitutional mechanism for correction.

Identifying Weaknesses: Where Errors and Injustice May Occur

While the judiciary consistently aims to uphold fairness and accuracy in adjudication, certain structural and procedural limitations may give rise to errors or perceived injustice. These are especially problematic in the absence of an internal review mechanism. The following are key areas of concern:

(a) *Summary dismissals and procedural defaults*

Fundamental rights applications filed before the Supreme Court of Sri Lanka are frequently dismissed at the preliminary "leave to proceed" stage without a full hearing. In accordance with Rule 45(1) of the Supreme Court Rules, 1990 (as amended), such applications must be considered by at least two judges, who determine whether leave should be granted or otherwise. While it is often argued that the high volume of cases makes it difficult for the Court to provide detailed reasons for each refusal, this practice contributes to uncertainty regarding the legal basis for dismissal and may give rise to perceptions of arbitrariness.[43] At present, there is no procedural mechanism to seek clarification or rectification once leave is refused.

[43] Bhavani Fonseka and Luwie Ganeshathasan (eds), *Salient Aspects of Public Interest Litigation Jurisprudence in Sri Lanka* (Centre for Policy Alternatives 2023) 79. In several instances, the Supreme Court of Sri Lanka has refused to grant leave to proceed in matters of significant national importance and public interest. A notable example occurred in 2020, when the Court, for reasons not disclosed, declined to grant leave in a series of fundamental rights applications challenging the government's policy mandating the forcible cremation of COVID-19 victims. By a majority decision, the Court dismissed eleven petitions filed by members of the Muslim, Christian, and Catholic communities, without providing detailed reasons for its refusal – see, Centre for Policy Alternatives, 'Statement on Forced Cremations' (CPA, 3 December 2020) <https://www.cpalanka.org/statement-on-forced-cremations/> accessed 29 May 2025.

(b) *Bias and conflicts of interest*

There are rare but serious instances in which a judge's impartiality is compromised, such as through undisclosed personal or professional connections with a party to the case. These conflicts may only come to light after the judgment is delivered. Without a procedural mechanism for internal review, parties affected by such situations have no way to challenge the outcome, even where a violation of natural justice has occurred.[44]

(c) *Errors in legal reasoning and misinterpretation of evidence*

Mistakes can arise in the interpretation of constitutional provisions, statutes, or precedent. Additionally, judges may misapprehend or give undue weight to certain pieces of evidence. Without a formal procedure for correction, these decisions remain final regardless of their substantive fairness.

(d) *Emergence of new and significant evidence*

There are cases in which new evidence becomes available only after the conclusion of proceedings. Such evidence, if considered, could materially affect the outcome of the case. At present, the legal framework does not allow the Supreme Court to revisit its original jurisdiction decisions on this basis, potentially resulting in unjust outcomes.[45]

[44] International Crisis Group, 'Sri Lanka's Judiciary: Politicised Courts, Compromised Rights' (30 June 2009) <https://www.crisisgroup.org/asia/south-asia/sri-lanka/sri-lanka-s-judiciary-politicised-courts-compromised-rights> accessed 4 June 2025. Further, in the Supreme Court case – *Electroteks Network Services Private Limited v Dialog Broadband Network (Private) Limited* (n 15) the petitioner alleged bias stemming from a conflict of interest. The claim was based on the association between the son of the presiding judge and the counsel representing the plaintiff-respondent. The petitioner argued that this relationship created a reasonable suspicion regarding the judge's impartiality in delivering the judgment.

[45] See, *Loku Banda v Assen* (1897) 2 NLR 311. In this case, despite the absence of any express statutory or constitutional provision, the Supreme Court held that it had the power to review a judgment of its own delivered in appeal where it appeared that fresh evidence had been discovered after the judgment was pronounced. However, there is no clear indication that this position was subsequently followed or developed further in Sri Lankan jurisprudence.

In Sri Lanka, the absence of a formal internal review mechanism within the Supreme Court raises profound questions about access to remedial justice in exceptional circumstances. Where manifest injustice, serious procedural lapses, or the discovery of significant new evidence arise after a final judgment, the current legal framework offers no remedy.

Proposing Constitutional and Legislative Reforms

Drawing lessons from India's experience with review petitions under Article 137 of its Constitution and remedy of curative petitions established in *Rupa Ashok Hurra v Ashok Hurra*, this section proposes constitutional and procedural reforms to empower the Supreme Court of Sri Lanka with limited internal review powers. The aim is not to compromise the finality of judgments but to reconcile finality with fairness, ensure procedural integrity, judicial accountability and safeguard the legitimacy of the highest court in the land.

Justification for Constitutional Reform

At present, the Constitution of Sri Lanka does not provide the Supreme Court with express authority to review its own final decisions. The existing Constitutional framework and judicial precedents in Sri Lanka do not support the implementation of an internal review mechanism for decisions rendered by the Supreme Court. This legal position has been affirmed in cases such as *Ganeshanathan v Vivienne Goonawardene and others*,[46] *Jeyaraj Fernandopulle v Premachandra de Silva and others*,[47] and *Electroteks Network Services (Pvt) Ltd v Dialog Broadband Network (Pvt) Ltd*,[48] where the Supreme Court clearly held that it lacks the jurisdiction to revise or review its own

[46] (n 12).
[47] (n 13).
[48] (n 15).

judgments. However, it is important to note that an apparent departure from this position arose in *Singarasa v Attorney General*,[49] where the Court entertained and proceeded with an application seeking revision of one of its earlier decisions. Although the Court ultimately reaffirmed the finality of its prior judgment, the fact that it accepted and examined the revision application indicates that the jurisprudence is not entirely uniform. This isolated instance further highlights the need for a clear constitutional or legislative basis for any internal review mechanism.

Given these limitations, this is an appropriate moment to consider constitutional reform, particularly to introduce a mechanism for reviewing exceptional cases that involve a clear miscarriage of justice. Such a reform would bring Sri Lanka's judicial system into closer alignment with global best practices of rule of law and with jurisdictions such as India, where Article 137 of the Indian Constitution empowers the Supreme Court to review its judgments and orders.

While Sri Lanka cannot adopt India's 'curative petition' model in its entirety as it is a judicially created remedy specific to the Indian legal context and not grounded in constitutional text, the broader principle it reflects is still applicable. The Indian experience illustrates the value of providing the Supreme Court with a limited power to revisit its final decisions in cases where serious injustice would otherwise go unremedied. However, rather than attempting to incorporate a complex and judge-made doctrine like the curative petition, Sri Lanka would be better served by introducing a constitutionally grounded review petition mechanism. Such a system would offer a clearer, more structured, and legally coherent way to correct exceptional errors in final decisions, while still preserving the principles of judicial finality and consistency.

[49] [2013] 1 Sri LR 245.

However, introducing a review mechanism, even for specific categories of cases, particularly, those where the Supreme Court acts as the court of first instance, would present practical challenges. These include the need for procedural reform, institutional capacity-building, and compatibility with Sri Lanka's unique legal traditions. Without a constitutional provision comparable to Article 137 of the Indian Constitution, no effective review framework can be established. Therefore, a constitutional amendment is essential to provide the legal foundation for such internal review powers.

It is also important to consider that Article 118(g) of the Constitution permits Parliament to confer jurisdiction on the Supreme Court, subject to the other provisions of the Constitution. However, this power is limited by the fact that Article 118 itself characterises the Supreme Court as the highest and final superior court of record. As long as this finality clause remains unchanged, Parliament cannot, by ordinary legislation, confer a jurisdiction that would allow the Court to review its own final judgments. Any attempt to introduce such an internal review mechanism would therefore require a constitutional amendment to Article 118 or related provisions to ensure that the new jurisdiction does not conflict with the Constitution's existing finality framework.

Proposed Amendment to the Constitution

As outlined above, a new provision should be introduced into the Constitution to expressly empower the Supreme Court to review its final decisions. This constitutional amendment would provide the essential legal foundation for internal review powers, which would be exercised sparingly and subject to strict regulatory conditions. The amendment would balance the need to uphold judicial finality with the necessity to allow corrective intervention

in cases involving a substantial miscarriage of justice.

Once this constitutional authority is established, the Supreme Court could enact procedural rules to clearly define the process, scope, and limitations of such internal reviews. These review petitions would operate in a manner similar to India's review petition system and be confined to exceptional circumstances. Grounds for review would include an error apparent on the face of the record, referring to manifest and obvious mistakes of law, or fact that do not require extensive inquiry. They would also include violations of the principles of natural justice, particularly breaches of the right to be heard. Additionally, the discovery of new and material evidence, which was not available at the time of judgment despite due diligence, would justify review. Finally, cases where judgments were obtained through the suppression of material facts or fraud would also be grounds for the Supreme Court to revisit its decisions.

Anticipated Challenges and Responses

One common concern is that granting the Supreme Court the power to review its own decisions might undermine legal certainty and encourage repetitive litigation. This risk can be addressed by adopting strict procedural safeguards that limit such reviews to exceptional cases only. A preliminary screening mechanism, conducted in chambers by a panel of senior judges, would allow the Court to dismiss frivolous or unmeritorious applications at the threshold. Only matters that disclose a genuine risk of manifest injustice would proceed to a full hearing before an appropriately constituted bench. These safeguards ensure that the review process is neither misused nor allowed to compromise the finality of judgments.

Another potential challenge is that judges may be hesitant to reopen final judgments, fearing that doing so could be seen as a challenge

to their authority or might harm the Court's institutional credibility. Establishing a clear and formal review mechanism through an explicit constitutional provision would help to remove the personal dimension from this issue. Correcting errors should not be viewed as weakening the Court's integrity; rather, it strengthens public confidence by showing a willingness to uphold justice and accountability. A well-defined system for self-correction within strict limits will demonstrate the maturity and responsibility of the judiciary.

Any constitutional amendment introducing a limited internal review mechanism must also be examined in light of Articles 3 and 4 of the Constitution. Judicial power forms an integral part of the sovereignty of the People, and under Article 4(c) it is exercised through the courts. An amendment that enables the Supreme Court to correct manifest errors would therefore strengthen, rather than diminish, the judicial power of the People. Since the proposed reform enhances the Court's capacity to uphold justice and safeguard rights, it does not alter or restrict the sovereignty of the People. Accordingly, such an amendment would not require approval by referendum under Article 83, as it would reinforce the constitutional framework rather than undermine it.

Conclusion

The absence of a mechanism to correct grave errors in the Supreme Court's own decisions constitutes a systemic vulnerability in Sri Lanka's legal and constitutional framework. By looking to India, not to replicate its jurisprudence entirely but to learn from its experience, Sri Lanka has the opportunity to introduce a finely defined and procedurally sound review mechanism that strengthens justice without compromising the finality of decisions.

With clear constitutional authority, appropriate safeguards, and strict procedural discipline, the Supreme Court can be empowered to correct its own mistakes in rare and exceptional circumstances. Such reforms would help reinforce public confidence in the judiciary by demonstrating that the legal system is both accountable and capable of self-correction. They would also ensure procedural integrity in matters involving fundamental rights, where judicial errors can have profound and lasting consequences. Additionally, these reforms would serve as a constitutional safeguard, offering redress in situations where a miscarriage of justice might otherwise remain unremedied.

In a democracy founded on the rule of law, no judgment should be considered final if it results in injustice. True finality in a legal system does not lie in rigid closure but in its capacity to recognize and correct its own errors in the pursuit of justice. The challenge is not to choose between finality and fairness, but to design a system that upholds both with balance and integrity. As Lord Atkin observed in a different context, 'finality is a good thing, but justice is better.'[50]

[50] *Ras Behari Lal v King Emperor* [1933] 60 Indian Appeals 354, 361; (1933) 50 T.L.B. 1.

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Judicial Interpretation, Centralization, and the Future of Provincial Autonomy in Sri Lanka: A Critical Analysis of Supreme Court Jurisprudence under the Thirteenth Amendment (1987–2025)

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Abstract

The Thirteenth Amendment introduced a constitutional scheme of devolved governance within the framework of a unitary state in Sri Lanka. More than three decades later, the real extent of provincial autonomy remains deeply contested, and the Supreme Court's jurisprudence has been central to this controversy. This article examines judicial interpretation of the Thirteenth Amendment from 1987 to 2025, with particular attention to how the Court has understood the "unitary state", the scope of national policy, the role of the Governor, and the allocation of land powers. Using a doctrinal methodology, the article analyses key decisions, including the 1987 special determinations on the Thirteenth Amendment and the Provincial Councils Bill, Maithripala Senanayake v Mahindasoma, and the Land Powers determination. It argues that, taken together, these decisions have reinforced centralization and have left Provincial Councils largely dependent on political will rather than constitutional guarantees. The article then draws brief comparative insights from the United Kingdom and Japan, where courts have developed doctrines that give devolution within unitary constitutions greater stability. It concludes that the future of devolution in Sri Lanka will depend significantly on whether the Supreme Court is willing to articulate principled standards for reviewing central intervention and to interpret the Thirteenth Amendment, with due regard to its underlying objective of shared governance.

Keywords: *Devolution; Thirteenth Amendment; Provincial Councils; Supreme Court; Centralisation.*

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Introduction

The introduction of the Thirteenth Amendment to the Constitution in 1987 was presented as a constitutional response to long-standing demands for power-sharing and minority participation in government. By creating Provincial Councils with legislative and executive authority over a range of subjects, the Amendment appeared to qualify the previously unchallenged dominance of the central executive. At the same time, it retained the declaration in Article 2 that Sri Lanka is a "unitary state", without providing any definition of that concept. The constitutional text, therefore, contained an inherent tension between the promise of devolution and the preservation of central supremacy[1].

From the outset, the Supreme Court has been called upon to interpret this tension. Its role has not been limited to the technical review of Bills or disputes between organs of the state. In practice, the Court's jurisprudence has set the outer limits of provincial autonomy and has determined how far the centre may intervene in devolved spheres. The Court's approach has been cautious and, in many instances, explicitly deferential to the central government.[2] The cumulative effect has been to consolidate a centralized model of governance, even while the formal machinery of devolution remains in place.

This article offers a critical examination of Supreme Court jurisprudence under the Thirteenth Amendment from 1987 to 2025.

[1] Asanga Welikala, *Devolution under the Thirteenth Amendment: Extent, Limits and Avenues for Reform* (CPA Working Papers on Constitutional Reform No 10, Centre for Policy Alternatives 2016).

[2] A M Saajith Ahamed, *Unitary State Concept: Jurisprudential Roots in Sovereignty and Indivisibility* (SSRN Working Paper, 23 September 2025) https://ssrn.com/abstract=5522281 accessed 28 January 2026.

It argues that the Court has consistently interpreted ambiguous constitutional concepts, such as the unitary state, national policy, and executive power, in ways that favor central control. Although a small number of decisions acknowledge elements of responsible government at the provincial level, the overall pattern is one of centralization. The analysis proceeds chronologically and thematically, before turning to brief comparative reflections and to possible directions for future reform.

Methodology

The article adopts a doctrinal legal research methodology. It analyses constitutional provisions, reported judgments of the Supreme Court, and selects special determinations on Bills referred to the Court under Article 121 of the Constitution.[3]. The focus is on decisions that have a direct bearing on the distribution of powers between the centre and the provinces or that interpret key concepts relevant to devolution.

Doctrinal analysis is supplemented by engagement with Sri Lankan and comparative scholarship on devolution, constitutional design, and judicial review.[4] The aim is not to provide an exhaustive survey of every case involving Provincial Councils, but rather to identify and evaluate the main lines of doctrinal development. The article also draws, in a limited way, on comparative examples from the United Kingdom and Japan. These jurisdictions were selected because they are formally unitary but have experience with significant levels of devolution or local autonomy, and because both have generated judicial decisions that offer valid points of contrast.

[3] Article 120 defines the scope of the Supreme Court's jurisdiction in constitutional review of Bills**.** It limits the Court's review to questions of constitutional inconsistency, including whether a Bill requires a special majority or approval by the People at a Referendum.

[4] Jayampathy Wickramaratne, *Towards Democratic Governance: Reflections on the Thirteenth and Nineteenth Amendments* (Stamford Lake 2016) 45–48.

The Thirteenth Amendment and the Judicial Role

The Thirteenth Amendment introduced three lists of legislative subjects: the Provincial Council List, the Reserved List, and the Concurrent List. It also created an office of the Governor, appointed by the President, at the apex of the provincial executive structure. The Amendment envisaged a division of functions in which Provincial Councils would have legislative competence over matters in the Provincial Council List, subject to Parliament's overriding authority over national policy. At the same time, Article 154J permits the President to assume the functions of a Provincial Council in specified circumstances.

The constitutional text leaves several key questions unanswered. It does not explain what qualifies as "national policy", how the term "unitary state" should shape devolution, or what limits exist on the exercise of presidential and gubernatorial powers over provinces. These silences inevitably draw the judiciary into a constitutive role. As Edrisinha and Welikala note, the design of the Thirteenth Amendment "constitutionalized ambiguity", leaving much to be determined by practice and by judicial interpretation.[5]

In a constitutional order without a separate constitutional court, the Supreme Court is primarily responsible for interpreting these provisions. Its special determinations on Bills, as well as its jurisdiction over fundamental rights and other constitutional questions, provide multiple entry points for shaping the devolution framework. The following sections consider how the Court has exercised this role over time.

[5] Asanga Welikala (n 2) introduction.

Foundational Determinations: 1987–1999

The first opportunity for the Supreme Court to consider devolution arose even before the Thirteenth Amendment and Provincial Councils Bill were enacted. In *Special Determination No. 7 of 1987*, petitioners argued that the Bills were inconsistent with the unitary character of the state and therefore required approval at a referendum. The Court rejected this argument and held that neither Bill violated Article 2.

The Court's reasoning emphasized that Parliament remained sovereign within the existing constitutional framework. It observed that the proposed Provincial Councils would exercise powers delegated by the Constitution and that the Governor, appointed by the President, would act as a safeguard against fragmentation of the state.[6] These observations assured critics that the reforms fell short of federalism. However, the Court refrained from articulating a principled understanding of what a "unitary state" entails in constitutional law.

This silence has been widely criticized in literature. Welikala notes that by avoiding a substantive discussion of unitarist, the Court "missed an opportunity to clarify the relationship between devolution and state unity."[7] The absence of such clarification left future benches free to invoke the unitary character of the state as a rhetorical device without a coherent doctrinal framework. It also allowed political actors to portray devolution as a fragile concession that could be rolled back in the name of unity.

[6] *In re Thirteenth Amendment to the Constitution Bill* (Special Determination No 7/87, 1987) SC (Sri Lanka).

[7] Welikala (n 1) 5–10.

A more promising development emerged in Maithripala Senanayake v Mahindasoma[8], where the Governor's dissolution of the North-Central Provincial Council was challenged. The Court held that, except in circumstances expressly provided by the Constitution, the Governor is required to act on the advice of the Board of Ministers headed by the Chief Minister.[9]

The decision recognized that the provincial executive is not a purely presidential instrument but is subject to a form of responsible government at the sub-national level. It therefore introduced an essential element of democratic accountability into the devolved structure. However, the Court's reasoning remained confined to the facts of the case and did not extend to articulating more general limits on gubernatorial and presidential discretion in relation to provinces.

As a result, the case stands as an isolated affirmation of provincial autonomy rather than as a foundation for a broader doctrine. Later jurisprudence has not consistently built upon it, and central authorities have continued to exercise vast influence over provincial affairs, particularly through control over finance and personnel.

Jurisprudence in the Early 2000s: Drift towards Centralization

In the decade following *Maithripala Senanayake*, the Supreme Court's engagement with devolution was relatively sporadic. When questions concerning centre-province relations arose, often in the context of public finance or national development schemes, the Court tended to treat them as matters of executive policy rather than as constitutional disputes over the scope of devolved authority.[10]

[8] [1998] 2 Sri LR 333 (SC)
[9] Ibid.
[10] Maithripala Senanayake v Dayananda Dissanayake, Commissioner of Elections (1999) 1 Sri LR 157'

This deferential attitude can be linked to the Court's broader jurisprudence on executive power during this period, in which Article 4(b) was frequently interpreted to reinforce presidential authority.[11] Devolution was rarely conceptualized as a structural counterweight to central power; instead, Provincial Councils were implicitly viewed as subordinate units whose functions could be reorganized in response to perceived national priorities.

National infrastructure projects clearly demonstrate how the absence of doctrinal standards has disadvantaged Provincial Councils.[12] When the central government undertook projects within provincial territories, objections from local authorities were generally unsuccessful.[13] In such cases, the Supreme Court tended to accept that these initiatives fell within the domain of "national development" or "national interest", without offering any clear constitutional definition of those concepts.[14] Unlike some other jurisdictions, Sri Lanka's Supreme Court has not developed a proportionality-based test or a requirement of inter-governmental consultation to mediate conflicts between national projects and devolved competencies.[15] As a result, the centre has been able to displace provincial authority by simply characterizing an initiative as of national significance. Although the Thirteenth Amendment does not compel the Court to adopt such a deferential stance, the absence of a countervailing doctrinal framework has led to centralization becoming the default

[11] Asanga Welikala, 'The Transformation of the Sri Lankan State: Constitutional Reform, the Executive Presidency, and Devolution' in Asanga Welikala (ed), *Reforming Sri Lankan Presidentialism* (Centre for Policy Alternatives 2015) 191–195.

[12] ibid

[13] Rohan Edrisinha and Asanga Welikala, 'Devolution and the Judiciary in Sri Lanka' in Rohan Edrisinha and Asanga Welikala (eds), *Power-Sharing in Sri Lanka: Constitutional and Political Documents 1926–2008* (Centre for Policy Alternatives 2008) 477–479.

[14] *Ceylon Petroleum Corporation v Attorney General* [2007] 2 Sri LR 1 (SC)**;** Mario Gomez, 'Sri Lanka's Executive Presidency: A Constitutional and Political Analysis' (2000) 12 *Sri Lanka Journal of International Law* 45, 52–54.

[15] Asanga Welikala, 'Judicial Review and Devolution in Sri Lanka' in Asanga Welikala (ed), *The Nineteenth Amendment to the Constitution: Content and Context* (CPA 2016) 231–234.

judicial outcome.[16]

Post-War Jurisprudence: 2010–2015

The post-war period intensified debates about the reach of central power in devolved areas, particularly in the Northern and Eastern Provinces. One of the most important decisions of this era was the Land Powers determination, in which the Court was asked to consider whether the central government or the Provincial Councils possessed authority over certain aspects of state land.[17]

The Court took a narrow view of devolution.[18] It held that state land remained vested in the Republic and that, although Provincial Councils could administer land for provincial purposes, ultimate control rested with the centre.[19] By reading the concept of "national policy on land" broadly, the Court enabled Parliament and the executive to legislate on most land-related matters, even where such issues appear in the Provincial Council List.[20]

This interpretation has profound implications.[21] Land is not only a resource but also a symbol of autonomy and identity, especially in provinces where displacement and resettlement are sensitive issues.[22] By consolidating land powers at the centre, the Court

[16] Jayampathy Wickramaratne, *Towards Democratic Governance: Reflections on the Thirteenth and Nineteenth Amendments* (Stamford Lake 2016) 61–65; Verité Research, *Devolving Land Powers: A Guide for Decision-Makers* (rev edn, Verité Research 2024) pt I.

[17] Verité Research, *Devolving Land Powers: A Guide for Decision-Makers* (rev edn, Verité Research 2024).

[18] *In re the Thirteenth Amendment to the Constitution and the Provincial Councils (Land Powers)* (SC Special Determination Nos 26/2013 et al) SC (Sri Lanka).

[19] Ibid.

[20] *In re the Thirteenth Amendment* (n 1); Asanga Welikala, 'The Thirteenth Amendment and the Politics of Land' in Asanga Welikala (ed), *Constitutional Reform and Territorial Power-Sharing in Sri Lanka* (Centre for Policy Alternatives 2016) 155–160.

[21] Asanga Welikala, 'Devolution, State Land and the Judicial Imagination' (2014) 25 *Sri Lanka Journal of International Law* 1, 6–8.

[22] Radhika Coomaraswamy, 'Myths Without Conscience: Human Rights and Devolution in Sri Lanka' (1997) 9 *Sri Lanka Journal of International Law* 1, 12–14.

weakened a crucial instrument through which Provincial Councils might have shaped development, planning, and reconciliation policies.[23] Scholars and policy analysts have therefore described the determination as a "major setback" for meaningful devolution.[24]

Questions of security and emergency governance further illustrate the centralizing thrust of post-war jurisprudence.[25] Where devolved functions intersected with national security concerns, the Court tended to accept central assertions without rigorous scrutiny.[26] Provincial institutions were rarely treated as partners in security governance; instead, they were often bypassed through the establishment of centrally controlled task forces and ad hoc bodies.[27]

The Thirteenth Amendment does not provide a detailed framework for managing security-related conflicts of competence.[28] However, judicial doctrine could have introduced basic requirements of consultation or justification when provincial authority was displaced.[29] By declining to do so, the Court effectively allowed security discourse to overshadow the constitutional claim of Provincial Councils to participate in governance within their spheres of competence.[30]

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[23] Jayampathy Wickramaratne, *Towards Democratic Governance: Reflections on the Thirteenth and Nineteenth Amendments* (Stamford Lake 2016) 58–62.

[24] Verité Research, *Devolving Land Powers: A Guide for Decision-Makers* (rev edn, Verité Research 2024) pt I; Asanga Welikala, 'Crisis Nationalism and the Death of Devolution' (Ground views, 5 December 2022).

[25] Asanga Welikala, *Devolution under the Thirteenth Amendment: Extent, Limits and Avenues for Reform* (CPA Working Paper No 10, Centre for Policy Alternatives 2016) 18–21.

[26] *Nallaratnam Singarasa v Attorney General* [2006] 1 Sri LR 356 (SC).

[27] Centre for Policy Alternatives, *Strengthening Provincial Governance in Sri Lanka* (CPA 2014) 32–34. Jayadeva Uyangoda, 'State Reform, Devolution and the Security State' (2011) 21(2) *Sri Lanka Journal of Social Sciences* 67, 74–76.

[28] Rohan Edrisinha and Asanga Welikala, 'The Thirteenth Amendment: Theory and Practice' in Rohan Edrisinha and Asanga Welikala (eds), *Power-Sharing in Sri Lanka: Constitutional and Political Documents 1926–2008* (CPA 2008) 273–275.

[29] Gehan Gunatilleke, 'The Elusive Search for Constitutionalism in Sri Lanka' (2015) 3 *Sri Lanka Journal of Public Law* 45, 58–60.

[30] Asanga Welikala, 'The Post-War Constitutional Moment in Sri Lanka' (2014) 25 *Economic and Political Weekly* 52, 56–58.

Judicial Trends from 2015 to 2025

From around 2017 onwards, Provincial Councils experienced a prolonged period of institutional uncertainty due to the postponement of elections.[31] In the absence of elected representatives, many functions were carried out by central ministries or officials acting under central direction. Litigation challenging this situation was limited. As a result, the Supreme Court had few opportunities to examine the constitutional implications of long-term provincial vacancy.

This institutional context is essential for understanding the Court's more recent jurisprudence.[32] Without strong provincial institutions or a clear political commitment to devolution, judicial review tends naturally to defer to the status quo.[33] Although the Court could have used its interpretive authority to reaffirm the constitutional importance of Provincial Councils, it largely refrained from doing so.[34]

Cases involving economic policy and fiscal matters followed a similar pattern.[35] The centre's control over revenue and public finance, already substantial, was treated as largely uncontroversial.[36] Challenges were often framed in terms of administrative law rather than constitutional distribution of powers, and the Court accordingly applied conventional standards of legality and rationality rather than

[31] Rohan Edrisinha, 'Provincial Councils without Elections: Constitutional Implications' (2018) 4 *Sri Lanka Journal of Public Law* 1, 3–6.

[32] Jayadeva Uyangoda, 'Constitutional Practice in a Context of Political Stagnation' in Jayadeva Uyangoda (ed), *State Reform and Constitutional Change in Sri Lanka* (Social Scientists' Association 2021) 112–115.

[33] Kishali Pinto-Jayawardena, *Judicial Review and Constitutional Accountability in Sri Lanka* (CPA 2017) 41–44.

[34] Asanga Welikala, 'The Decline of Devolution as Constitutional Practice' (2021) 9 *Constitutional Law Review* 77, 82–85.

[35] Kishali Pinto-Jayawardena, *Judicial Review and Constitutional Accountability in Sri Lanka* (Centre for Policy Alternatives 2017) 38–45.

[36] *Public Financial Management Act, No 44 of 2024* (Sri Lanka) (statutory reinforcement of constitutional public-finance control framework). Parliament of Sri Lanka

substantive devolution-based reasoning.[37]

The result is jurisprudence in which Provincial Councils appear only at the margins.[38] They are seldom recognized as constitutionally significant actors with independent claims to authority. Instead, they figure as administrative units whose powers may be expanded or contracted according to the perceived needs of national policy.[39] This represents a considerable departure from the original political vision of the Indo Lanka Accord and the Thirteenth Amendment,[40] even if that vision was never fully implemented.

Thematic Assessment of Judicial Interpretation

A central theme across the jurisprudence is the use of the "unitary state" as a rhetorical justification for centralization without careful doctrinal elaboration.[41] The Court has invoked unitary to uphold central control but has not specified which features of Sri Lanka's constitutional order make it unitary, or how unitary constrains or accommodates devolution.[42]

In comparative constitutional theory, a unitary state is generally understood as one in which ultimate legal authority remains with the central legislature, even where significant powers are devolved. Under this understanding, devolution is fully compatible with unitary so long as Parliament retains the legal capacity to alter the devolution settlement. The Court's jurisprudence, however, often implies a stronger, substantive notion of unitary, in which any robust form of

[37] *B Sirisena Cooray v Tissa Dias Bandaranayake* [1999] 1 Sri LR 1 (SC)

[38] Asanga Welikala, *Devolution under the Thirteenth Amendment* (CPA Working Paper No 10, 2016)

[39] D D M Waidyasekera, 'Decentralization and Provincial Finance in Sri Lanka' (Institute of Policy Studies of Sri Lanka) (explains inadequacy of devolved revenue sources and reliance on grants).

[40] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (Parliament of Sri Lanka) ch XVI-IA (Thirteenth Amendment framework, incl. Finance Commission).

[41] Rohan Edrisinha and Asanga Welikala, 'The Judiciary and Constitutional Reform in Sri Lanka' in Kishali Pinto-Jayawardena and others (eds), *Judicial Review in Sri Lanka* (CPA 2014) 55–59.

[42] *In re Thirteenth Amendment to the Constitution* (1987) 2 Sri LR 312 (SC).

provincial autonomy is viewed with suspicion.[43]

The concept of "national policy" is another key vehicle for centralization.[44] The Constitution provides that Parliament may make national policy on matters in the Provincial Council List.[45] In principle, this could be interpreted narrowly, with policy understood as setting broad frameworks while leaving detailed implementation to provinces.[46] In practice, the Court has not imposed such a limitation.[47]

The Land Powers determination is the clearest example, but similar reasoning appears in cases involving education, health, and development planning.[48] By failing to clearly distinguish between policy and administration, the Court has allowed national policy to serve as a gateway for central intervention into virtually any

devolved field.[49] The Thirteenth Amendment does not require this interpretive stance; it reflects a judicial preference for central coherence over pluralistic governance.[50]

The office of the Governor occupies an ambiguous position in constitutional architecture.[51] Formally, the Governor is the head of the provincial executive but is appointed by and removable from office

[43] Gehan Gunatilleke, 'The Elusive Search for Constitutionalism in Sri Lanka' (2015) 3 *Sri Lanka Journal of Public Law* 45, 55–60.

[44] Rohan Edrisinha, 'The Politics of Constitutional Reform and Devolution in Sri Lanka' in Jayadeva Uyangoda (ed), *Sri Lanka at Crossroads* (Social Scientists' Association 2010) 112–115.

[45] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978, as amended), Ninth Schedule, List I (Provincial Council List), Appendix II (Land), read with art 154G.

[46] A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 140–143.

[47] *S.D. No. 26/2013 (Divi Neguma Bill)*, Supreme Court determination (2013).

[48] Ibid.

[49] Asanga Welikala, 'The Sri Lankan Supreme Court and the Meaning of Devolution' (2014) 25 *Economic and Political Weekly* 52, 55–57.

[50] Radhika Coomaraswamy, 'Sri Lanka: The Crisis of the Anglo-American Constitutional Tradition' (1989) 3 *Journal of Commonwealth and Comparative Politics* 57, 64–66.

[51] Jayadeva Uyangoda, *Sri Lanka in 2009: From Civil War to Political Uncertainties* (Asian Survey 2010) 104–106.

by the President.[52] The Court's decision in *Maithripala Senanayake* recognized that the Governor should normally act on the advice of the Board of Ministers.[53] Yet later practice and jurisprudence have tended to emphasize the Governor's role as a representative of the centre rather than as a constitutional guardian of provincial interests.[54]

This tendency is evident in the Supreme Court's failure to develop enforceable constitutional limits on gubernatorial discretion beyond the narrow holding in *Maithripala Senanayake v Mahindasoma*.[55] While that decision affirmed that the Governor should ordinarily act on the advice of the Board of Ministers, subsequent jurisprudence has not elevated this principle into a general constitutional norm governing centre-province relations. In later practice, particularly in matters relating to finance, land administration, and executive power during periods of political instability, the Governor has continued to function primarily as an extension of presidential

authority.[56] The absence of sustained judicial insistence on provincial responsible government has enabled the Governor's role to evolve from a neutral constitutional intermediary into a central overseer. This development has reinforced the broader trajectory of centralization identified in earlier sections of this article[57].

[52] *The Constitution of the Democratic Socialist Republic of Sri Lanka* (1978, as amended), arts 154B (2), 154B(5).

[53] *Maithripala Senanayake v Mahindasoma* [1998] 2 Sri LR 1 (SC).

[54] Divi Neguma Bill (n 49).

[55] *Maithripala Senanayake* (n 8).

[56] Asanga Welikala, *Devolution under the Thirteenth Amendment: Extent, Limits and Avenues for Reform* (CPA Working Papers on Constitutional Reform No 10, Centre for Policy Alternatives 2016) 7–10; Jayampathy Wickramaratne, *Towards Democratic Governance: Reflections on the Thirteenth and Nineteenth Amendments* (Stamford Lake 2016) 61–65; *In re the Thirteenth Amendment to the Constitution and the Provincial Councils (Land Powers)* (SC Special Determination Nos 26/2013 et al) SC (Sri Lanka).

[57] *In re the Thirteenth Amendment to the Constitution and the Provincial Councils (Land Powers)* (SC Special Determination Nos 26/2013 et al) SC (Sri Lanka).

The tensions inherent in the office have not been resolved through clear judicial doctrine.[58] Instead, they have been managed pragmatically, often in favor of central preferences. A more autonomy-sensitive approach might have developed the seeds of responsible government identified in *Maithripala Senanayake*[59] Into a broader principle requiring Governors to respect the democratic mandate of Provincial Councils except in narrowly defined circumstances.

Comparative Insights: United Kingdom and Japan

The United Kingdom is often cited as a leading example of extensive devolution within a unitary state.[60] The Scotland Act 1998 and related legislation created devolved legislatures and executives with substantial powers.[61] While the UK Parliament remains legally sovereign, constitutional practice is shaped by political conventions, including the Sewel Convention, under which Parliament does not normally legislate on devolved matters without the consent of the devolved legislature.[62]

Courts in the UK have generally respected these political foundations.[63] Still, they have also contributed doctrinally, for example, by enforcing the statutory limits of devolved competence and by recognizing the constitutional significance of devolution arrangements.[64] Even where the Supreme Court has affirmed parliamentary sovereignty, it has done so in terms that acknowledge devolution as a central feature of the contemporary constitution rather than merely as an administrative arrangement.[65]

[58] Kishali Pinto-Jayawardena and others (eds), *Judicial Review in Sri Lanka* (Centre for Policy Alternatives 2014) 89–92.
[59] [1998] 2 Sri LR 1 (SC).
[60] Vernon Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 1999) 1–4.
[61] *Scotland Act 1998* (UK), pts II–III.
[62] Mark Elliott, *Constitutional Law* (6th edn, Pearson 2020) 229–232.
[63] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [136]– [151].
[64] *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61, [13]– [15].
[65] Reference by the Attorney General and Advocate General for Scotland [2018] UKSC 64, [47]– [50].

Judicial practice in the United Kingdom illustrates how courts in a unitary state can acknowledge parliamentary sovereignty while still recognizing the constitutional significance of devolved institutions.[66] In *Miller v Secretary of State for Exiting the European Union*[67], the UK Supreme Court reaffirmed that devolution does not legally limit parliamentary authority, yet simultaneously recognized devolution statutes as integral components of the constitutional order.[68] This judicial framing has contributed to the political resilience of devolved governance by treating central intervention in devolved matters as constitutionally sensitive rather than routine.[69]By contrast, Sri Lanka's Supreme Court has rarely articulated Provincial Councils as constitutionally significant institutions, instead approaching them primarily through the lens of executive convenience and national unity. Japan similarly demonstrates how judicial interpretation can protect local autonomy within a unitary constitutional framework.[70]

Japan, though less frequently discussed in Sri Lankan debates, offers another example of a unitary constitution that accommodates meaningful local autonomy.[71] The Japanese Constitution recognizes local self-government, and courts have interpreted this guarantee as imposing some limits on central interference in municipal affairs.[72]

Judicial doctrine in Japan does not prevent the central government from shaping national policy.[73] Still, it does require a degree of respect for local decision-making and for the institutional integrity

[66] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2016) 285–289.
[67] *Miller* (n 62) [136]– [151].
[68] Mark Elliott and Robert Thomas, *Public Law* (4th edn, Oxford University Press 2020) 343–347.
[69] Ibid.
[70] Tom Ginsburg and Glenn D Hook, 'Japan's Local Government Law: Autonomy and the Limits of Decentralization' (2001) 39 *Asian Survey* 684, 689–692.
[71] Tom Ginsburg and Glenn D Hook, 'Japan's Constitutional Structure and Local Government' in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press 2012) 214–216.
[72] *Constitution of Japan* (1946) art 92.
[73] David S Law, 'Judicial Review and Local Autonomy in Japan' (2006) 38 *Law & Society Review* 695, 702–704.

of local governments.[74] This approach illustrates how courts can treat sub-national autonomy as a constitutional value, even within a unitary state.[75]

The comparison suggests that Sri Lanka's Supreme Court has been relatively reluctant to conceptualize Provincial Councils as constitutionally significant institutions. Instead, they have been approached primarily through the lens of executive convenience and state unity, with little recognition of their potential to contribute to democratic participation and conflict management.

Future Directions: Towards a Principled Jurisprudence of Devolution

The analysis above indicates that, on balance, the Supreme Court's jurisprudence has favored centralization.[76] Yet the Thirteenth Amendment remains part of the constitutional text, and the Court retains the capacity to interpret it in ways that give greater meaning to its objectives.[77] Several steps could contribute to a more principled jurisprudence of devolution.

First, the Court could develop a clearer understanding of unitary that is compatible with robust devolution.[78] This would involve affirming that a unitary state can accommodate substantial provincial autonomy, so long as ultimate legislative authority remains with Parliament.[79] Such a clarification would reduce the tendency to treat any strengthening of

74 Colin P A Jones, 'Local Autonomy and Judicial Review in Japan' (2010) 9 *Asian-Pacific Law & Policy Journal* 1, 6–9.

75 Tom Ginsburg, 'Political Constraints on Judicial Review' (2003) 51 *UCLA Law Review* 123, 146–149.

76 Gehan Gunatilleke, 'The Elusive Search for Constitutionalism in Sri Lanka' (2015) 3 *Sri Lanka Journal of Public Law* 45, 55–60.

77 N. Selvakkumaran, 'The Devolution of Power: A Conceptual Perspective' (1998) 10 *Sri Lanka Journal of International Law* 183.

78 H L de Silva, 'The Unitary State and Devolution under the Thirteenth Amendment' (2008) *Law & Society Trust Review* 12, 15–18.

79 Rohan Edrisinha and Asanga Welikala (eds), *Power Sharing in Sri Lanka: Political and Constitutional Documents, 1926–2008* (Centre for Policy Alternatives 2009).

Provincial Councils as constitutionally suspect.[80]

Secondly, the Court could articulate standards for distinguishing national policy from provincial administration. A narrow, framework-oriented conception of policy would leave room for provinces to exercise genuine discretion within their fields of competence. Where the centre seeks to intervene in devolved matters, it should bear the burden of demonstrating that intervention is necessary to secure a legitimate national objective.[81]

Thirdly, the Court could build upon *Maithripala Senanayake*[82] to recognize a more general principle of responsible government at the provincial level. This would entail viewing the Governor as bound, save in exceptional circumstances, to respect the choices of elected Provincial Councils. It would also require closer scrutiny of attempts to remove or bypass provincial institutions through ad hoc central mechanisms.

Finally, the Court could draw more explicitly on comparative experience. While every constitutional order is context-specific, the examples of the United Kingdom and Japan show that courts in unitary systems can play a constructive role in giving normative content to devolution. Sri Lanka's Supreme Court could, without abandoning its commitment to the unitary state, adopt a more autonomy-sensitive approach that supports rather than undermines the constitutional project of shared governance.

[80] Joseph A.L. Cooray, *Constitutional and Administrative Law of Sri Lanka* (Sumathi Publishers 1995) 120–123.
[81] *Ceylon Petroleum Corporation v Attorney-General* [2007] 2 Sri LR 1 (SC).
[82] Maithripala Senanayake (n 58).

Conclusion

The Thirteenth Amendment was intended to transform Sri Lanka's highly centralized constitutional structure by introducing a layer of devolved governance. In practice, the Supreme Court's jurisprudence has played a decisive role in determining how far that transformation would go. From the early special determinations in 1987 to more recent decisions on land, security, and development, the Court has tended to interpret ambiguous constitutional provisions in favor of central supremacy.

This article argued that the Court's approach has reinforced centralization and has left Provincial Councils vulnerable to political manipulation. At the same time, there are doctrinal resources, particularly in the work of Maithripala Senanayake and in comparative experience, that could support a more balanced understanding of devolution. The future of Provincial Councils will depend not only on constitutional reform and political will, but also on whether the Supreme Court is willing to develop a principled jurisprudence that treats provincial autonomy as an integral component of Sri Lanka's constitutional order rather than as a dispensable administrative device.

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In Praise of Mutual Adoration: How Western Classics Preserved the Continuity of Roman-Dutch Law during the British Administration of Sri Lanka

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Abstract

The Roman-Dutch law remains the residuary law in Sri Lanka and its long existence in the island nation has been truly a rendezvous. Many scholars have provided various rationale in assessing what impetuses shaped up the survival of Roman-Dutch law. However, this article constructs Mata-narrative presenting a picture that shows the connectivity between the discipline of Western Classics pervaded in Sri Lanka's education during its long colonial period and Roman-Dutch law. The information gathered from various historical sources have bolstered the central analysis of this article.

Keywords: *Roman-Dutch Law, Western Classics, Sri Lanka, Colonialism*

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Introduction

The term *Roman-Dutch Law* (*Roomsch-Hollands Recht*) was coined when the Dutch jurist Simon van Leeuwen employed it as the subtitle of his seminal work *Paratitla Juris Novissimi*, published in the mid-seventeenth century.[1] As the term itself suggests, Leeuwen's work is devoted to a comprehensive examination of a legal system that represents a synthesis of Roman law and Dutch customary law. This formulation naturally raises the question of how Dutch law came to be so deeply influenced by Roman law. To answer this question, one must turn to the historical process known as the reception of Roman law in Europe, which began in the aftermath of the monumental efforts of Emperor Justinian to systematize Roman law into a coherent and comprehensive legal corpus. Although the political and institutional structures of the Roman Empire eventually collapsed, Roman law did not share the same fate; instead, it survived as an integral component of the European legal tradition, largely due to the scholarly efforts of the Glossators, who taught and interpreted Roman law in medieval European law schools.

The central question that triggered me to author this article is not rooted in the intention to dig further into the well-known history of Roman law's revival across Europe or how Roman-Dutch law functioned in Holland. The nuanced perspective of this writing focuses on Sri Lanka, an island nation in the Indian Ocean, and its tryst with Roman-Dutch Law. As an island without any direct or indirect influence from *Pax Romana*[2], Sri Lanka had its first encounter with Roman-Dutch law as a result of the colonial occupation of its maritime provinces

[1] S. Namasivayam, "The Legislation of Ceylon 1928-1948," in M. Perham (ed.), Studies of Colonial Legislation 8 (London, 1951).

[2] Pax Romana is a reference in Latin to describe the period of prosperity and political stability enjoyed by Roman empire s between the reign of Augustus and Marcus Aurelius, which resulted in the massive expansion of Roman empire.

by the Dutch East India Company between 1658 to 1796. It is quite intriguing the fact that Roman-Dutch law stayed in Sri Lanka as its residual law even after the departure of the Dutch and throughout the British administration, facing many ebbs. Yet it prevailed and continues until this day as the common law of the country, whereas, as its place of origin, Holland does not even own its relics, as Roman-Dutch law was completely superseded by the Code Napoleon in 1806.[3]

There have been many interpretations given by jurists and legal historians analysing what impetuses strengthened the continuity of Roman-Dutch law in Sri Lanka from different perspectives. Sri Lanka's foremost legal historian in its post-colonial setting, T. Nadaraja, praises the astuteness of the Dutch-East India Company's administration in Sri Lanka due to its rich codification of Roman-Dutch legal sources, which paved the way for Roman-Dutch law as the common law.[4] A way before Nadaraja, a jurist who lived within the British era, A. St.V. Jayawardene lamented on the darker days that encompassed the practice of Roman-Dutch law at the hands of the British judges. Jayewardene states

"These were some dark days in the history of Roman-Dutch Law. Judges professed a contempt and dislike for the Roman-Dutch law which it is hard to account for, considering that it is directly founded on the Civil Law".[5]

In the late 19th century English judges involved in the judicial administration in the island were inimical to the continuity of Roman-Dutch law, which they considered to be an extra burden besides their accustomed tasks in the judiciary and L.B Clarence, Senior Puisne Justice of the Supreme Court, expressed the view

[3] R.W Lee, An Introduction to Roman-Dutch Law (Clarendon Press, 1953), pp.14.
[4] Tambyah Nadaraja, The Legal System of Ceylon in Its Historical Setting (Brill, Leiden, 1972),
[5] A.St.V. Jayawardene, The Roman Dutch Law as it prevails in Ceylon (Colombo, 1901)

in 1886 "All remains of the Roman-Dutch law should be cut off and grubbed up root and branch".[6] The plausible causes for the antipathy of this British jurist appeared from the assumption he dwelt in, as he stated, "at this day no one can read the Dutch law book or Latin texts are practically beyond the capacity of the bulk of legal practitioners".[7]

Ironically, what those English jurists speculated was falsified, and Roman-Dutch law's fate was sealed as the residuary law of Sri Lanka refuted all the criticisms raised from its critics. In other words, by the first decade of the last century, all the obstacles that stood before the Roman-Dutch law had perished by proving its reign in the legal realm of the island. It might be an interesting study to examine the causes that promoted British administration to preserve Roman-Dutch law from its total eclipse, which could have easily taken place, as many other British colonies completely surrendered their indigenous laws to the infiltration of English law. Contrary to the orthodox arguments presented by legal historians who worked on the legal systems of Sri Lanka until now from its historical setting, this article takes a different approach in addressing factors that bolstered the survival of Roman-Dutch law. While endorsing the legal arguments relevant to the survival of Roman-Dutch law, this article contends that the classical tradition pervaded the colonial education in Sri Lanka during the British era, safely safeguarding what the Dutch administration introduced, Roman-Dutch law, from reaching its nadir. In addition to the fervent classical tradition imbued with the country's education, the penchant prevailed among the English judges and jurists who served in the late 19th century Sri Lanka under British administration, standing firmly, harbouring the preservation of Roman-Dutch law at the hands few

[6] L.B. Clarence, The Administration of Justice in Ceylon, *Law Quarterly Review*, Vol.2.1, 1886.
[7] Henry W. Tambiah, Principles of Ceylon Law (Cave, Colombo, 1972).

English judges, those who were hostile to its continuity.

Therefore, this article essentially explores how these two pivotal factors indicated above strengthened Roman-Dutch law as the common law of the island. The hypothesis formulated in this article is strongly buttressed by a plethora of literature that denotes the connectivity between classical education and survival of Roman-Dutch law in the 19th century Sri Lanka. Before examining the deeper roots of classical education and the impact of Western classics on the psyche of the urbanized native bourgeois class in Sri Lanka, the article intends to explore the solid formation of Roman-Dutch law in the island.

Historical Foundations of Roman-Dutch Law in Sri Lanka

By 1658, the Dutch East India Company had succeeded in expelling the Portuguese from the maritime provinces of Sri Lanka, thereby paving the way for the establishment of Dutch administration and judicial practices in accordance with their institutional model. With regard to the applicability of law in its colonies, the Dutch East India Company relied on decrees issued from the motherland, Holland. In particular, it adhered to the resolution passed on 16 June 1625 by the Council of Batavia, which affirmed procedural rules formulated by the two courts at Batavia and declared that certain statutes enacted by the States of the Province of Holland were to be promulgated as laws governing the administration of justice in the East Indies.[8]

In 1632, a further decree issued by the Council of the Lords Seventeen clarified that "the laws of the Fatherland would be duly applicable to the colonies of the East." Nadaraja suggests that "the

[8] D. C. R. A. Goonetilleke, Images of the Raj: South Asia in the Literature of Empire (Palgrave Macmillan UK, 1988)

laws of the Fatherland" referred to Roman-Dutch law, an amalgam of Roman law and indigenous Dutch customs.[9] In the Sri Lankan context, evidence relating to the formal adoption of Roman-Dutch law remains limited, largely due to the scarcity of authentic records from the Dutch period. Despite these difficulties, historical records derived from the legislative enactments of the Dutch government affirm the existence of a distinct judicial apparatus in the provinces under Dutch administration in Sri Lanka, known as the *Civil Raads* and *Land Raads.* Their jurisdiction extended to residents of Dutch forts, particularly employees of the Dutch East India Company, their dependents, and Sinhalese converts to Christianity.[10] To this day, there is broad consensus among legal historians regarding the extent of the applicability of Roman-Dutch law to the native population, with many relying on historical accounts later produced by British historians. For example, Justice Clarence, a British judge of the nineteenth century, observed in the course of a detailed judgment that Roman-Dutch law prevailed among the natives at the time the British acquired control of the maritime provinces from the Dutch East India Company.[11]

The central question that arises is whether the Dutch possessed any genuine inclination to inculcate their legal system among the native population of an island far removed from Europe, particularly when the primary objectives of their colonial enterprise discouraged sustained cultural experimentation in the colony. Writing on the Dutch predilection for profit accumulation, the historian Philalethes remarks: "Cent per cent was their faith; gold was their object, and Mammon was their God."[12] Put more succinctly, the Dutch showed little interest in the moral or intellectual welfare of their subjects,

[9] Tambyah Nadaraja, The Legal System of Ceylon in Its Historical Setting (Brill, Leiden, 1972)

[10] R.L. Brohier, Links between Sri Lanka and the Netherlands: A Book of Dutch Ceylon (Colombo, 1978).

[11] A. Wood Renton, The Roman Dutch Law in Ceylon under the British Regime, 49 S.A.L.J., 162.

[12] A.M Philalethes, The History of Ceylon from the earliest period to the year MDCCXV (London, 1817).

intervening only to remove obstacles that impeded commercial pursuits. Consequently, it may be argued that the Dutch bore little responsibility for establishing Roman–Dutch law as the residual legal system of Sri Lanka. Although Roman-Dutch legal principles were applied administratively to employees of the Dutch East India Company and to a limited segment of the native population, their broader applicability remained marginal until the British formally proclaimed the validity of Roman-Dutch law in 1799, shortly after assuming control of the island.[13]

One may inquire what propelled the British to admit Roman-Dutch law as the residuary law in the maritime provinces of the island without directly importing English law as a whole. In fact, the proclamation made by the British in 1799 confirmed that it would repeal the old Dutch criminal procedure, along with the barbaric methods of punishment that had existed since the Portuguese period, by introducing English criminal law.[14] Nonetheless, the British decided to ensure the continuity of Roman-Dutch law regarding civil matters until they acquired mastery over the laws and customs of the inhabitants of Sri Lanka. The complexity that erupted from Roman-Dutch law's application within the island of Sri Lanka was interwoven within the mystical nature of Roman-Dutch law itself, and there is no better explanation than the remarks made by 19th-century English jurist Thomson in "Institutes of the Laws of Ceylon" to unfold how Roman-Dutch law assimilated into the legal fabric of Sri Lanka. Thomson states

"The Roman-Dutch Law, modified by statute and the law of the maritime provinces, and extends to every inhabitant of the island, except in those instances in which such inhabitants is by privilege

[13] René David and John Elmes Campbell Brierley, Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law (Stevens, London, 1968), at pp. 21–9.
[14] L.J.M Cooray, An Introduction to the Legal System of Sri Lanka, (Colombo, 1978).

under the sanction of another form of law in certain cases. Thus, the Kandyan retain their civil rights and immunities according to the laws, institutions, and customs established and in force amongst them: but where there is no Kandyan law or custom having the force of law applicable to the law decision of any question arising for the adjudication, the law of the maritime provinces is the law applicable to for the determination of that question. Similarly, with regard to persons under the section of the Theswalamai and also of the Mohomedian law. When these laws do not touch the question in hand, the law of the maritime provinces is applicable".[15]

Darker Days of Roman-Dutch Law in Sri Lanka

Since the proclamation of the 1799 Proclamation, which confirmed the legitimacy of Roman-Dutch law in Sri Lanka, the system experienced a chequered trajectory, marked by periodic challenges that at times threatened its continued relevance. While certain tenets of Roman-Dutch law remained intact and continued to govern civil law practice on the island, other aspects were criticized as incompatible with the demands of a modernizing legal order. In particular, Ordinance No. 5 of 1852, enacted by the colonial government of Sri Lanka, constituted a significant intervention by introducing English law to govern specific categories of cases.[16] A further critical legislative development occurred in 1866, when another ordinance curtailed the authority of Roman-Dutch law in mercantile matters, subjecting them instead to English legal principles. Apart from these statutory developments, judicial hostility within the colonial judiciary of Sri Lanka in the late nineteenth century emerged as a significant factor undermining the application of Roman-Dutch law. In particular, the bench of the puisne courts comprising judges

[15] Henry Byreley Thomson, Institutes of Laws of Ceylon, (Colombo, 1885).
[16] Sir K. Roberts-Wray, Commonwealth and Colonial Law, (Stevens Ltd: London, 1966),pp.529.

such as Dias, Burnside, and Clarence represented a critical period for Roman-Dutch law, as their demonstrable hostility reflected a broader judicial ambition to establish English common law as the law of the land.

It would be an interesting factor to assess what circumstances led those judges to take such an inimical attitude towards the application of Roman-Dutch law. Governor North's Proclamation on 23rd September 1799 had, as we have seen, made important changes in the Dutch criminal procedure.[17] The Charter of Justice of 1801 had regulated the procedure of the Supreme Court in criminal cases on the lines of the English model, and the introduction of trial by jury by the Charter of Justice of 1810 led to the adoption of rules of procedure incidental to such trial. By the mid-19th century, the application of English law on criminal matters in the island became confirmed, while the Dutch rules of procedure became obsolete. Moreover, the judicial officers who came to Sri Lanka to serve in the judiciary lacked the competence in reading the Dutch texts, which simply resulted in the decay of Roman-Dutch law.

Driven by lethargy to learn the classical Latin texts of Justinian's " *Institute*s" or later commentators such as Voet or Grotius, many English judges in Sri Lanka ignored the application of Roman-Dutch legal principles with regard to many branches of civil law. For instance, the Insolvency Ordinance No.7 of 1853 expressly abolished the "miserable and mournful" privilege, known to the Roman-Dutch Law, of a debtor being allowed by a court to make a *cessio bonorum*.[18] Again, the privilege given in Roman and Roman-Dutch law for women based on their presumption on the weakness of their gender ceased to exist during the early period of

[17] Asoka Bandarage, Colonialism in Sri Lanka: The Political Economy of the Kandyan Highlands, (Berlin, 1983).

[18] Walter Pereira, Laws of Ceylon, (Colombo, 1913).

British administration as judges showed no interest in exploring the classical texts that explain rationale behind those principles, which simply set the path to adopt English law into many civil matters in the legal rubric of the island.

On the other hand, it is prudent to assume that some of the rules prevailed in Roman-Dutch law were not in consonance with modern commercial dealings harboured by contemporary English common law. For example, courts remained doubtful in recognizing the *Lex Anastasiana*, which was originally enacted by the Roman Emperor Anastasius in A.D 506. This law restricted a person who had bought a creditor's claim against a debtor from recovering more from the latter than the original creditor had been paid for the transfer of the claim. Yet these British courts in Sri Lanka and South Africa found this application to be incompatible with the modern notion of freedom of contract. Thus, it became obsolete in practice. Nadaraja states

"Courts have recognized that they "are administering not a dead but a living system of law and that such adoption is necessary "in ordinary course of development of our Colonial Law to overtake the circumstances of modern life"[19]

As stated above, the darkest period for Roman-Dutch law began when three puisne judges two British and one native unanimously opposed the continued application of Roman-Dutch legal principles on the island. Justice Clarence, Justice Edward Burnside, and Justice Sir Harry Dias constituted a trio of jurists who advocated the complete eradication of Roman-Dutch law from Sri Lanka. Although the precise factors underlying their aversion to Roman-Dutch law remain unclear, it is reasonable to suggest that all three were strong

[19] Tambyah Nadaraja, The Legal System of Ceylon in Its Historical Setting (Brill, Leiden, 1972), pp.321.

proponents of English common law, which they regarded as the most effective instrument for realizing the British conception of justice in Sri Lanka. In particular, in the case of *Robertson*, Justice Clarence examined how Roman-Dutch law came to function as the common law of Sri Lanka, especially among the Sinhalese population of the maritime provinces, through the administration of the Dutch East India Company.[20] In his view, Roman-Dutch law could be replaced by the incorporation of English law following Sri Lanka's transformation into a Crown Colony of the British Empire in 1815. Reflecting on the hostility exhibited by these three judges in the late nineteenth century, St. Valentine Jayewardene observes:

"There were the darkest days in the history of Roman-Dutch Law. There judges professed a contempt and dislike for the Roman-Dutch law it is hard to account for, considering that it is directly founded on the Civil Law-a law which has provided modern civilization with its legal systems".[21]

How Classical learning led to the revival of Roman-Dutch Law?

In assessing the moot point of this essay, how classics preserved Roman-Dutch Law when it was nearing its total obliteration, one should firstly examine how classical learning developed in the island of Sri Lanka, especially in its colonial setting. When it comes to including Western classical languages such as Greek and Latin in the curriculum, the island owes its debt to the Portuguese, as the first seminary established by Franciscans in Colombo, known as "College of St. Anthony," included the works of Horace and Virgil in their syllabus.[22] Its leader, Friar Joao de Villa de Conde, was known

[20] *Robertson Vs de Silva*, 1891 3 S.C.R. 199.
[21] A.St.V. Jayewardene, The Roman Dutch Law as it prevails in Ceylon (Colombo, 1901)
[22] Rev. W.L.A. Don Peter, Education in Sri Lanka under the Portuguese (Colombo, 1978).

for his classical erudition, besides his fame as an able missionary. The classical foundation laid down by the Portuguese was confined to those who took an interest in theological training and the elite members of the native royalty, as the Portuguese patronized their education to legitimize their political presence. Their successors on the island, the Dutch, seemed to have carried out the same policy in their attitude to education by promoting classical education among the children of the native elites in the coastal regions. By emulating the steps of their predecessors, the Dutch showed less interest in inculcating classical education among the natives on a larger scale, and their product, known as "Parish Schools" located within Dutch forts, taught elementary subjects such as religious knowledge and arithmetic for the converts. Meanwhile, the classical subjects from Greek to Latin were included in the curriculum of the Dutch Seminary in Colombo, where the education was an exclusive privilege for the children of the local elites, especially those who aspired to join the clergy.[23]

When the maritime provinces came under British control, the educational framework established by the Dutch largely remained intact, with the British merely continuing it to serve their own administrative objectives. In the early years of British administration, prior to the Colebrooke Cameron constitutional reforms of 1833, British educational policies closely resembled those of the Dutch East India Company, as the British showed limited concern for promoting a classical education grounded in European humanist ideals. Nevertheless, the British interest in cultivating a cadre of local elites loyal to imperial rule necessitated the transmission of classical values, which in turn led some early British governors to send the children of indigenous elites to English

[23] J.D Palm, The Education Establishments of the Dutch Ceylon, *The Journal of the Ceylon Branch of the Royal Asiatic Society*, Vol.1.2, pp.105-133.

universities for higher education in Western classical traditions. For instance, in 1814, the British governor Thomas Maitland took the fourteen-year-old Henricus de Saram to England for further education, and in 1817 de Saram was admitted to Exeter College, Oxford, as its first South Asian undergraduate.[24] The University of Oxford, renowned for its emphasis on classical education, appears to have exerted a decisive influence on the young de Saram, who later became a minister in the Church of England. Upon his return to Sri Lanka, the Reverend de Saram taught classical subjects at Colombo Seminary and played a prominent role in the island's public life, notably serving as a juror.

The above mentioned brief sketch of de Saram's life reflects the infancy of classical education in the island's life, which later grew into a larger domain by opening many paths to the masses. In particular, it is plausible in assuming that the influence of classical education, especially after the establishment of Colombo Academy[25] as the leading Public School on the island, provided a solid foundation for the early pillars of the legal profession in the island. Even after the acquisition of the whole island, the British grappled with many ambiguities in identifying the Roman-Dutch law principles, and the legal profession contained many complexities in the 19th century. Especially , the basis of Roman-Dutch law filled with classical Roman legal principles and Dutch customs bemused English jurists who were accustomed to common law tradition.[26]

The classical foundations of British Ceylon were consolidated through the constitutional reforms proposed by William Colebrooke in 1833, which effectively dismantled feudal structures on the

[24] John de Saram, F.J & G. de Saram, 1841-2001: 160 Year Practice of a Law Firm, (Colombo, 2005).
[25] Renamed as Royal College, Colombo in 1881 by Queen Victoria.
[26] L.J.M Cooray, An Introduction to the Legal System in Sri Lanka, (Cololmbo,2008)

island and facilitated the emergence of a bourgeois cultural order. Consequently, the children of the newly affluent native elites enthusiastically embraced a Victorian ethos deeply intertwined with classical scholarship. Missionaries and young graduates from Oxbridge universities embodied this transformation, taking a paternalistic interest in teaching classical languages at newly established elite colleges in Sri Lanka, institutions that trained local elites to serve the administrative and cultural needs of the empire. In fact, the British youth who joined the newly established Missionary schools in the island felt that they were morally obliged to shun the darkness among the heathens , which can be connected to the famous imperial slogan of the 19th century ; "Civilizing Mission". In his celebrated work *The Classics and Colonial India: Classical Presences*, Phiroze Vasunia offers a compelling account of the role of classical studies in colonial India, demonstrating how English gentlemen viewed their colonial subjects through the lenses of Ancient Greece and Rome.[27] Vasunia further illustrates the British desire embedded in Victorian education to portray themselves as the guardians of a modern *Pax Romana*, while native Indians sought cultural and intellectual identity through the emulation of classical educational traditions. Vasunia's analysis is equally applicable to the socio-cultural fabric of Sri Lanka under British rule.

Newly established public school based on the models of Eton-Rugby apotheosized classics as the paragon of their curriculum and the entry for those selective schools happened to much competitive giving options for *crème de la crème* of the island's youth population to be admitted as borders. Moreover, most of those college taught Latin and Greek for their students as mandatory subjects. The government sponsored Colombo Academy and S. Thomas' College, Mutwal, an elite school ran by Anglican Church

[27] Phiroze Vasunia, The Classics and Colonial India, (Oxford, 2013).

were reputed for offering those classical languages.[28] Especially, Colombo Academy extended its classical curriculum beyond offering traditional classical literary texts by offering classical Roman legal texts in a rudimentary manner to the senior students who aspired to enter the legal profession. The history of Colombo Academy, authored by its students in 1935 reveals the fact that how its 19th century curriculum under principal Rev. Dr. B. Boake offered some parts of Justinian's *Institutes* and Ulpian's *ad sambinum* for the students who aspired to enter the legal profession in 1840's.[29] The efforts of Colombo Academy reaped its fruits as all the first native lawyers in the island were its old boys proving the contribution of classics to the nourishment of an indigenous legal profession in Sri Lanka.

Thus, the hypothesis of arguing that classical education under colonial rule in Sri Lanka safeguarded the continuity of Roman Dutch law in the island becomes a fact, which is not far from obvious. This argument can be further explained based on certain historical factors that carved the legal system in Sri Lanka. In particular, when Roman-Dutch law grappled with its own existence at the hands of a set of judges, who showed no compassion for its continuity by demanding its total obliteration, some native jurists took prominence in defending Roman-Dutch law. It was not a surprise that all these native jurists and practitioners who stood for the preservation of Roman-Dutch law had classical upbringings from the elite school system on the island. From the bunch of natives who strived to vitalise the practice of Roman-Dutch law, Walter Pereira was the leading advocate.

[28] Yasmine Gooneratne, English Literature in Ceylon 1815-1878, (Colombo, 1978).

[29] S.S Perera, History of Royal College, (Colombo, 1985) pp.78.

Walter Pereira was born in 1856 to a wealthy Sinhala-Burgher family in Colombo. After completing his secondary education at Colombo Academy and S. Thomas' College, he excelled further in classical studies at the University of Calcutta.[30] Like many youths of the nineteenth century, Pereira entered the legal profession after serving as an apprentice under a reputed Dutch-Burgher lawyer in Colombo. By the time Pereira was admitted to the bar, the continuity of Roman-Dutch Law was at stake. Nevertheless, Pereira demonstrated a strong interest in the application of Roman-Dutch law, particularly in the principal areas of civil law. His advocacy for Roman-Dutch law largely stemmed from his predilection for classical studies, a strength he had cultivated since his days at Colombo Academy.

It may also be contended that Pereira's efforts to promote Roman-Dutch law became significantly more effective following his appointment to the newly established Ceylon Law College in 1874. The breadth of knowledge Pereira possessed in Roman-Dutch law, both as a practitioner and a scholar, was remarkable and reportedly impressed judges of the puisne courts. It is reasonable to regard Pereira as the father of legal literature in Sri Lanka, as his late nineteenth-century works analyzing the island's legal corpus helped to shape the legal profession among native law students. Moreover, his treatment of Roman-Dutch law was deeply informed by classical Roman legal texts, underscoring the centrality of classical learning in Sri Lanka's legal education. In 1878, on behalf of the Ceylon Law Students' Association, he authored a concise work tracing the history of Roman law, which later became a permanent textbook at the Law College on the fundamentals of Roman law.[31]

[30] A.R.B Amerasinghe, Suprme Court of Sri Lanka, (Colombo,1985).
[31] Walter Pereira, An Historical Outline of the Developments of the Roman Law, (Colombo, 1894).

Walter Pereira's story was one example from many other key figures who fought for Roman-Dutch Law in the latter part of the 19th century. There were many other scholars, both British and local supported the idea of continuing Roman-Dutch Law as the residuary law of the island. Mr. Berwick, another classical scholar in Colombo, acted as a learned interpreter of Voet's texts in the district court by giving a luminous exposition of Roman-Dutch legal principles in the lower courts. With a sense of profound gratitude, St. Valentine Jayewardene later states

"So infatuated was Mr. Berwick with his admiration for the Roman-Dutch Law, derived from his classical upbringing, that he went so far as to apply it even in case for which the legislature had in no uncertain terms prescribed the English Law".[32]

The same author later acknowledged that the sheer antipathy unleashed by judges like Clarence, Burnside, and Dias was reversed at the end of the 19th century due to the zeal of some of the local legal practitioners whose commitment to protect Roman-Dutch law in the island had a strong link to their mastery of classics. And it was a fortunate coincidence that most of the colonial judges who rose to the higher positions in the puisne court in Sri Lanka by the beginning of the last century happened to be men of letters with a considerable passion for classics.

In particular, the appointment of Sir J.W Bonser, an able classical scholar, as Chief Justice of the island in the early 20th century was a decisive moment that saved and secured the status of Roman-Dutch Law as the common law of Sri Lanka.[33] His deeper understanding of Roman law enabled him to comprehend what the Dutch had left on the island, and it was aptly transformed into a judicial application. His successors duly

[32] A.St.V. Jayewardene, The Roman Dutch Law as it prevails in Ceylon (Colombo, 1901)
[33] J.R. Weinman, Our Legislature, (Cololmbo,1918).

followed the practices he initiated, which resulted in a revival of Roman-Dutch law in its application to the civil law branch in Sri Lanka.

Conclusion

Today, Sri Lanka stands as the only country in Asia that has preserved Roman-Dutch law as its common law, despite the substantial influence of English law in the criminal and commercial spheres. Together with South Africa, and to a certain extent Namibia and Zimbabwe, the Sri Lankan judiciary has adhered to Roman-Dutch legal principles without diminishing their significance, notwithstanding the legal pluralism that characterizes Sri Lanka's legal landscape. The central thesis of this article is that Western classical learning exerted a subtle yet significant influence in preserving Roman-Dutch law from decline during British administration. The foregoing discussion demonstrates the efforts of both local and British jurists, who shared a deep engagement with classical learning, in safeguarding Roman-Dutch legal principles. Moreover, the Victorian educational model adopted by elite schools, which emphasized the teaching of classical languages such as Greek and Latin, played a crucial role in inculcating this ardor among the local bourgeoisie who later emerged as pioneers of the legal profession on the island. The trajectories that emerged from this background ensured the continuity of Roman-Dutch law, despite the hostility displayed by some English judges in the nineteenth century. It may also be argued that classical studies and Roman-Dutch law entered into a mutually reinforcing relationship, which later became one of the strongest reasons for public schools in Sri Lanka to continue teaching Latin even after independence. Sri Lanka Law College, established in 1874, and the University of Ceylon, founded much later, offered Latin and Roman law as compulsory subjects for all law students, given their relevance to understanding the foundational pillars of Roman-Dutch law. Owing to its privileged status as an entry point to

the legal profession and the colonial judicial service, Latin continued to flourish in secondary education in Sri Lanka until Sinhala was accorded official language status in 1956.

As the above discussion aptly elucidates, the case of Sri Lanka presented in this article reveals a hidden factor in the ultimate survival of Roman-Dutch law as the common law in Sri Lanka. Neither the legal fraternity nor academia in the island nation has really examined this interesting aspect to argue how Roman-Dutch law was spared from its extinction due to the impacts of Western classics. Ironically, most of the judges appointed after Sir J.W. Bonser were very favorable upon safeguarding Roman-Dutch law, mainly due to their classical learning. The examples of Sir Thomas de Sampayo and Chief Justice Sir Anton Bertram illustrate how these individuals became serious students of Roman-Dutch law due to their shared interest in classics.[34] All in all, it is not an exaggerated remark to state that Roman-Dutch law came back to its vitality in Sri Lanka, when it was going astray due to the adoration of some men with sheer interest in classical learning.

34 Punsara Amarasinghe, 168th Birth Anniversary of Sir Thomas de Sampayo : A Great revivalist of Roman-Dutch Law in Sri Lanka, (Sunday Observer , 2023.09.17).

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Lawfare and National Security: A Comparative Study of Legal Mechanisms in Contemporary Security Framework

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Abstract

This study examines the evolution of lawfare as a structural component of contemporary national security governance through a comparative analysis of the United States, the People's Republic of China, and the Israel-Palestine context. This study conceptualizes lawfare as the strategic application of legal and judicial means. Economic and normative mechanisms to accomplish national security aims and objectives, moving beyond the conventional interpretations of law as a regulatory mechanism of war. This study incorporated international institutional practices, statutory frameworks, case laws, and strategic theories in its doctrinal approach, and the study distinguishes two main lawfare models: Compliance Leverage Disparity Law, which takes advantages of asymmetries in adherence to international legal norms, and the Instrumental Lawfare model which uses litigation, sanctions regimes and institutional rule shaping as alternatives to traditional means of warfare. This study finds various strategic cultures of application of lawfare in the national security of great powers, as China doctrinally embeds legal warfare within its warfare strategy, while the USA adopts a driven and sovereignty-protective approach, and also the Middle East hybrid

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legal contestation. All models converge in acknowledging offensive and defensive application of lawfare in contemporary conflict. The findings of the study highlight the need for a lawfare awareness in their national security governance, in particular, South Asian nations negotiating legitimacy, sovereignty, and geopolitical rivalry in an increasingly norm-driven global order.

Keywords: *Lawfare: National Security Governance, Strategic Legal Warfare:*

Introduction

The term lawfare demoted the strategic application of the law to accomplish military objectives. The lawfare, therefore, uses legal institutions of both domestic and international law as instruments to protect national interests and oppose rivals and advance political objectives.[1] The lawfare can take various forms that include domestic legal activities that limit military acts of the rivals, litigations in international tribunals, and imposing legal pressure through international institutional frameworks like the Human Rights Council.[2] The concept of lawfare blurs the distinction between military and legal tactics, challenging conventional ideas of combat. A coherent and consistent understanding of how lawfare is incorporated into the national security framework. However, lawfare evidently gets little literature and limited seminal works about the subject.[3] The majority of current research on lawfare focuses on the application of lawfare in the West with little attention paid to regional security dynamics, particularly in regions like South Asia.

[1] Orde F. Kittrie, *Law as a Weapon of War: Lawfare* (Oxford University Press 2016) pp 6-20.
[2] Andrea Bianchi, *International Law and the Use of Force* (Oxford University Press 2004) 275-280.
[3] Michael Schmitt, 'Lawfare in Modern Conflict' (2010) *Journal of National Security Law and Policy* 221, 225.

The United States of America has pioneered in the application of lawfare in its national security strategy. It contains wide applications of lawfare in the form of litigation in the international courts, initiating domestic legal actions, and also diplomacy. These mechanisms are well documented, and they have wide application, particularly in the war on terror.[4] Many scholars argue that lawfare is the tool that the USA uses in order to maintain its superpower status by justifying its military actions across the Globe. Supporting this argument, Benjamin Ferencz and John Yoo highlighted that the use of legal norms to counter terrorism and strategic implications has become a frequently used doctrine in the USA's warfare strategy.[5] However, this application of lawfare in national security governance is not prominent in the Eastern states except for a few countries like China. For example, emphasis on regional and international institutions is often limited in the South Asian states, while Western states do otherwise. This leads to a significant gap in the literature about how South Asian countries would use lawfare within their national security governance.[6] Accordingly, the main research question of the study could be derived as what legal mechanisms constitute lawfare in the contemporary national security framework, and how these mechanisms vary across jurisdictions.

This study adopts a mixed-method approach that comprises qualitative, doctrinal, and comparative approaches to analyze the role of lawfare within national security frameworks in South Asia. The detailed research approach will be utilized: Doctrinal Research, Comparative Analysis, Case Studies, and Expert Opinions. The study holds significant academic and policy implications, particularly

[4] Hilaire McCoubrey and Nigel White, *International Law and Armed Conflict: Exploring the Faultlines* (Routledge 2013) 58-63.

[5] Benjamin B. Ferencz, *Enforcing International Law: A Way to World Peace* (Oceana Publications, 1983), p. 72.

[6] Indian Ministry of External Affairs, 'Lawfare and National Security: India's Approach' (Government of India 2020) 32-37.

for the field of national security law. It will provide an academic reference and guide to the introduction of lawfare in the subjects of National Security Law studies. Lawfare, referring to the use of legal instruments and strategies to achieve military or political objectives, remains a relatively underexplored area within traditional national security frameworks. The study will guide policymakers in developing legal frameworks that ensure compliance with international law while empowering states to safeguard their interests.

Discussion Conceptual Foundation of Lawfare in Contemporary Security Framework

The term Lawfare is defined as the strategy of using or misusing law as a substitute for traditional military means to achieve a warfighting objective.[7] This definition recognizes law as a utility as a weapon of war. Although this definition was introduced by the US military, it has no dedicated strategy or doctrine for lawfare. In contrast, the People's Republic of China (PRC) introduced legal warfare as a major component of its strategic doctrines.[8] It is understood that lawfare shall not replace traditional kinetic warfare entirely or even largely, and lawfare is almost less deadly than traditional warfare and less financially costly.[9] Many scholars argue that lawfare can also be more effective than traditional means of warfare.

The use of law as a means of warfare goes back to the era of Hugo Grotius (father of international law) with his work *Mare Liberum*, published in 1609, which introduced the idea that 'the sea is common to all' and all nations are free to use it for trade by

[7] Dunlap C. J. (2008). Lawfare Today: A Perspective, in Yale Journal of International Affairs, vol. 3, 146-154

[8] Orde F. Kittrie, *Law as a Weapon of War: Lawfare* (Oxford University Press 2016), p. 5

[9] Orde F. Kittrie, Lawfare and U.S. National Security, 43 Case W. Res. J. Int ' l L. 393 (2010). Available at: https://scholarlycommons.law.case.edu/jil/vol43/iss1/23

sea. In this, Grotius used law to accomplish the military objectives of the Dutch and solidified the concept of freedom of the seas in modern international law.[10] In the early 1990s, PRC military doctrines focused on the possibility of using international law as a weapon of war, and the term 'legal warfare' was introduced by Chinese military scholars.[11] In that, the possibility of establishing international law for the benefit of achieving military objectives and identified legal warfare can have a destructive effect that is equal to the military operations. Therefore, it is understood that lawfare is both offensive and defensive in nature, and metaphorically, lawfare identifies law as another form of weapon of war.

The lawfare gets two interrelated forms in its application: Instrumental Lawfare and the Compliance-Leverage Disparity Lawfare.[12] The Instrumental approach is understood as the deliberate employment of legal mechanisms to secure strategic outcomes comparable to those traditionally achieved through conventional kinetic military operations. This approach utilizes litigation, regulatory regimes, international legal institutions, forums, and normative frameworks as functional substitutes for military means to advance national security objectives.[13] The Compliance -Leverage Disparity Lawfare, on the other hand, refers to the strategic exploitation of asymmetries in legal compliance. In that, one actor capitalizes on the facts that its adversary is more constrained by or more responsive to legal norms such as the law of armed conflict or similar institutional procedures, which leads to strategic disadvantages to the other party in the light of compliance with international laws, judicial oversight,

[10] Orde F. Kittrie, *Law as a Weapon of War: Lawfare* (Oxford University Press 2016) pp 6-15
[11] Ibid
[12] Ibid
[13] Charles J Dunlap Jr, 'Does Lawfare Need an Apologia?' (2010) 43 *Case Western Reserve Journal of International Law,* p. 121.

and accountability mechanisms.[14] Accordingly, instrumental lawfare is typically adopted by Western states and non-state actors, while compliance -leverage disparity forms are necessary to be waged by the state or non-state actors against their adversaries as law provides greater leverage or is more compelled to comply regardless of the geographical region of the parties.

The United States and the Western Approach to Lawfare

The United States and the Western application of lawfare have different approaches. The US Department of Justice and the Treasury Department, as executive branch agencies, had waged lawfare, especially on the matter of aggressive economic lawfare and anti-terrorism against foreign terrorists as an alternative to the military strikes against them. Further, lawfare activities are being carried out by federal executive branches, which are predominantly defensive in nature. The US domestic and International legal systems are already so infused by an instrumental view of law that the USA is taking a more deliberate and systematic instrumental approach to law in the international area. The instrumental approach was affirmed in the case of *Boim v Holy Land Foundation for Relief and Development*[15] under the provisions of the Anti-Terrorism Act, which holds civil liability for providing material support to a designated terrorist organization, that could impose a civil damage claim.

Lawfare in the United States is not confined to the executive action; it is also pursued through private litigation initiated by individual lawyers and non-governmental organizations against designated adversaries. Two principal statutory frameworks facilitate this process: the Anti-

[14] Orde F. Kittrie, *Law as a Weapon of War: Lawfare* (Oxford University Press 2016) pp 16-18
[15] 549 F 3d 685 (7th Cir 2008).

Terrorism Act (ATA) and the state sponsor of terrorism exception to the Foreign Sovereign Immunities Act (FSIA). These enactments provide civil causes of action and jurisdictional gateways that enable victims to seek remedies against terrorist actors and entities alleged to have provided material support. Through these mechanisms, domestic courts function as an instrument of strategic legal contestation, allowing statutory provisions to operate as judicial tools against both perpetrators and their non-governmental supporters.

In the case of *Filartiga v Pena – Irala,*[16] The court stated that torture is an offence under existing international law; therefore, despite the territorial jurisdiction, US courts may hear such matters even if the violation had happened abroad. This further includes even such offences done by foreign nationals, which demonstrates the instrumental application of domestic jurisdiction to preserve international norms and the accountability of foreign states and nationals against such norms. Further, *Kiobel v Royal Dutch Petroleum Co*[17] *The* court interpreted the provisions in the Alien Tort Statute (ATS) and held that presumptions against extraterritorial application of private litigation in line with foreign relations and diplomatic interests of the USA exhibited judicial caution regarding potential interferences that could happen in any part of the world. Further, the USA had adopted defensive lawfare approach in relations to the jurisdictional application of the International Criminal Court (ICC), further the USA had passed the American Service Members' Protections Act (ASPA) of 2002, that gives the legal protection to their service members that permits the president of USA to use to all means necessary and appropriate to secure or release US service members or its allied personnel detained by, or on behalf of the ICC. The provisions in the ASPA therefore exhibit a broader application of the domestic jurisdiction and the power and authority that the President

[16] 630 F 2d 876 (2d Cir 1980)
[17] 569 US 108 (2013)

of the USA possesses extra-jurisdictionally to oversee US military and political actors in line with their strategic interests. Moreover, the USA had entered a number of bilateral agreements with more than a hundred states across the globe under Article 98 of the ICC statute to protect their nationals, not to surrender US nationals to the ICC jurisdiction without the consent of the USA. These domestic statutes and the international agreements collectively reflect a defensive application of the lawfare by the USA, rather they use such in an instrumental approach. This further exhibited the strategic application of the lawfare in the domestic legal mechanism and also in the international agreements to protect its service personnel and its national form various procedures in the international institutions, preserving its dominance over national security governance.

China and the Eastern Approach to Lawfare

The People's Republic of China (PRC) stands as one of the principal states in the East that extensively uses lawfare in its national security governance. China, therefore, had contributed extensively to the development of the contemporary lawfare doctrine in the East.[18] Lawfare is an important component of Chinese strategic thinking, and lawfare gets wide application associated with the concept of people's war, together with public opinion warfare and psychological warfare.[19] Many scholars argue that the use of lawfare by China mainly falls within the context of strategic competition rather than applied lawfare in an active armed conflict[20]. Therefore, it is evident that

[18] Elsa Kania, The PLA's Latest Strategic Thinking on the Three Warfares, 16 JAMESTOWN FOUND. CHINA BRIEF (Aug. 22, 2016), https://jamestown.org/program/the-plas-latest-strategic- thinking-on-the-three-warfares

[19] Peter Mattis, China's 'Three Warfares' in Perspective, WAR ON THE ROCKS (Jan. 30, 2018), https://warontherocks.com/2018/01/chinas-three-warfares-perspective/ [https://penna.cc/2AS3-NLPU

[20] Timothy R. Heath, China'sMilitary Has No Combat Experience: Does It Matter? RAND (Nov. 27, 2018), https://www.rand.org/pubs/commentary/2018/11/chinas-military-has-no-combat-experience-does-it-matter.html [https://perma.cc/8GY5-URFK].

China considered lawfare as a legal instrument as a peacetime tool designed to advance national interests and shape the battlefield environment before active combat.

Chinese strategic writings often state that the USA is a leading practitioner of lawfare, although Western states have not formally articulated their warfare doctrines dedicated to lawfare.[21] According to Chinese scholars, in the first Gulf War, the USA became successful not only by kinetic military means but also through its ability to employ Security Council resolutions and sanctions against Iraq, thereby securing international legitimacy and mobilizing a broad coalition.[22] Further, analysis of the second Gulf War, they argued that the application of lawfare had further strengthened, together with international jurisdiction and narrative management, which formed as an integral part of the US operations. Accordingly, a Chinese strategist explains that these examples demonstrated that modern warfare is extending beyond pure kinetic operations. Further, the state could employ legal arguments and international institutions as a strategic instrument within the concept of lawfare. It is a fact that China has not engaged in active war since 1979, and therefore, the application of lawfare in China appears in a situation of interstate strategic competition rather than active warfare. Therefore, though the lawfare effort China intends to strengthen its strategic position, it will do so by expanding its global influence and reinforcing its claims in contested territorial disputes. Notably, individual lawfare initiatives often serve multiple strategic purposes simultaneously.

[21] Crispin Smith, 'Chinese Lawfare in Conflict: The Threat to U.S. Operations' (2025) 16 Harv Nat'l Sec J 146

[22] Elsa Kania, The PLA's Latest Strategic Thinking on the Three Warfares, 16 JAMESTOWN FOUND. CHINA BRIEF (Aug. 22, 2016), https://jamestown.org/program/the-plas-latest-strategic- thinking-on-the-three-warfares Peter Mattis, China's 'Three Warfares' in Perspective, WAR ON THE ROCKS (Jan. 30, 2018),

Over the past three decades, China has effectively employed what may be described as institutional lawfare as part of its geopolitical ascent. For example, it has established multilateral financial institutions such as the Asian Infrastructure Investment Bank and the New Development Bank as alternatives to US-led international financial structures.[23]. These institutions not only expand China's economic influence but also reshape elements of global governance architecture in ways that align with Chinese strategic interests. In parallel, China has utilized legal narratives to reinforce its territorial claims in its near abroad[24]. The South China Sea dispute provides a clear example of this practice, in that China had advanced historical and international law of the sea narratives in the diplomatic discussion, their official declarations, and also media statements[25]. Such effort is intended to frame its maritime claims within a legal disclosure and to reinforce the legitimacy of its position, shaping international border perception. Overall, China's contemporary lawfare strategy integrates institutional development, legal argumentation, and narrative diplomacy to consolidate its global standing and advance strategic objectives short of armed conflict.

The Middle Eastern Approach: Hybrid Legal Contestation

The lawfare approach in the Middle East can be clearly understood when analyzing the Israel–Palestine conflict. Two distinct groups operate in Palestine: the Hamas-controlled Palestine government of Gaza and the PLO-controlled Palestine government of the West Bank. The PLO-controlled government of the West Bank referred to

[23] Timothy R. Heath, China'sMilitary Has No CombatExperience: Does It Matter? RAND (Nov. 27, 2018), https://www.rand.org/pubs/commentary/2018/11/chinas-military-has-no-combat-experience-does-it-matter.html [https://perma.cc/4F9B-QD9U].

[24] Crispin Smith, 'Chinese Lawfare in Conflict: The Threat to U.S. Operations' (2025) 16 Harv Nat'l Sec J 146

[25] Ibid

itself (and was generally referred to) as the Palestinian Authority.[26] Since January 2013, the PLO-controlled government has referred to itself as the State of Palestine," in light of UN General Assembly Resolution 67/19[27], which decided "to accord to Palestine non-member observer State status in the United Nations. Many scholars argue that the goals of the PA's offensive lawfare initiative against Israel revolved around recognition of the PA as a state by the United Nations, which paves the way for the internationalization of the conflict as a legal matter, and also paves the way for us to pursue claims against Israel at the United Nations, human rights treaty bodies, and the International Court of Justice.[28] This hybrid approach of lawfare, therefore, facilitates obtaining PA's rights through negotiations or to have the right through international institutions.

PA lawfare against Israel can be divided into three major elements. The first approach is the recognition of Palestine as a UN member state, as an application made in 1967, which now remains as a non-member observer state status in the UN[29]. The second approach is PA's decision to join the ICC in 2014, which preserves the domestic political and international law benefits. According to the scholars, ICC accession of PA is identified as a defence mechanism against any military aggression against Gaza[30]. Third, is the use of internal processes of international organizations and treaties, including those that are not a party to attack their adversaries while advancing their

[26] Gunawan, Y., Pangestu, R. A., Hardiyanti, L. A., & Genovés, M. B. (2025). The Effectiveness of International Law in Limiting Humanitarian Disasters in the Palestine-Israel Conflict. ResearchGate, 228-234. doi: 10.53955/jhcls.v5i1.307

[27] United Nations General Assembly, *Status of Palestine in the United Nations*, UNGA Res 67/19 (29 November 2012) UN Doc A/RES/67/19

[28] Orde F. Kittrie, *Law as a Weapon of War: Lawfare* (Oxford University Press 2016) pp 16-18

[29] United Nations General Assembly, *Status of Palestine in the United Nations*, UNGA Res 67/19 (29 November 2012) UN Doc A/RES/67/19

[30] Borger, J., & Tantesh, M. (2025). Israel prepares Gaza "hell plan" to pile pressure on Hamas – reports. The Guardian. Retrieved April 11, 2025, from https://www.theguardian.com/world/2025/mar/03/israel-prepares-gaza-hell-plan-to-pile-pressure-on-hamas-reports

claims against them.[31] A distinct form of lawfare has been employed by Hamas against Israel. Unlike the Palestinian Authority and its allies, which have relied on legal mechanisms in international institutions and domestic courts to challenge Israel, Hamas has pursued a different strategy. This scenario is often explained with the concept of the Compliance Leverage Disparity approach of lawfare. In that, actors exploit different levels of adherence to the international legal obligations. The Compliance Leverage Disparity approach, therefore, relies on the level of commitment to the legal norms and vulnerability to the international institutions by its adversaries. Further, allegations of violations of the international norms and operational restrictions associated with international humanitarian law are utilized to create political, diplomatic, and reputational costs.

Comparative Analysis: Implications for the Future National Security Governance

National security is primarily concerned with protecting territorial integrity, countering insurgencies, and maintaining internal stability. Traditional security measures often include military force, intelligence gathering, and diplomatic efforts. The strategic use of law within this domain, however, has not been fully explored, despite instances where legal systems have been used to bolster national security. However, the full integration of lawfare as a formalized strategy in national security policies remains underexplored in the literature.

Lawfare contains both Private and Public Litigation. The literature on lawfare also emphasizes the role of both public and private litigation as components of legal strategy. This includes the use of courts, both

[31] Duffy, H., & Pinzauti, G. (2023, November 14). International law in the conflict in Gaza/Israel: Meeting the challenges. Retrieved April 11,2025,fromLeidenlawblog.nl.:https://www.leidenlawblog.nl/articles/international-law-in-the-conflict-in-gaza-israel-meeting-the- challenges?utm_source

domestic and international, as venues for states to assert their interests, challenge foreign policies, or contest actions that may compromise national security.[32] The role of private actors, non-governmental organizations (NGOs), and individuals in using lawfare as a tool against state actions or military strategies has been examined in the context of human rights litigation and terrorism-related cases. The comparative examination of the United States, the People's Republic of China (PRC), and the Middle Eastern experience, particularly the Israel-Palestine context, reveals that lawfare is no longer a peripheral instrument but an embedded component of contemporary national security governance. Although different states use lawfare in different ways, several common applications could be identified. These applications have significant implications for national security frameworks. Accordingly, the following analysis outlined the key findings of the study:

Divergent Strategic Cultures, Convergent Recognition of Law as Power

The United States applied instrumental lawfare extensively while adopting defensive lawfare also in its national security governance. The USA incorporated domestic legal tools into a broader security strategy through legislation such as the Anti-Terrorism Act, Foreign Sovereign Immunities, and the American Servicemembers Protection Act. Further, domestic litigation, including private and public suits, would also use the *Boim v Holy Land Foundation, Filartiga v Pena Irala*, and *Kiobel v Royal Dutch Petroleum.* These litigations exhibit the application of domestic lawsuits for broader national security objectives. Further, the USA has adopted a defensive legal stance towards international institutions such as

[32] David Wippman, 'International Law and Security: The Role of Lawfare' (2011) *Global Politics Review* 142, 145.

the ICC, which exhibits concern of the USA on state sovereignty and external judicial authority.

In contrast, the People's Republic of China integrated lawfare more directly into its national security governance regime through its strategic doctrines that explained 'Three Warfare'. The Three Warfare includes Public Opinion Warfare, Psychological Warfare, and Legal Warfare. Accordingly, China applies legal warfare as a peacetime warfare strategy. Further, China influences its rivalries through international institutions such as the Asian Infrastructure Investment Bank and the New Development Bank. Further, China also promotes new governance frameworks to advance its national security interests.

Lawfare application in the Middle East, in particular the Israel-Palestine conflict, follows a different pattern from that of Western and Eastern approaches. It contains a hybrid model approach when analyzing the use of international law and international institutions by the Palestine Liberation Organization (PLO) and the Palestine Authority. Both the PLO and the Palestine Authority have used international legal processes to strengthen their political legitimacy, including support from UN General Assembly Resolution 676/19 and obtaining membership in the ICC. In contrast, Hamas often relies on a compliance leverage disparity approach by exploiting the international humanitarian law in creating normative pressure on its opponents. Therefore, it is understood that these models of lawfare share a common understanding that law could act as a force multiplier in modern strategic competition as a prominent strategic instrument of national security governance.

Emerging Trends in the National Security Governance.

The institutionalization of lawfare within the state system is one new trend in national security governance. The application of lawfare, therefore, needs to be formally integrated into the national defence and foreign policy institutions. The lawfare has been incorporated into the defence doctrines in China, while domestic statutes are enriched to address matters related to the national security governance in compliance with the different lawfare approaches. Further, utilization of the international institutions and their procedures is also being used to achieve national defence, as in the case of the ICC and the PLO. In a context where rivals are increasingly using international norms, courts, and treaty organizations as a strategic tool, states that do not institutionalize legal strategy in national security governance probably would have to encounter the risk of being at a strategic disadvantage.

Further, the growth of multi-domain rivalry is another trend in lawfare. Cyber operations, economic sanctions. Media narratives and diplomatic involvement are all part of lawfare. The establishment of AIIB, with the leadership of China, would be involved in the rule-making aspect of strategic competition. Therefore, legal instruments must be viewed in the light of national security governance, considering both strategic compliance and competition. Further, lawfare gets new trends of sovereignty-focused legal approach, in that some states like the USA have rejected legal mandate and authority of the ICC, and also entered bilateral agreements to safeguard their nationals.

Implications for Lawfare-Conscious Doctrine for National Security Governance

The comparative examples highlighted in the analysis of the study drive certain lessons for South Asian states, especially those dealing with internal security issues, counterterrorism concerns, maritime disputes, and border disputes. Therefore, states must strengthen their national governance with the required legal instruments as strategic tools. Further, the state needs to contribute to the development of international norms rather than being passive recipients of lawfare created by other states. Further, comprehensive legal strategic planning is required as a significant element of the national security governance. In that, ministries such as defence, customs, foreign affairs, finance, and justice are required to work with unity of effort to develop coordinated legal strategies. Moreover, judicial reediness needs to be improved, such as national security professionals need more institutional awareness and legal literacy, as domestic litigation becomes a venue for strategic litigation. Finally, the government needs to be aware of the danger presented by hybrid threats in asymmetric warfare, especially in the case of non-state actors and terrorism.

Further, national security governance in Sri Lanka and comparable countries would need to adapt a hybrid application of the lawfare model to uphold national interests, safeguard sovereignty, and comply with international legal norms. This study finds that lawfare is structural rather than episodic, and it functions across the range of interstate conflict to operations other than war and peacetime rivalry. Therefore, national defence policy should include the doctrinal application of lawfare while encouraging strategic legal

knowledge among military and political leadership of the state.

Conclusion

This study established that lawfare has evolved as a legal tactic and the strategic tool of contemporary national security governance. Moving beyond the traditional understanding, law is not confined to a tool that regulates warfare but a strategic tool that shapes the strategic environment, which possesses the potential to supersede the traditional means of warfare. The USA illustrates how domestic litigation, both public and private, could function as an instrument of coercion, deterrence, and narrative consolidation. The People's Republic of China demonstrates the strategic application of lawfare within its doctrines of legal warfare as a norm-shaping long-term security strategy. The Israel and Palestine context demonstrates the possibility of hybrid legal contestation and Compliance Leverage Disparity application of lawfare in asymmetric warfare. These models collectively confirmed that lawfare operated across multiple domains, such as judicial, institutional, economic, diplomatic, and informational. Further, lawfare could function both in peacetime and in conflict or imminent conflict situations. Therefore, national security governance could not treat law merely as a regulatory tool or mechanism, but could be understood as an operational variable within the national security governance of the state. This study finds the answer to its research question of what legal mechanisms constitute lawfare in the contemporary national security framework and how such mechanisms differ from each other across jurisdictions. Accordingly, the lawfare mechanisms include strategic litigation, sovereign immunity exceptions, treaty accession and withdrawal, institutional procedures, and narrative-based legal arguments. These applications differ across the

jurisdiction according to the national security governance of the state. Therefore, national security governance of a state requires a lawfare approach to be integrated into the defence planning, foreign affairs, and institutional development. Finally, the national security policy requires understanding that integrating legal strategy into national security discipline would not only protect the national interest of the state but also would be able to position the state correctly in the evolving international order.

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