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IMPUNITY IN SOUTH ASIA

Impunity in Sri Lanka: The Role of Survivors, Victims, and Their Families in Challenging Impunity

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ABSTRACT

This paper will explore the issue of impunity in Sri Lanka. The survivors and the victims in this paper refers to those that have suffered from impunity and injustice in Sri Lanka's legal system. To this end, the paper makes reference to cases of survivors' and victims' fights against impunity in the country. One of the key findings of this study is that challenging impunity in Sri Lanka is not well received due to reasons that range from: gaps in legal institutions and a lack of public interest or commitment; to corruption and inefficiency in the existing systems, as well as political and state interference and other pull and push factors, which will be elaborated in detail.

chapter one

INTRODUCTION

'It's a major fault of our justice system that justice is not accessible and available independently and as a right, and quickly, but rather, appears to depend on a victim's courage or ability to garner support.'[1]

1.1 The Context

The 'culture of impunity' has been a persisting trend in Sri Lanka whereby survivors and victim's families do not receive redress, while perpetrators evade justice'[2]. In 2013, the then Minister of External Affairs, Prof. G.L. Peiris welcomed the UN High Commissioner for Human Rights Navanethem Pillay for investigation on Sri Lanka's conflict. He pointed out that there is no culture of impunity in the country. However, in 2002, a written statement submitted to the 58th session of the Commission of Human Rights by the Asian Legal Resource Centre (ALRC) revealed that in over 3,000 cases of disappearances that have been reported to the state-appointed commissions of inquiry, only about 500 cases have been prosecuted, and even these have been conducted 'negligently' in most instances.[3]

A report published in 2012 by ICJ identifies some key factors that fuel impunity in Sri Lanka such as continuous emergency laws for forty years[4]. Other factors include:

i. Prevention of Terrorism Act no 48 of 1978(PTA)[5];
ii. Immunity provisions for the President under the 1978 Constitution[6] (subject to the exceptions under the 19th amendment to the Constitution[7]);
iii. Conferral of immunity on State officials using emergency laws;
iv. Prevention of Terrorism Act of 1978.

These all provide broad powers to search, arrest and detain suspects; as well as problematic trends of increasing political pressure, and eventual control extended over all institutions involved in State accountability; challenges in the independence of the judiciary; and politicization of the Attorney-General's office, which also violates international standards on the conduct of judges and lawyers.

In 2015, the government regime of the time prioritized good governance and made some efforts to remedy issues around the rule of law, such as passing the 19th amendment to the Constitution of Sri Lanka. However, after coming to power in November 2019, president Gotabaya Rajapaksha declared his intention to amend the constitution in his inaugural speech, an act which some political analysts have feared would be the 'first step to autocracy'[8]. The draft of the 20th Amendment as gazetted on 28th August 2020 grants immunity to the President from all legal action and awards the same party with the powers to make crucial appointments such as to Judges of the Supreme Court; the Chief Justice; the Attorney General; members of the Judicial Service Commission (JSC); and the Police Commissioner, who would be responsible for appointing the Police Chief.

In 2019 the UN Working Group on *Enforced or Involuntary Disappearances; the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* asked the government of Sri Lanka for its explanation and mechanism on missing persons, following the government's consideration to withdraw its commitments to the UN human rights commission.

Despite the culture of impunity in Sri Lanka, some of the survivors and victim's families have

1 Ruki Fernando. "Solidarity Acrions and Struggles for Justice in Sri Lanka". Accessed 18 May 2021 https://groundviews.org/2015/12/30/solidarity-actions-and-struggles-for-justice-in-sri-lanka/

2 ICJ. Authority without accountability: The crisis of impunity in Sri Lanka. Geneva, Switzerland: ICJ, 2012. Accessed 17 May 2021 https://www.refworld.org/pdfid/50ae365b2.pdf

3 Jane Thomson-Senanayake. A sociological exploration of disappearances in Sri Lanka. Hongkong, China: AHRC. 2014. Accessed 7 June 2021. http://www.humanrights.asia/wp-content/uploads/2018/08/A-SOCIOLOGICAL-EXPLORATION-OF-DISAPPEARANCES-IN-SRI-LANKA.pdf.

4 ICJ. Sri Lanka: ICJ Report Documents 'Crisis of Impunity'. Accessed 7 June 2021. https://www.icj.org/sri-lanka-new-icj-report-documents-crisis-of-impunity/.

5 ICRC. "Prevention of Terrorism Act no 48 of 198". Accessed 17 May 2021 https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/8a597180e56d83edc125773700393abb/$FILE/Prevention%20of%20Terrorism%20Act.pdf

6 The Constitution of Sri Lanka 1978

7 19th Amendment to the Constitution of Sri Lanka 2015

8 David Kumar. "Amending the constitution will be the first step to autocracy" . Accessed 17 May 2021 https://srilankabrief.org/2020/01/sri-lanka-amending-the-constitution-will-be-the-first-step-to-autocracy-kumar-david/

challenged impunity throughout the years amidst practical challenges such as the slow progress of legal proceedings, evidenced by data provided by the Sri Lanka police.

The purpose of this paper is to explore the role of survivors and victim's families in challenging impunity, with a focus on crimes of sexual violence including: rape; enforced disappearances; killings; torture; freedom of religion or belief; LGBTIQ rights and presidential pardons.

1.2 Objectives of the Paper

The main research objective is to identify roles of survivors and victim's families in challenging impunity in Sri Lanka. This includes identifying achievements and limitations based on the various cases that are presented, and any underlying causes for these outcomes, as well as any further challenges that were faced.

1.3 Methodology

To achieve the aforementioned objectives, this research undertakes qualitative analysis based on primary and secondary data. Secondary data consists of (i) qualitative information and statistical data on impunity and challenging its practice in Sri Lanka as well as, (ii) 32 case studies on challenging impunity by victims and survivors in Sri Lanka. The secondary data was obtained from: academic research; reports; research publications by human rights organisations and UN bodies; as well as media reports, legal judgements and the reports of the commissions of inquiry appointed by the government. Primary data were collected by undertaking interview schedules among the selected personalities by the author and the purpose was to cross-verify the information collected from the secondary sources and validate the findings.

In order to identify the trends and patterns of impunity, and the ways in which impunity was combatted by the victims' families and survivors by analysing both primary and secondary data, two separate questionnaires were prepared. The first was administered among the families and survivors while the second was administered among individuals and expert groups involved in the relevant cases. All these attempts have been able to identify 32 cases through secondary data review while six cases through field study. All the case studies referred to in this report have been useful in giving insight into the achievements, failures and challenges that survivors and victim's families have faced in challenging impunity in Sri Lanka.

chapter two

RAPE, SEXUAL VIOLENCE, & GENDER BASED DISCRIMINATION IN SRI LANKA

'Sexual violence is a powerful weapon because it impacts on core aspects of people's identity and through the weaponising of stigma, destroys the social fabric'[9].

This section investigates selected sexual offences, and the fetters around reporting and accountability including: prosecution; conviction; and the achievements and obstacles faced by the survivors and victim's families in pursuit of justice; as well as the factors that have contributed towards impunity and overcoming it.

The Penal Code of Sri Lanka criminalizes a number of sexual offences including: rape; statutory rape[10]; and grave sexual abuse. However, as revealed by primary and secondary data, prosecution of these crimes is alarmingly low. The rights of survivors and victim's families as well as access to justice is severely hindered with many cases going unreported .Further, there is no recognition of conflict related rape in Sri Lanka, Despite the large numbers reported as a during the 30 year civil war[11].

Available data suggests that 35% of women around the world have experienced some form of sexual violence. The number of sexual offences reported in Sri Lanka as of July 2020 rested at approximately 6884 cases, of which 5242 cases were of child abuse and 1642 cases were sexual abuse of women. It has also been reported that approximately 17,000 child abuse cases were stagnant in the Attorney General's Department in 2017, with estimates revealing that this number may have increased by a staggering 20,000 cases in 2018.[12]

In early 2018 the United Nations Convention on the Rights of the Child (UNCRC) issued a red alert in Sri Lanka due to the governments' seemingly careless approach to child protection 10. The collective number of convictions and imprisonments related to child sexual abuse, rape and other sex related offences in 2018 and 2017 were 82 and 138, respectively.[13]

2.1 Systemic and Institutionalized Sexual Offences and Violence: The State

'Sexual crimes are not investigated, let alone prosecuted, and over the years, government representatives have repeatedly denied or minimized the problem, fostering a culture of impunity for perpetrators.'[14]

This section will briefly look at sexual offences committed in a systematic and institutionalized manner, as a means of torture, and the subsequent impunity that it has given rise to.

Sri Lanka faced a 30 year civil war between the Liberation Tigers of Tamil Eelam (LTTE) and the Government of Sri Lanka. The island also witnessed the political uprising of the Janatha Vimukthi Peramuna (JVP) during the 1970's where those involved or suspected to be involved with the JVP were abducted, tortured (including sexual torture) and killed. During both these conflicts, male and female prisoners were raped, whereby male prisoners were forced to sexually abuse female prisoner during the JVP uprising.[15] Police in the South have been reported for these crimes, and some successful convictions have been obtained. In addition, narratives of conflict related sexual violence and torture against Tamils have been recorded by non-governmental institutions.[16]

9 Heleen Touquet, Unsilenced: Male Survivors Speak of Conflict Related Sexual Violence in Sri Lanka. Truth and Justice Project, 2018, Pg 11. Accessed 17 May 2021 https://itjpsl.com/assets/ITJP_unsilenced_report-final.pdf

10 Senanayake,S.M. "Reasons of female children for elope with boyfriends in Anuradhapura district of Sri Lanka". Sri Lanka: Medico-Legal Journal of Sri Lanka,, 5(1), 2017 5(1)), Pg 1

11 Centre for Equality and Justice. Rape and Sexual Violence in Conflict: Definitions Under Domestic and International Law. Colombo, Sri Lanka: Centre for Equality and Justice, 2018), Pg 9. Accessed 17 May 2021 http://cejsrilanka.org/wp-content/uploads/Rape-and-Sexual-Violence.pdf

12 World Health Organisation. Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence. Switzerland : World Health Organisation, 2013 pg 2

13 "Number of Complaints reported to 1929 Child Help Line" . Accessed 17 May 2021 http://www.childprotection.gov.lk/wp-content/uploads/2018/02/2020.2.24-1929-complaint-data-to-web.pdf

14 Heleen Touquet, Unsilenced: Male Survivors Speak of Conflict Related Sexual Violence in Sri Lanka. Truth and Justice Project, 2018, Pg 11. Accessed 17 May 2021 https://itjpsl.com/assets/ITJP_unsilenced_report-final.pdf

15 Heleen Touquet, Unsilenced: Male Survivors Speak of Conflict Related Sexual Violence in Sri Lanka. Truth and Justice Project, 2018, Pg 11. Accessed 17 May 2021 https://itjpsl.com/assets/ITJP_unsilenced_report-final.pdf

16 Sudath Silva v Kodituwakku (1987) 2 SLR 119)

Definitions for torture and cruel and inhumane treatment are found in both the 'United Nations Declaration on Torture' and the 'Convention Against Torture and Other Cruel and Inhumane or Degrading Treatment or Punishment'.[17] Article 11 of the Constitution of Sri Lanka[18] protects persons from torture and cruel and inhumane treatment with definitions from case law. However, reports detail the use of various forms of sexual violence as torture against suspected members or supporters of the LTTE to obtain 'confessions' during and after the war[19]; these survivors have not been able to seek redress by challenging the wrongdoers, thereby leading to impunity of the state and its actors.

The existing system's inability to grant protection to the victims and ensure redress and justice to the victims in conflict related rape and sexual violence is troubling. The sexual violence that arises in the aforementioned context is more heightened as compared to regular circumstances.[20] Due to the unsafe political sphere and lack of convictions, the official reports within the Island have been rare. The cultural stigma and the inability to speak about their experiences even with family members as well as a lack of accountability for offenders has forced the survivors into silence., therefore making it difficult for them to challenge the injustice they faced and leading to further impunity. The consistency within documented narratives and the pattern that isrevealed has brought the existence of unwritten policy to light.[21]

However, in reaching out to these victims and creating a safe space to speak out, support organizations and researchers have helped bring out the injustice and have highlighted the impunity. In some cases, this has provided the first opportunity for these survivors to speak out about the crimes committed against them.

2.2 Cases of rape perpetrated by private persons (non-state)

Some offenders of rape and sexual assault against women and children include the military; government officials and close associates of the ruling hierarchy, soldiers, monks[22] and civilians[23]. Even though some of the cases involving the above parties were prosecuted with offenders receiving sentences, delays in the justice system; political interference; and institutional prejudice, among other factors have made the battle for justice harder for these survivors and victim's families. Further, sentences received after immensely delayed trials have been appealed and justice seems to be short lived for many victims who have fought relentlessly, often breaking cultural barriers and stigma.

The challenges thrown at survivors and victims of sexual offences, include 'character rape' during trial as well as lack of cooperation and sensitivity from the authorities, as discussed further in the report. However, despite these vast challenges, some survivors and victim's families have fought for accountability and justice.

i. Vithya Sivaloganathan, an 18 year old Tamil girl from Jaffna district was abducted, gang raped and murdered on May 2013 in Pungudutivu, Jaffna district[24]. Nine suspects were arrested and two of them turned over to the state as witnesses. Attempts were made to transfer the case to Colombo. This was resisted in a 4 day protest, which was followed by a sit-in protest involving civil society organizations. The protesters handed over a letter to the Chief Justice calling for the matter to be taken up before a Tamil speaking bench[25]. Thereafter, the Attorney General ordered

17 Jayampathy Wickramaratne, Fundamental Rights in Sri Lanka, 2nd Edition. Sri Lanka: Stamford Lake Publication, 2017, Pg 207

18 The Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Article 11

19 Heleen Touquet, Unsilenced: Male Survivors Speak of Conflict Related Sexual Violence in Sri Lanka. Truth and Justice Project, 2018, Pg 24 and 36. Accessed 17 May 2021 https://itjpsl.com/assets/ITJP_unsilenced_report-final.pdf

20 Centre for Equality and Justice. Rape and Sexual Violence in Conflict: Definitions Under Domestic and International Law . Sri Lanka: Centre for Equality and Justice, 2018, Pg 16

21 Heleen Touquet, Unsilenced: Male Survivors Speak of Conflict Related Sexual Violence in Sri Lanka. Truth and Justice Project, 2018, Pg 44. Accessed 17 May 2021 https://itjpsl.com/assets/ITJP_unsilenced_report-final.pdf,

22 "12 year Old Girl Child Gang Raped: Police on the Hunt for a Buddhist Monk". Colombo Telegraph. 30 July 2016 https://www.colombotelegraph.com/index.php/12-year-old-girl-child-gang-raped-police-on-the-hunt-for-a-buddhist-monk/

23 Kingsley Karunaratne. "What a rape case says about Sri Lanka's legal system" . UCA News 22 April 2016 https://www.ucanews.com/news/what-a-rape-case-says-about-sri-lankas-legal-system/75834

24 Ananth Palakidnar. "Vithya Sivaloganathan rape and murder case was the first ever Trial at Bar conducted by High Court in Jaffna". Accessed 17 May 2021 http://dbsjeyaraj.com/dbsj/archives/55579

25 "Vidya murder: Protests continue" .Sri Lankan

the Kytes Police to file an indictment in the Jaffna High Court. Vithya's family was present in Court during the fight for justice. Her mother also made public statements about her relentless fight for accountability, as well as setting an example and warning message to other perpetrators. The other 7 accused were convicted of murder, abduction and rape in September 2017[26], after approximately 2 and a half years, and were eventually sentenced to death by the Jaffna High Court along with a 30 year rigorous imprisonment. The 2nd 3rd, 5th, 6th and 8th accused received a fine of Rupees 40,000 (USD 203), whilst the 4th and 9th accused received a fine of Rupees 70,000 (USD 355), along with an order to pay 1 million rupees (USD 508) in compensation each to the parents. However, despite the family's brave and relentless battle and victory, an appeal was filed in the Supreme Court and the matter was fixed for support on May 19th.[27]

ii. Vishwamadu, a town located in Kilinochchi district in the North of the country witnessed the gang rape and sexual assault of two women who were returning home from an Internally Displaced camp in July 2010. The two women had been visited by 4 men of the armed forces, who later returned at night and committed the crimes after assaulting their children. The Police initially refused to record the victim's complaint and sent her to the military police. The military police then offered her money to stay silent about the attack. The rape victim denied the police's offer. She was then held in military custody until the police arrived and accepted the official complaint. Human rights activist, Shreen Saroor, who has worked intensively with victims of torture; domestic violence; and other types of abuse states that hundreds of military men were brought to the identification parade in an attempt to confuse the survivor and keep her from correctly identifying the perpetrators. However, the survivor identified all 5 offenders. Magistrates proceedings were instituted in Kilinochchi and thereafter, an indictment against all the identified perpetrators was filed in the Jaffna High Court under case no 1569/12. The four soldiers were released on bail. One absconded and the trial was conducted in absentia.[28]

Human rights organizations such as the Women's Action Network and activists as previously noted, played a significant role in supporting the survivors in their fight for justice and accountability. There was also significant community involvement, as well as public outcry and support to protect the survivor's identity. Saroor recalls mobilizing masses of women who accompanied the survivor to court in similar attire to protect her identity from the public and the media. She also recalls severe emotional torture inflicted on her, including attempts by the military to shame her and her child within society, as well as efforts to break apart her family; who was her main support system. This attempt spread to her extended family, friends and neighbours and led to her losing support from those who had once stood by her, she was eventually subjected to stigma, shame and ostracisation.

The fact that the perpetrators were part of the military means that they had greater access and methods of intimidation, as previously demonstrated. She also revealed the difficulties faced by the survivor as a result of the court procedure; including a public display of the undergarments worn by the victim at the time of her assault. She also noted massive delays in the trial, which in turn prolonged the intimidation and trauma of the crime and her fight for justice.

However, despite the long, relentless battle of the resilient survivor and those around her, the judgment was subsequently appealed and the accused were acquitted following a judgment on the 10th October 2019. The acquittal in itself has led to impunity and a major setback to the survivor or and was a major setback to the progress. The survivors did not appeal the conviction.

iii. Rita, a 17 year old Malaiyaha Tamil (Up country Tamil) girl was raped in Thalawakele in the Nuwara Eliya district in August 2001. The survivor immediately complained to the police, however, there seemed to be a delay in the action taken by

Mirror. Accessed 17 May 2021 https://srilankamirror.com/news/3099-vidya-murder-protests-continue-video

26 Newsfirst Sri Lanka. "Justice for Sivaloganadan Vidya". Youtuve Video, 6.50, 27 September 2017 https://www.youtube.com/watch?reload=9&v=mCaA7Scr1wc

27 Lakmal Sooriyagoda. "Appeal by 7 accused fixed for support". Daily News. 7 December 2019 https://www.dailynews.lk/2019/12/07/law-order/205057/appeal-seven-accused-fixed-support

28 Vishwamadu Military Rape Case: These Crimes are not Committed by the Military Alone, Accessed 7 June 2021. https://srilankabrief.org/?s=These+Crimes+are+not+Committed+by+the+Military+Alone.

the police, indicating potential impunity. A public protest was held in the locality with the involvement of human rights activists and clergies, after which investigations began. Thereafter, criminal proceedings were instituted in the Magistrates court and, an Indictment was filed in the High Court of Kandy in October 2006; following this, the accused were given bail. (Case no. HC 57/2007).[29] The case was then transferred to the Nuwara Eliya High Court in October 2009. During the course of the two trials, the Judges were recorded as absent on multiple dates resulting in the postponement of the case[30]. In one of the High Court trials, the judge observed that the evidence had been mishandled by the police. The first witness, the survivor, was called to give evidence in 2011, almost 11 years after the crime was committed. The entire trial lasted a period of 14 years at the end of which the Nuwara Eliya High Court[31] sentenced the accused to 23 years imprisonment. Here, the common law principle that 'Justice delayed is justice denied' springs to mind.

Human Rights Activists, Human Rights Office (Kandy); a few church leaders; the victims grandfather; family and friends supported the victims throughout this period by organizing protests, accompanying her to court; providing protection when needed; as well as giving economic and psychosocial support,; and remaining a constant source encouragement in her pursuit for justice. The immediate and brave action taken by the girl in notifying the authorities and continuing to fight for justice, even after marriage and starting a family of her own, helped ensure accountability and justice.

iv. Divya, a 13 year old Malaiyaha Tamil girl in Matale district was raped in November 2007. Criminal proceedings were filed following support from her immediate family including her grandmother and her uncle. The child is reported to have been further victimized by the police during interrogation. Following a report from the Judicial Medical Officer confirming her account of the accused's conduct, she was released from hospital and brought to Kandy by the Human Rights office (HRO) staff for counselling, protection and for security. Thereafter, she was housed by the HRO in Ambepitiya in the Kalutara district while activists and clergies supported her in continuing her education, while ensuring she had access to legal aid. After a 5 year battle, the accused were convicted of rape in May 2012 by the High Court of Kandy and sentenced to 20 years rigorous imprisonment along with a 5,000 fine, and 100,000 compensation to the survivor. The survivor was reported to have been under the protection of the HRO even after the judgement was granted.[32]

v.Matara, a town in the Southern region of the Island witnessed the repeated gang rape of a 12 year old Sinhalese girl in July 2016. The Officer in Charge (OIC) of the Bureau had stated that the child had been raped by 9 men, taken to a different location and further raped by more men. Following this, she fled to a known temple for refuge where she was raped by the monk. Complaints were filed by the child's family on the 10th of July, and she was subsequently found by the Matara Police's Children and Women Bureau after approximately 11 days. Action had thereafter been instituted, however, according to last known reports, the monk had gone into hiding.[33]

vi.Kesara Kahandaliyanage, a 23 year old Sinhalese autistic boy was repeatedly raped by 4 fellow employees while at work as a cook at the Green Cabin Pepiliyana in the Colombo District, in 2015. A complaint was lodged with the police with the support of the family of the survivor .The Government medical officer confirmed the sexual abuse.[34] The 4 perpetrators were then arrested and brought before the Gangodawila Magistrates Court and released on bail after 3 weeks. The mother of the boy had relentlessly attempted to contact the Managing Director of the restaurant

29 Kingsley Karunaratne. "What a rape case says about Sri Lanka's legal system" . UCA News. 22 April 2016 https://www.ucanews.com/news/what-a-rape-case-says-about-sri-lankas-legal-system/75834

30 Basil Fernando. " Sri Lanka: Deterioration of the legal intellect :The rape victim who got hell of a Justice", Accessed 17 May 2021 https://countercurrents.org/fernando080615.htm

31 Ruki Fernando. "Solidarity Acrions and Struggles for Justice in Sri Lanka". Accessed 18 May 2021 https://groundviews.org/2015/12/30/solidarity-actions-and-struggles-for-justice-in-sri-lanka/

32 "Historical Judgement, Trial Conducted within 14 days". Sri Lanka Guardian. 3 June 2012 http://www.srilankaguardian.org/2012/06/historical-judgment-trial-concluded.html

33 "12 year Old Girl Child Gang Raped: Police on the Hunt for a Buddhist Monk". Colombo Telegraph. 30 July 2016 https://www.colombotelegraph.com/index.php/12-year-old-girl-child-gang-raped-police-on-the-hunt-for-a-buddhist-monk/

34 "Abuse of an Autistic youth". Daily Mirror Online. 16 Sepetmber 2015 http://www.dailymirror.lk/87599/abuse-of-an-autistic-youth

on multiple occasions, who initially refused to speak to her and ignored her requests to meet. A further step towards impunity was the human resource department and the managing director's claims that no such incident had happened before. This was further cemented by a statement by the managing director where he stated that, 'there is some doubt in my mind that this rape occurred in our premises, ' thereby attempting to cast doubt on the boys complaint. The survivors sister's outcry on social media brought about massive social media support, which led to a public protest being held outside the Green Cabin, alongside the brave survivor who turned up with a placard.

vii. The Mannar Rape: two Tamil mothers staying at a lodge in Mannar in the Northern Province, were taken by a special investigative unit of the armed forces, forced to give a confession statement in the Sinhala language and brutally tortured. One of the mother's was brutally raped in front of her child. Activists arrived at the location, but were denied access to them by the Police. The Bishop of Mannar was then contacted and he accompanied the activists to the police station. He was then allowed to speak to the women who stated that they had been sexually assaulted. Thereafter 15,000 women were mobilized for a public protest, which impeded the police's ability to hide or deny the incident. The survivors were then sent to the Judicial Medical Officer accompanied by the activists. A case was thereafter filed in the Mannar court. The protest that began in Mannar, gained momentum and spread to other parts of the North and East, thereby pressuring the police. An NGO helped in protecting the women, while, the case dealing with Tamil women with written confessions of being affiliated to the LTTE was transferred to Anuradhapura, a Sinhala majority area, on the basis of security and protection for the Special Unit. Following this, the women were severely threatened and one woman disappeared. One of the mothers continued to appear in the Anuradhapura Court, but the case was finally closed as the intimidation and threats towards her were too great. A Special Commission was appointed by the then President Chandrika Bandaranayake; the commission was approached by activists seeking justice for the survivors. However, there is remains no available information on any justice in this incident.[35]

35 Based on Interview with a Human Rights activist

viii. Gender and religious discrimination and impunity

This section briefly examines the struggles of challenging impunity by survivors of gender based violence by the LGBTQ+ community (Lesbian, Gay, Bisexual, Transgender, Queer +) in Sri Lanka, as well as the impunity of those who violate their rights, which often includes the police and their own families.

Despite Article 12 (1) of the Constitution,[36] which calls for the provision of equal protection of all persons, Section 365 and Section 365(a) of the colonial Penal code (as amended)[37] leads to victimization through its criminalization of homosexuality. Further, societal and cultural values and perspectives have in effect created a systemic problem of: discrimination; humiliation; torment and a lack of access to equal protection of the law by those belonging to the LGBTQ+ community in Sri Lanka.[38] Further, the vaguely worded Vagrancy Ordinance is used by the Police to arrest transgenders and homosexuals, most of whom are from the lower socio economic group. The affluent and elite face lesser extents of harassment.[39]

In Sri Lanka, observations have revealed that homosexuality and related stigma are not largely associated with men, and only arises when gay men express femininity, or when they are transfeminine.[40] Police abuse towards transgender women has included verbal; physical and sexual abuse; theft of their valuables; and a discriminatory approach to handling their complaints of crime and victimization. Other forms of abuse include: unwarranted arrests and harassment; asking victims to dance for them inside the police station; derogatory name calling; as well as physical abuse. Notably, transgender women report that a large portion of the reported abuse tends to happen in

36 The Constitution of Sri Lanka 1978, Article 12 (1)

37 The Penal Code of Sri Lanka 1995, Section 365, Section 365(a)

38 Rebecca L. Stotzer, Bias Crimes Based on Sexual Orientation and Gender Identity: Global Prevalence, Impacts, and Causes, Handbook or LGBT Communities, Crime, and Justice . New York: Springer, Science and Business Media, 2014.pg 56 - 58

39 Vagrancy Ordinance of 1842

40 Andrea J Nicholes, Intersections of Gender and Sexuality in Police Abuses Against Transgender Sex Workers in Sri Lanka,Handbook or LGBT Communities, Crime, and Justice. New York: Springer, Science and Business Media, 2014, pg., 167

settings of their sex work. These individuals endure further suffering due to due to police stealing their money[41].

Victim's narratives reveal that the police refuse to register their complaints, and that in some cases, the police sexually exploit them further. Reports further reveal that there is unequal punishment for clients and sex workers when transgender sex workers are 'caught' engaging in sex work by the authorities. The former are rarely arrested, and may even escape with a meagre fine,[42] despite the fact that providing and receiving sex work are both criminalized.

2.3 Impunity Arising from the Muslim Marriage and Divorce Act 1951[43]

The recent past has seen calls for reforms of the Muslim Marriage and Divorce Act (MMDA). The MMDA comprises religious principles together with interpretation and Islamic tradition. A few of the concerns raised include the fact that the MMDA has no provisions for alimony, and no guidelines to calculate maintenance, where spouses are separated or divorced. It also allowed for the un-Islamic practice of dowry (i.e. where some form of property is given by the bride's family in contemplation of marriage), despite Mahr (whereby, the groom gives property to the brides family when contemplating marriage) being the accepted conduct under Islamic tradition. A major concern is the absence of a minimum age of marriage and no requirement of consent of the bride to be married. In case of marriage of a girl below the age of 12 years, permission is required from a Quazi (Judge of the Quazi Court which governs matters within the MMDA), yet the penalty imposed for failure to do so, is gravely insufficient despite the fact that it is a criminal offence.

Further, there are unequal provisions for divorce for men and women, whereby, it is it more difficult for a woman to file for divorce, whereas filing tends to be a smooth process for the husband. Even though divorce by consent is possible, the wife will not be entitled to financial support if she initiates the divorce. The Act also provides for polygamy despite it being an offence under the general laws of Sri Lanka, and despite the ideals of 'equality and freedom from discrimination' being guaranteed to all as a fundamental right under the Constitution of Sri Lanka[44].

The Quazi Court system has also been subjected to severe criticism due to the mistreatment of women within the courts and by the Quazi themselves[45]. The MMDA does not allow women to be Quazi's, nor does it require a Quazi to have a legal background, minimum educational qualifications. or expertise in the field. There are also calls for reform due to the poor monitoring system and lack of accountability. Further, accounts have shown the existence of Summary justice (i.e. vigilante justice by the community) for offences such as rape and incest. Despite having no provision for Hadd (flogging as punishment for adultery), accounts have shown its use before four men from the mosque federation whereby victims receive 100 flogs if unmarried, and 110 flogs if married. There is no provision in the MMDA that allows individuals to opt out of the MMDA, even though other countries have made such provisions.

The Muslim women, the Muslim Personal Law Reform Action Group as well as other activists and organizations have played a large role in demanding reforms[46] to the MMDA, and putting forward recommendations, while working with victims and survivors of abuse to mitigate the lack of provision in the MMDA.

Case Studies

i. A woman of a minority Muslim sect who was married to a man of the same community experienced physical and emotional abuse and

41 Andrea Nichols, Dance Ponnaya, "Dance! Police Abuses Against Transgender Sex Workers in Sri Lanka". Feminist Criminology, 5(2), pg. 196

42 Andrea J Nicholes, Intersections of Gender and Sexuality in Police Abuses Against Transgender Sex Workers in Sri Lanka,Handbook or LGBT Communities, Crime, and Justice. New York: Springer, Science and Business Media, 2014, pg. 171 - 173

43 Hyshama Hamin., Hasanah Isadeen. Unequal citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka, 2016. Accessed 17 May 2021 https://mplreformsdotcom.files.wordpress.com/2016/12/unequal-citizens-study-hyshyama-hamin-hasanah-cegu-isadeen1.pdf

44 Constitution of Sri Lanka Article 12 (1), (2)

45 "Lived realities of Sri Lankan Muslim Women". MPLRAG. Accessed 17 May 2021 https://mplreforms.com/cases/

46 "Muslim Women's Demands on reforms to the Sri Lankan Muslim Marriage and Divorce Act (MMDA)"MPLRAG. Accessed 17 May 2021 1951https://mplreforms.com/2017/04/04/muslim-womens-demands/

controlling behaviour from her husband. No longer able to bear the abuse, she decided on to seek a divorce. However, she was unable to obtain a fasah divorce under the MMDA, as the law required her to obtain her husband's consent for a divorce. Her husband refused to grant her a divorce, solely because he could do so. She was therefore forced to be married to him for a further 3 years, after which she was able to obtain a divorce. During this time, she received strong support from her family; community; and religious leaders who put immense pressure on her husband.[47]

ii. A married mother of two children aged 3 years and 11 months faced severe difficulties due to financial neglect by her husband who had a second wife. Upon seeking support from the local Quazi judge. She was told, to 'go home to your children, squeeze their necks and kill them but don't come asking for maintenance. ' The woman then sought assistance from the District Secretariat who had a reputation of providing community assistance during mediation cases. The Secretariat had informed the Quazi to investigate the matter. However, upon her next visit, the Quazi informed the mother that he would not allow the woman to receive any maintenance from her husband.[48]

iii. A 14 year old girl who was forced to stop school and get married, sought a Fasah divorce after a few months of marriage due to severe sexual torture by her husband. The Quazi chose to interrogate the child for over two hours demanding detailed description of the sexual violence. This caused further psychological trauma which led to depression and caused her to attempt suicide.[49]

Rashmi, a human rights activist and lawyer that has worked with those disadvantaged by the Muslim Marriage and Divorce Act stated that the Quazi Court system in itself is not well regulated under the Judicial Service Commission. She also stated that Quazi judges who are appointed, are in many instances, known by those making the appointments. This creates a sense of security for Quazi judges, irrespective of their actions or inaction, even in cases where they may refuse to grant maintenance or enforcement orders. Rashmi narrated a case of over 60 complaints being made to the JSC against an identified Quazi, whose appointment was renewed despite the dissatisfaction. The said Quazi, she says, also has a reputation of not issuing enforcement orders in maintenance actions, which in effect means that husbands are fairly certain that they do not need to practice paying maintenance. This contributes towards impunity for any corruption related issues, and for those who are protected by the Quazi (including Husbands).

Rashmi also stated that an RTI (Right to Information) had been filed to obtain information about the complaints that had been filed against Quazi's and, the action that had been taken. Following this, the JSC doubled down on why the requested information should not be released to the public. Rashmi noted the challenges in sharing information with the public as far as complaints made and subsequent action taken. She also highlighted the absence of transparency, and proper oversight, which also contributes to impunity of those governed by the MMDA.

She also stated that survivors and victim's families have only challenged impunity in very rare instances as they struggle to find a sliver of justice in their own individual cases, as a result of the issues and injustice caused by the MMDA. (See above)

47 Hyshama Hamin., Hasanah Isadeen. Unequal citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka, 2016. Pg. 16. Accessed 17 May 2021 https://mplreformsdotcom.files.wordpress.com/2016/12/unequal-citizens-study-hyshya-ma-hamin-hasanah-cegu-isadeen1.pdf,

48 Hyshama Hamin., Hasanah Isadeen. Unequal citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka, 2016.Pg 21. Accessed 17 May 2021 https://mplreformsdotcom.files.wordpress.com/2016/12/unequal-citizens-study-hyshya-ma-hamin-hasanah-cegu-isadeen1.pdf,

49 Hyshama Hamin., Hasanah Isadeen. Unequal citizens: Muslim Women's Struggle for Justice and Equality in Sri Lanka, 2016.Pg 21. Accessed 17 May 2021 https://mplreformsdotcom.files.wordpress.com/2016/12/unequal-citizens-study-hyshya-ma-hamin-hasanah-cegu-isadeen1.pdf,

Summary

The above case studies and interviews illustrate certain patterns of impunity. The involvement of military personnel and other members of the state seems to open windows of opportunity for greater intimidation of the survivors or victims' families. It opens windows for political interference against the protection of perpetrators creating a space for impunity to prevail. However, as evidenced, delays in the existing system for the protection of survivors and the upholding of justice, along with a lax approach and corruption by the authorities further contributes to a culture of impunity.

Cultural and societal norms and standards; insufficient awareness about gender and sexuality; as well as a lack of sufficient laws to protect those from the LGBTQ+ community has caused deep rooted systemic discrimination, as well as abuse and torture of this subset. Further, insufficient access to the general laws and fundamental rights to those of the religious minority has led to further gender-based violence, as well as a lack of proper access to legal remedies. Interviews with experts as well as observations from the aforementioned accounts have shown that support rendered by the survivors and victims' families, friends, clergies and human rights organisations have buttressed the survivors fight for justice and accountability. Protests, gatherings; accompanying the survivors to the relevant authorities; and being a point of contact for those affected, have in many cases, proved successful in expediting delayed processes as well as rendering emotional and moral support.

chapter three

ENFORCED DISAPPEARANCES

Sri Lanka is considered to be a country with the highest level of forced disappearances in the world 'with a backlog of 60,000 to 100,000 alleged disappearances' occurring 'since the late 1980s' as a result of political insurgencies and the war. Today, thousands of family members of disappeared persons which includes 'mothers' movements' in the North and South of Sri Lanka have been struggling for justice, which has proved to be futile. However, it is worth noting that, there have been some statutory and implementation procedures such as different Commissions and the Office of Missing Persons, even so, state related impunity in terms of enforced disappearances prevails. Thus, the families of disappeared people continue to challenge the country's systematised authority via the Sri Lankan judiciary system and other international tribunals.

Sri Lanka has been a state party to the International Convention for the Protection of All Persons from Enforced Disappearance since 2015. Act No. 5 framed in 2018 ensures the right to justice and reparation to victims of enforced disappearance which is compatible to the Convention.

In terms of statistics, it is difficult to find disappearance related data in government sources, however, the police department has a mechanism of reporting annual statistics on grave crimes. The key categories in these statistics are: abduction; homicide; rape; arson and kidnapping. Therefore, in order to explore data on disappearances, this research relies on multiple sources, including annual statistics by the police department in Sri Lanka.

Table 1: Abduction and kidnapping cases in Sri Lanka from 2010 to 2019.

Abduction

Abduction	2010 (Reported as Abduction/ Kidnapping)	2011 (Reported as Abduction/ Kidnapping)	2012 (Reported as Abduction/ Kidnapping & only the 1st quarter)	2013 (Reported as Abduction/ Kidnapping)	2014 (Reported as Abduction/ Kidnapping)	2015		2016		2017		2018		2019		Total
						Abduction	Kidnapping	Abduction	Kidnapping	Abduction	Kidnapping	Abduction	Kidnapping	Abduction	Kidnapping	
Cases Recorded	897	1012	293	1087	1036	725	246	738	297	647	251	753	260	663	212	9117
Mistake of Law fact	16	20	7	16	11	3	6	4	9	2	10	2	11	0	5	122
Complaint Designedly False	4	7	1	4	6	1	4	3	6	1	1	0	5	1	2	46
Total True Cases	877	985	285	1067	1019	721	236	731	282	644	240	751	244	662	205	8949
Complaints Filed	217	202	25	229	249	164	81	180	96	160	100	158	93	163	62	2179
Accused Unknown	86	75	30	99	54	32	21	19	15	16	8	14	9	18	8	504
Otherwise Disposed Of	13	15	3	14	28	6	4	5	9	7	4	8	5	9	11	141
Ending in Conviction	32	27	3	27	31	16	9	28	8	20	4	17	8	11	2	243
Ending in Discharge Acquitted	3	4	1	1	0	3	1	1	2	2	2	0	0	0	1	21
Total Disposed	134	121	37	141	113	57	35	53	34	45	18	39	22	38	22	909
Investigation Pending	549	676	229	669	613	447	130	463	171	406	131	539	139	445	133	5740
Pending in MC	169	156	17	187	190	139	67	146	77	131	90	133	80	143	48	1773
Pending with A.G.	25	32	1	70	103	78	4	69	0	62	1	40	3	26	2	516
Pending in DC/HC	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Total Pending	743	864	284	926	906	664	201	678	248	599	222	712	222	624	183	8076

Source: Crime Statistics by Sri Lanka Police

A report of the OHCHR Investigation on Sri Lanka (OISL) - 2015 states that amongst the 76 disappearance cases documented by International Truth and Justice Project between 2015-2017 (and in one case in 2018 and 2019), a vast majority of victims were abducted and detained illegally without their families knowing where they were.'

Technically, these count as disappearance cases despite the fact that the victims have now been released on ransom payments. There has been no instruction to security services to stop this practice. Instead, there has been widespread denial that this still occurring"[50].

Based on the interpretation that a 'vast majority of victims were abducted and detained illegally,' the research will present cases of abduction from 2013 to 2019, which will be compared with random data on disappearances as highlighted in: different UN reports; documentation from different organisations; media accounts and government statements. The intention of exploring these trends is to identify the success and failure related to combatting impunity in cases of disappearance by the families of disappeared persons. In early 2000 'Sri Lanka's president [Gotabaya Rajapaksha] … acknowledged for the first time that more than 20,000 people who disappeared during the country's civil war are dead'[51]; which is a serious statement considering the fact that thousands of families of disappeared persons are waiting for 'justice' and to hear 'truths' about the fate of their loved ones through a proper judicial mechanism.

Table 1 indicates that out of 8,949 cases of abductions and kidnapping, complaints were filed only for 2,179 cases. From this number 243 cases have ended in conviction (11%), while 21 cases ended in acquittal (0.96%), whereas 909 cases were disposed of. However, it is not clear what the number of enforced disappearances are among these cases. In a report published by International Truth and Justice Project, it is estimated that around 500 Tamil civilians disappeared in the custody of the Sri Lankan army around 18 May 2009, during the last phase of the war. It is also important to note that, no information on grave crimes in 2009 are reported in the repository of 'crimes statistics' by the Sri Lankan police. However, the Working Group on Enforced or Involuntary Disappearances of Commission of Human Rights in Sri Lanka has reported 6,030 cases of enforced or involuntary disappearance between 1980 and 2019, with general allegations transmitted. This number is reported as the second highest number in this report, where Iraq reports the highest global number of cases which is 16,420.

In discussing the: massive backlog of unresolved disappearance cases; a decade of impunity and the alleged disappearances by state agents including Sri Lankan police; armed forces; paramilitary groups; and non-state actors such as the LTTE, Amnesty International's report titled 'Only Justice Can Heal Our Wounds' gives a detailed account of the struggle of loved ones of disappeared persons. 'Having ratified the International Convention for the Protection of All Persons from Enforced Disappearance in May 2016, Sri Lanka has expressly committed to ensuring that no one will be subject to enforced disappearance and to take all appropriate measures to search for, locate and release victims and, in the event of death, to locate, respect and return their remains to their families'. A news report published by Human Right Watch on 2nd of February 2020, reported that families of disappeared persons are threatened. The report further states that 'Sri Lankan security forces and intelligence agencies have intensified surveillance and threats against families of victims of enforced disappearance and activists supporting them.'[52]

Based on the 'Only Justice Can Heal Our Wounds report'; cases reported by International Truth and Justice Project (IJTP,) court proceedings; and some other resources such as Janasarana, the following cases are analysed in depth to understand how the families of disappeared persons challenge impunity in Sri Lanka.

50 Amnesty International. "ONLY JUSTICE CAN HEAL OUR WOUNDS" LISTENING TO THE DEMANDS OF FAMILIES OF THE DISAPPEARED IN SRI LANKA" . London, UK: Amnesty. Accessed 17 May 2021 https://www.amnesty.org/download/Documents/ASA3758532017ENGLISH.PDF

51 "Sri Lanka Civil War: Rajapaksa says Thousands Missing are Dead". BBC. 20 January 2020 https://www.bbc.com/news/world-asia-51184085

52 Human Rights Watch. "Sri Lanka: Familes of Disappeared Threatened" . Accessed 17 May 2021 https://www.hrw.org/news/2020/02/16/sri-lanka-families-disappeared-threatened

Cases

i. The Embilipitiya Abduction and Murder Case of 1989/1990: This is a significant case which led to the conviction of a principle and six army personnel to 10 years of rigorous imprisonment for abduction with an intention to murder of 25 Sinhalese school children in grades 10, 11 and 12 in Ratnapura High Court.[53] Initially, impunity prevailed due to the inability of the police to handle the case adequately as was evidenced by the refusal to take down complaints; the distortion of complaints; omissions in recording vital matters; the 'no action' attitude of the local police; and the partition approach of some Crime Investigation Department officers[54]. Fear psychosis, prevalent among people during this specific time period because of the political situation in the country and the forceful or deceitful manner in which victims were taken away from parents were other contributing factors. Additionally, some common law legal principles were ignored in this case, for instance, despite the fact that 'in several habeas corpus applications that were examined in the Court of Appeal, the Court specifically recommended that the respondents in the cases who were found responsible for enforced disappearance should be prosecuted', however, 'these directions went unheeded.' Failure to hold an identification parade; inadequate sentencing; influence of military hierarchy; marginalisation of victims; bypassing of victim's concerns by prosecutorial process; and difficulty in proving the establishment of secret detention are other highlights of impunity.[55]

The struggle of victims and their families is significantly important in this case. It is reported that some survivors who escaped from the brutality became witnesses in this case. Most importantly, family members (especially mothers) introduced themselves as strong witnesses as they were present at the scene of abduction of their children. Information provided by these family members was considered solid evidence. Other initiatives such as the 'Association of Disappeared School Children of Embilipitiya' led to protracted outcry with media, political and international traction. However, this case was highly politicised during the relevant period. Certain politicians pledged justice for the victims which allowed them to win public interest in their political campaigns. Report of Western, Southern and Sabaragamuwa Disappearances Commission (1994) and the annual report of Human Rights Task Force (1992) played an important role, including in recommending a full-scale investigation.

ii. The abduction and disappearance of 11 men including youths in 2008 to 2009 in Kotahena and the suburbs in Colombo remains an ongoing case in which 14 navy personnel were accused as perpetrators, including former Navy Commander and Admiral of the Fleet, Wasantha Karannagoda and Lt. Commander Sumith Ranasinghe. This case following a Habeas Corpus Application (2011) and an appeal is also considered by the Presidential Commission of Inquiry subjected to political victimization being named as perpetrators for the relevant case to justify human rights violation. In July 2020, an interim injunction was issued by the Court of appeal, thereby preventing further action. This followed a petition filed by Wasantha Karannagoda, after the Attorney General who filed objections and the Court ordered the case to be called on 4th of December 2020.[56] The parents of the disappeared children claimed that the aforementioned commission was advantageous to the perpetrators.[57] Prevalence of impunity in security forces; the Criminal Investigation Department struggling to reach the naval officers for questioning; political interventions; threats to the lawyer representing the victims and their family members; prolonged delays; and an instance of 'one of the judges hearing the case recusing himself, based on conflict of interest as a private lawyer' are observable in this case.

That being said, there has been some level of media interest, political interest and supportive international influences regarding this case. The families of the victims as well as the legal representatives of victims have been challenging the impunity via constant and unceasing

53 Information derived from the Law Report 2003, Embilipitiya Case

54 Kishali Jayawardena. "Post-war justice in Sri Lanka". Accessed 17 May 2021 http://www.humanrights.asia/resources/rule-of-law-sri-lanka/post-war-justice-in-sri-lanka/

55 Law Report 2003, Embilipitiya Case

56 Zulfick Farzan. "Case against Wasantha Karannagoda and 13 others postponed". News First. 24 July 2020 https://www.newsfirst.lk/2020/07/24/case-against-wasantha-karannagoda-and-13-others-postponed/

57 https://www.youtube.com/watch?v=XZV10EQ7FZ8

engagement in the legal process, even though they have been subjected to state violence. The case has been prolonged due to clashes between the impunity in security forces and the judiciary[58] including supreme court lawyer Achala Shanika Seneviratne, who has been subjected to death threats, intimidation and online harassment for representing victims. Though she has lodged two complaints with the Criminal Investigation Department, no legal action has been taken for the complaint[59]. The victims' loved ones have been facing an immense level of injustices such as: being mistreated, having their complaints ignored multiple times even after risking their lives to save their children from kidnappers; and lawyers being reluctant to represent their case. Even so, they have been amplifying their voices through mediums such as. press conferences, thereby refusing to let the case be swept under the rug.

iii. The Navatkuly disappearances is an ongoing court case with an Habeas Corpus Application of the enforced disappearance of 25 Tamil youth from Navatkuli, Jaffna in **1994**, which was committed by state security forces (i.e. the Army). Institutionalised impunity within security forces; violation of human rights by the state during the conflict; and harassment and intimidation directed against those who are involved in the case (including the victims' families) remain prevalent in this case. Incidents such as whereabouts of the abducted youth were not reported to the Gramasevaka (village head). Attorney General appearing for the then Lieutenant General and now Major General Duminda Kepetiwolana is alleged to have been directly responsible for the disappearances as officer-in-charge of Navatkuli Army Camp. The Jaffna High Court dismissed the objections by ruling that the AG's department could appear for the respondent[60] (Tamil Guardian).

An assistant to one of the petitioners in a Habeas Corpus was brutally attacked but the police refused to accept the complaint.

Kumaravadivel Guruparan, a human rights lawyer appearing for this case stated that he cannot practise as a lawyer due to instigation of the alleged perpetrators, the army. Organisations such as Front Line Defenders urged the relevant authorities to revoke all restrictions by "guarantying the safety of Kumaravadivel Guruparan. All those involved in the Navatkuli Habeas Corpus case to take immediate steps to prevent any act of reprisal or intimidation against them" (as of 19th November 2019)[61]. Incidents such as family members who appeared for a court hearing military personnel intelligence discourage the formers' appearance or giving interviews for media.

iv. the Lalith and Kugan disappearance happened on 9th December ***2011*** when two human rights and political activists (i.e. Lalith and Kugan) from Jaffna did not return home a day before Human Rights Day. At the time, they were involved in documenting disappearances in the Northern Province. The current President, Gotabhaya Rajapaksha was named as the perpetrator of this case which is still on going in the Appeal Court in Jaffna, with a Habeas Corpus application.

Structural or systemic impunity; a lack of witness protection; and the perpetrator failing to appear before the court, citing personal difficulties and security threats in both instances where he was summoned were key issues in this case.

Lalith and Kugan have an affiliation with Frontline Socialist Party in Sri Lanka, and the latter has been at the forefront of this case, especially in terms of aiding in the legal process; holding protests[62]; speaking out; claiming justice; and condemning incidents such as the perpetrator's attempt at evading the Court[63]. During the day of Lalith and

58 Nirmala Kannangara. "Abduction of Tamil Youths Twists and Turns in Investigations". Daily Mirror Online. 21 August 2018 http://www.dailymirror.lk/expose/Abduction-of-Tamil-youths-Twists-and-turns-in-the-investigations/333-154315

59 Kithisiri Wijesinghe. "Sri Lanka: Female Human Rights Lawyer Facing Continuous Death Threats". JDS, 1 June 2020 http://www.jdslanka.org/index.php/news-features/human-rights/950-sri-lanka-female-human-rights-lawyer-facing-continuous-death-threats

60 " Sri Lankan Attorney General to appear in appear in court for army official accused of disappearance". Tamil Guardian. 4 April 2018 https://www.tamilguardian.com/content/sri-lankan-attorney-general-appear-court-army-official-accused-disappearances

61 Front Line Defenders. "Sri Lanka human Rights Lawyers Kumaravadivel Guruparan barred from practicing law". Accessed 17 May 2021 https://www.frontlinedefenders.org/sites/default/files/sri_lanka_-_ua_-_kumaravadivel_guruparan_-_13_nov_2019.pdf

62 Protest for Lalith and Kugan". Daily Mirror Online. 10 December 2012 http://www.dailymirror.lk/caption_story/protest-for-lalith-and-kugan/110-24157

63 "Military intimidates families of missing youth during Jaffna Court Hearing". Tamil Guardian. 17 May 2018 https://www.tamilguardian.com/content/military-intimidates-families-missing-youth-during-jaffna-court-hearing

Kugan's disappearance, Lalith's father received a number of threatening phone calls, which he reported to the Kosgama Police station. Although Kugan's family members filed a complaint about the disappearance with the Achchuveli Police Station in Jaffna on 10th December 2011, they were not given a complaint number. Lalith's father also filed a complaint with Kosgama Police Station in Colombo on 11th December, while with the International Committee of the Red Cross (ICRC) of which the complaint no: is LKC/432333. Parliamentarian Ajith Kumara also submitted a written complaint regarding the disappearance to the Secretary to the Minister of Defence Gotabhaya Rajapaksha on 10th December 2011. Additionally, parliamentarian Ajith Kumara and Lalith's father have filed two complaints with the National Human Rights Commission of Sri Lanka; the aforementioned complaints may be identified as HRC/3352/2011 and HRC/3934/11.

According to a report in 'Ground Views ', Kugan's wife saw a motorbike which Lalith and Kugan last used parked inside Achchuveli Police Station when she visited to collect a copy of her complaint on the disappearance. Upon her enquiry, she was told that the bike was initially found by the Kopai Police, on 13th December, parked near a Hindu temple in Kopai. However, Minister Keheliya Rambukwella former Cabinet Spokesperson told the media that 'Lalith and Kugan are not disappeared, they are there. '

The families of the victims and 'We Are Sri Lankans' (WESL), a student-based university organization aimed at promoting and protecting the rights of the Tamil, as well as the Movement for People's Struggle (MPS) believe that the Sri Lankan Army is responsible for the disappearance while organisations such as: Amnesty International; the Asian Human Rights Commission; the Sri Lanka Human Rights Centre and the Campaign for Free and Fair Elections (CAFFE) have expressed their concern regarding the disappearance[64] [65].

v. The disappearance of Prageeth Eknaligoda is an on going landmark case, due to the continuous struggle for justice by Prageeth's wife, Sandhya Eknaligoda since his disappearance in January **2010**. Prageeth, a journalist and a political cartoonist was first abducted in a white van and released in 2009 before his second abduction that led to his ultimate disappearance. Prageeth Eknaligoda's on-going case in the appeal court alleging 9 army intelligence personas being the perpetrators. Family members are continuously intimidated and harassed - especially Sandhya has been bullied being a woman fighting for justice. The state has been misleading the public by victim-blaming stating that Prageeth fled the country and that the case has been delayed due to attempts to withhold evidence.

Sandhya, was awarded the *International Women of Courage Award* by the US Department of State in 2017, for her activism especially in terms of disappearances in Sri Lanka. Sandhya is not only advocating for justice for her husband's case but also for thousands of victims in Sri Lanka, moreover she is collaborating with many organisations and individuals in her struggle. Sandhya's biography on the 2017 International Women of Courage Award states that 'as a result [of Sandhya's mission to fight for the families of the missing], her husband's case has become a barometer of the Sri Lankan government's ability to restore the rule of law and accountability to the United Nations Human Rights Council resolution it co-sponsored in October 2015.' The same write-up accounts that Sandhya has made 90 court appearances as of 2017, all while 'lending her voice to families of disappeared victims, regularly travelling to these areas at considerable personal expense to meet with families of the missing'… and 'offering them advice and encouragement.' Sandhya, was taken into custody for several hours when she went to lodge a complaint with the police. She believes her husband was abducted by the government because of his criticism of President Rajapaksa[66]. Amnesty International reports that Sandhya has been subjected to a 'barrage of hate, abuse, intimidation, harassment and death threats on social media; smeared as a supporter of the Liberation Tigers

64 Dharma Sri Abeyratne. "Gotabaya talking of democracy while evading court". Daily News. 30 Ocober 2019 http://www.dailynews.lk/2019/10/30/political/201374/%E2%80%98gotabaya-talking-democracy-while-evading-court%E2%80%99?page=63

65 "Disappearance of Human Rights Defenders and Political Activists Lalith Kumar Weeraraj and Kugan Murugan on 9th December 2011" Groundviews. 12 September 2011 https://groundviews.org/2011/12/19/disappearance-of-human-rights-defenders-political-activists-lalith-kumar-weeraraj-and-kugan-murugan-on-9th-december-2011/

66 U.S Department of State. "Biographies of the Finalists for the 2017 International Women of Courage Awards". Accessed 17 May 2021 https://web.archive.org/web/20170329032421/https://www.state.gov/s/gwi/iwoc/2017/bio/index.htm

of Tamil Eelam, an armed group proscribed in Sri Lanka, taunted with threats of disappearance, and even threatened with death and violence against her children.' In 2016 Buddhist nationalist monk, Galagodatte Gnanasara Thero threatened her outside the court building[67]. He was convicted and imprisoned in 2018 yet released in 2019 with Presidential pardon.

vi. Antony Ranjan : A 27 year old named Antony Ranjan was taken by the Navy officials in Oolaithoduwai junction, Mannar, and then taken to a Navy camp at Dharapuram. His wife Jaykumary filed a complaint with the Mannar police. During the magistrate's inquiry, the Navy denied having taken Ranjan into custody. In July 2008 TID officers searched her premises while 4 men with their heads covered waited in a jeep; at one point, one of the men lifted his cover in an act that revealed his identity as the victim. The Family has not seen him since. Anthony's wife filed a habeas corpus petition in the Mannar High Court bearing case No. HCV/Writ/3/15 supported by an affidavit by another, party who saw her husband's face while he was in the jeep. Navy Respondent's had not filed their Objections.[68]

Over the years, Kumaravadivel has emerged as a leading human rights activist for the disappeared in the north. Yet, a lack of protection for her from state perpetrators has led to disheartenment due to continuous threats and intimidation as well as the fact that justice seems to be elusive. [69]

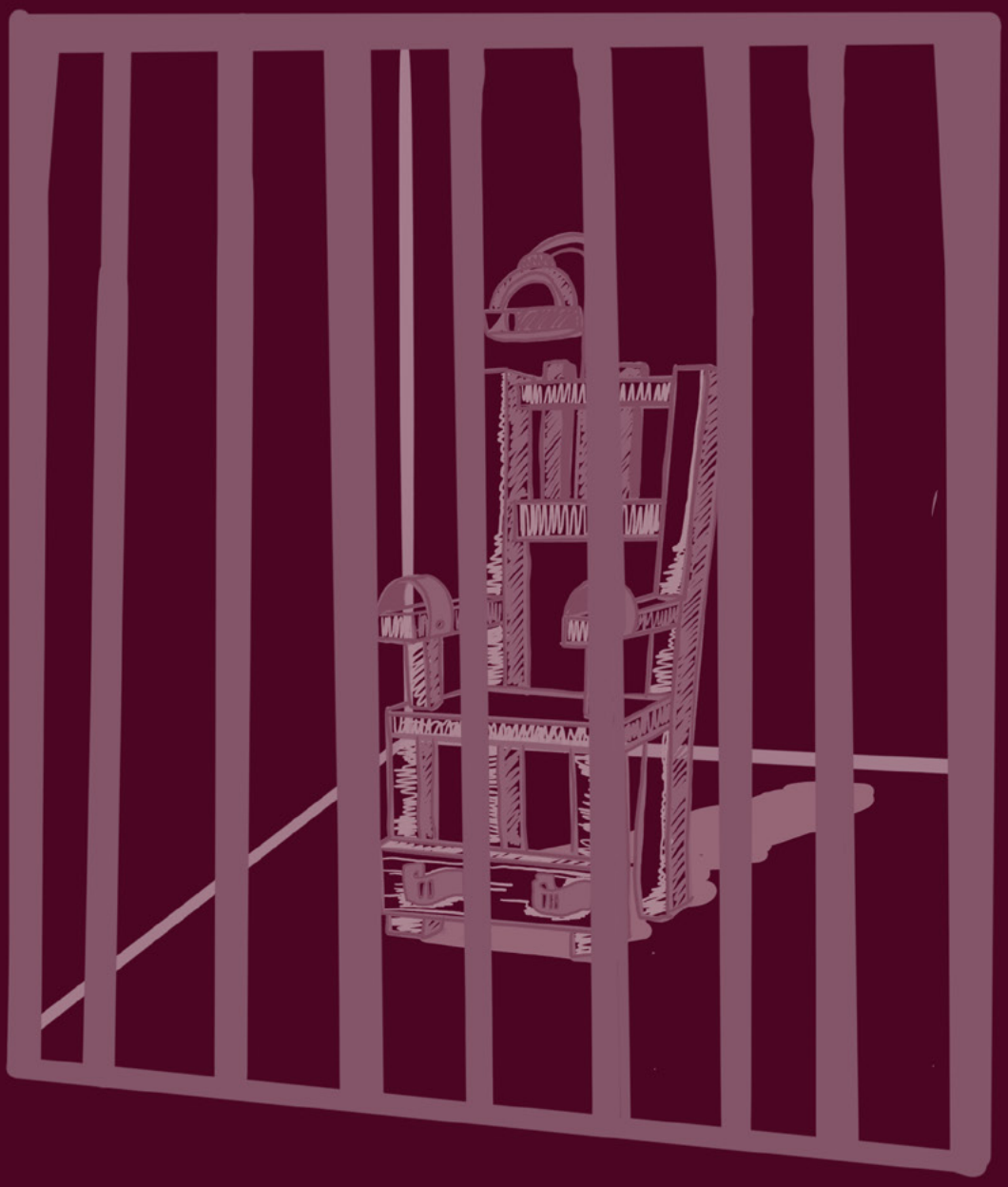
67 Amnesty International."Sri Lanka: Deplorable threats against human rights defender". Accessed 17 May 2021https://www.amnesty.org/en/latest/news/2018/06/sri-lanka-deplorable-threats-against-human-rights-defender/

68 Centre for Human Rights Development. "Enforced disappearances in Sri Lanka. Lessons from CHRD's Advocacy". Colombo, Sri Lanka: CHRD, 2015. Accessed 17 May 2021 https://srilankachrd.org/assets/book-a.pdf

69 Detained Tamil Campaigner held under PTA act by TID https://www.tamilguardian.com/content/detained-tamil-campaigner-held-under-pta-act-tid.

chapter four

TORTURE



In a Report to the UN Human Rights Council following a mission trip to Sri Lanka, the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment revealed that he was "extremely alarmed that the investigations into allegations of torture and ill-treatment are not investigated". The report further states that there are a vast number of documented cases of torture. Explaining the culture of impunity in terms of torture in Sri Lanka, it is highlighted that there are no complaints, of torture or ill treatment and, consequently, no investigation, failure to prosecute documented cases, lack of will on the part of judiciary. Also it is stated that "under the State's international obligations to prevent torture, it is the responsible of the prosecutors and judges to establish whether anyone has been mistreated, even in the absence of a complaint". A report published by the Right to Life Organisation in Sinhala "titled '*Wada Hinsanaya Nathuwama Barida*' elaborates that torture is systemised in state systems and the community, including in institutions such as: schools; hospitals; police establishments; prisons; religious institutions and homes. Additionally, the report mentions that some suspects who were subjected to torture have either died or have been permanently injured as a result of torture however, perpetrators, most of whom were state officials were convicted in only a few instances.

The concluding observations on the fifth periodic report of Sri Lanka on Committee Against Torture and Violence (2016) identifies different factors such as allegation of routine torture during police detention, white van abduction[70], torture in unacknowledged detention facilities, prevention of torture in places such as 4th floor in Colombo, Manik Farm and Trincomalee Navy Camp. The Committee also underscores the 'lack of statistical data on the number of complaints received by the state against victims and witness of torture and the outcomes of investigations into those complaints.'

Inadequate investigations; prolonged administrative detention under Prevention of Terrorism Act (PTA); forced confession; death in custody; poor conditions of detention institutions; harassment of human rights defenders and journalists; and sexual abuse of children by Sri Lankan peacekeepers are additional issues discussed in this report. One of the key highlights that may be extracted from this report is the statement on the committee's concern about the considerable discrepancy between the low number of complaints of torture reported by the police since 2012, which currently rests at 150 cases, whereas the Human Rights Commission of Sri Lanka reports a higher number of torture allegations at 2,259 cases. Furthermore, the report states that only 2 out of 17 cases resulted in conviction, and were filed under the Convention against Torture Act in 2012.

Entities such as the Right to Life; the Human Rights Office; Janasansadaya and the International Truth and Justice Project have documented many cases of torture victims and survivors who are residing in Sri Lanka as well as those who fled the country for their safety.

i. ***Torture by the Pitabeddara*** police is an incident reported in Pitabeddara, Matara in ***2011***, whereby 'Chatura Manohara Jayasingha, a popular businessman and Secretary of the Traders Organization in Piatabeddara was stripped naked and was subjected to inhuman torture, where he was put in 'Dharmachakkare' (method of sending into Nibbana when in the position of standing); the torture method was very famous during the 88' to 89' period.[71]

According to Right to Life, a large protest was held by the people from the area whereby the main section of Matara Deniyaya was blocked and all businesses in Pitabeddara were closed. The victim of the case has since made complaints to the Inspector General of Police and to the Human Rights Commission requesting a fair investigation against this inhumane assault. He has been waiting to file a fundamental rights case since 25th December 2011.

ii. The torture case of Podi Kumarihami: Podi Kumarihami is a 50 year old woman from Mahiyanganaya, in the Badulla District of Sri Lank; she is a mother of five children with the youngest being 19 and 13. She was brutally tortured by police

70 Sri Lanka's sinister white van abductions. 2021. https://www.bbc.com/news/world-asia-17356575. Accessed 28 August 2021.

71 Demons of Batalanda: Who was behind them? https://www.sinhalanet.net/demons-of-batalanda-who-was-behind-them. Accessed 28 August 2021.

because of a police constable's interest in her plot of land which was ideal for sand mining. The said constable made offers to buy the land, which she consistently refused since 2006. She was arrested for not wearing a white saree when she appeared at the Magistrate court and the female Magistrate remanded her for 14 days. The criminal case continues against her and she has been warned by the aforementioned Magistrate not to retain a lawyer from Mahiyangana to defend her. Further, police started harassing her 17 year old son who was arrested several times.

On 5 November, 2017, she alleged that her son was arrested by Mahiyangana Police and severely tortured and hospitalized, at which point the Magistrate came to the hospital and remanded him at Badulla remand prison. She also noted that the Magistrate was married to a senior police officer. Eventually Mahiyangana Police officers invented another charge of drug, to harass Podi Kumarihami and her family. On 15 August 2017, Podi Kumarihami was arrested again and no female Police officer was present during the time of her interrogation. She reported that she was allowed to leave on bail and her son-in-law was then remanded for 14 days. On the same day, police officers from Mahiyangana Police arrived at her house and attempted to arrest her daughter but when Podi Kumarihami objected to the arrest, she was physically harassed by the OIC and two other constables named Senadeera and Wimalasena. They warned her that if she had complained, she could be shot. By 20 August, 2017, Podi Kumarihamiwas summoned to the Police Station and was warned not to pursue any complaint against the Police and that, she would have to face dire consequences if she did.[72]

Podi Kumarihami complained to the Human Rights Commission. Her case No. HRC/BD/147/17 was scheduled for hearing on 27 November. Podi Kumarihamiand her son in-law Dilshan,, alleged that their arrest by the Mahiyanganaya Police was an act of reprisal. Additionally, Podikumarihami stated that she had written to: the Police Commission; to the Attorney General; The Human Rights Commission of Sri Lanka; and the DIG Badulla range.

72 A public testimony by a torture victim during the International day in support of the survivors of Torture, 2018 under the theme 'Torture of women' organised by Human Rights Office, Kandy

Based on interviews with a social worker that worked on Podi Kumarihami'scase, the first receipt (FR) is still going on, due to delays brought on by the COVID-19 pandemic. The social worker asserted that 'we got leave to proceed. And there are so many cases (37 according to my knowledge) filed against her. I think with this Corona related protest, six new cases were filed against her. All the time warranted. Even before the warrant is issued, the police would come to their house and would tell her children "your mother is warranted." With her, as soon as a judge issues a warrant, the police are at her house to arrest her, unlike in other cases in which normally the police take a few days to arrest a warranted person.

The researcher for this study said, "Even last week she called me and said such a thing. We asked her to move. She does not want to move as she wants to fight by staying there. Normally in other cases what we do is we move the victims from their houses and then we fight for justice. Last month when she was beaten, I had to say if she does not move out from her house, it is difficult for us to support her. She has to live first and have a peaceful mind."

iii. Roy Samaththanam, who is currently a Canadian national fled Sri Lanka, and was tortured in 2007. Roy returned to Sri Lanka in 2005. According to his account, he was handcuffed and blindfolded by the Terrorism Investigation Division of the Sri Lanka police, who directly reported to the former defence secretary, Gotabaya Rajapaksa.[73] He was detained and tortured for almost three years, under verbal charges, claiming that he was involved with the Tamil Tigers rebels"[74] and remainedwithout access to any legal aid. According to Roy's complaint, he was falsely accused of illegally importing a GPS device, and was taken into custody when he refused to pay a bribe for his release. Up until 2010, Roy was repeatedly tortured; humiliated; and denied his diabetes medication; additionally, .he faced threats that his wife and child would be raped and killed. When the victim refused to sign a false confession, he was sent from a detention

73 Stewart Bell. "Canadian torture survivor sues Sri Lankan official he claims was responsible for abuses". Global News. 15 April 2019 https://globalnews.ca/news/5169051/canadian-torture-survivor-sues-defence-minister/

74 "Roy Samthanam's US Case against Gotabaya Rajapaksa". Colombo Telegraph. 13 April 2019 https://www.colombotelegraph.com/index.php/roy-samathanams-us-case-against-gotabaya-rajapaksa-full-text/

facility in Colombo to Boossa camp in the Southern part of Sri Lanka.

During his time in detention in Colombo, representatives from the Canadian High Commission had access to visit him due to his wife's request. In an interview released online, Roy stated that, he did not have high hopes in filing a case in Sri Lanka considering how frequently such cases were rejected in the Sri Lankan legal system. Instead, he filed a torture complain against Sri Lanka with the UN Human Rights Committee (UNHRC); in 2016, the UNHCR ruled that Roy must be compensated for the abuses he suffered while visiting Sri Lanka[75]. In 2019, following his complaint in the Central District of California, the International Truth and Justice Project and the US law firm Hausfeld filed a civil suit against Sri Lanka's former defence secretary on Roy's behalf.

iv. Police Brutality against an autistic Muslim child: A 14 year old autistic Muslim boy was assaulted by police in Dharga Town, Aluthgama in June, 2020 in an instance that was captured on CCTV cameras. When his father went to the police station to file a complaint, he was told not to as it was his fault for letting the child wonder on his own. Following an online campaign titled '#JusticeForThariq' as well as criticism by politicians, journalists and activists, the accused police officers were reportedly suspended over the alleged assault[76].

75 Tamil Business Connect. "Roy Samathanam Canadian files torture complaints against Sri Lanka", 17:23, 25 February 2014 https://www.youtube.com/watch?v=QpmBYvwpaOI

76 Sri Lanka: The brutal police assault on Thariq Ahamed, a 14 year old autistic boy – Ali Zahir Moulana. https://srilankabrief.org/sri-lanka-the-brutal-police-assault-on-thariq-ahamed-a-14-year-old-autistic-boy-ali-zahir-moulana/.

chapter five

FREEDOM OF RELIGION OR BELIEF

As per the government census and statistics report in 2012, the categorisation of ethnic groups in Sri Lanka consists of: Sinhalese at 74.9%; Sri Lankan Tamils at 11.2%; Indian Tamils at 4.1%; Sri Lankan Moors at 9.3%; and others at 0.5% Meanwhile, the categorisation of religious groups consists of Buddhists at 70.1%; Hindus at 12.6%; Muslims at 9.3%; Christians at 1.4%; and Roman Catholics at 6.2%.

According to Article 9 of the Constitution of Sri Lanka, Buddhism is given the foremost place and it is the duty of the State to protect and foster the Buddha Sasana while assuring the rights granted by Articles 10 and 14(1)(e) to all the other religions. These two articles ensure that every person is entitled to freedom of thought, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice; and that every citizen is entitled to this freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice or teaching.[77] Thus Sri Lanka can be considered to be a religious state although a majority of the acts, laws and institutions of the country are secular. Nonetheless, as the state structure is formed with majority Buddhists and since it enshrines Buddhism, it is adequate to say that the state inadvertently prioritises Buddhism.

A National Value Survey conducted by the Asia Foundation in 2011 depicts the public perception in the country and reveals that Sri Lankans overwhelmingly perceive their society as becoming significantly more religious, with adherence to core religious practices being very high among Sri Lankans of all faiths. Additional perceptions were that: local religious leaders are highly influential and are by far the most respected leaders for Sri Lankans of all faiths; Buddhists view foreign influence on their religious teachings negatively, while Hindus and Muslims generally view it positively whereas Catholics are split; intolerance is high for certain forms of religious expression; and erecting religious statues or places of worship in public places continues to be divisive within and between all religious groups.

A wave of religious extremism has been taking place in different parts of the country. A publication titled 'the Chronic and the Entrenched: Ethno Religious Violence in Sri Lanka' reports incidents of violence against Muslims and Christians since 2013, that were predominantly exercised by Buddhist hardline organisations such as Badu Bala Sena, which has state patronage. The recent Easter Sunday attack happened in April 2019 in Colombo, Batticaloa and Chilaw escalated into tense situations in some parts of the country.

Following a visit to Sri Lanka in August 2017, the Report of the Special Rapporteur on Freedom of Religion or Belief for Human Rights Council identified key challenges such as: anti-Muslim hate propaganda; the right to proselytise and conversion; freedom of worship, including in places of worship; religious education; and the rights of women and gender-based discrimination. In a separate section on 'Impunity and the lack of rule of law and accountability' the culture of impunity in Sri Lanka was identified as one the main reasons for religious extremism and hate speech. Incidents such as large mobs enacting violence on minorities in front of law enforcement authorities including during curfew hours; the bias of law enforcement authorities in addressing cases on religious extremism; failure of police to register and investigate complaints; the support of violent attacks by law enforcement authorities; double standards in law enforcement; the influence of religious clergies in determining public policy in secular matters; and ignorance of the Government as far as 'simmering tensions and intolerance' are highlighted in this report. Data within this report (as demonstrated in the subsequent table) shows how widely impunity is practiced.

77 The Constitution of the Democratic Socialist Republic of Sri Lanka. https://www.parliament.lk/files/pdf/constitution.pdf. p.4. (Accessed: 2 September 2021).

Table 02: Violence against religion and belief

Incident		Impunity
Easter bombing in 2019	- A number of 289 people (mostly Muslims) were arrested under Emergency Regulations. - As of July 2019, 1655 people have been granted bail, while 423 were remanded and 211 were in detention.	● Families of Muslims arrested under the PTA claimed that they had a hard time in securing legal representation in their areas ● They had undergone significant financial hardship to hire lawyers from other areas. ● Most of the Muslim lawyers have been reluctant to defend victims in fear of reprisals. ● Often, non-Muslim lawyers refuse to defend those detained due to 'extraneous considerations
Documentation of 87 cases by The National Christian Evangelical Alliance	Physical attacks at places of worship, and residential areas, pastors or members of the Evangelical churches (2015-2019)	● Only 50 cases were reported to the police ● 8 cases went to the courts ● There were no convictions of perpetrators however, compensation has been granted to victims in some cases
Documentation of 11 cases and 300 instances by The Evangelical Christian communities	Cases on hatred and violence as well as Instances of harassment based on their religious identity.	• Not a single conviction.
The Jehovah's Witnesses reported that at least 58 cases were referred to the police in 2017 to 2019	Physical assaults; harassments and intimidation; disruption of their worship meetings; vandalism at the places of worship; and refusal of permits for building places of worship	● 33 cases have been taken to the court ● 5 cases have been decided in favour of the victims, whereby perpetrators agreed to stop harassing them ● Not a single conviction.

Source: The Report of Special Rapporteur on Freedom of Religion or Belief for Human Rights Council, 2017

i. the Aluthgama Riots were anti-Muslim riots that erupted in 2014 in Aluthgama in the Southern region of the country, and spread to Dharga, Valipana and Beruwela. Hate towards the Muslim community propagated by the Bodu Bala Sena (BBS) from 2012 led to sporadic out breaks of violence throughout the island.[78]

On the ***9th of May 2014***, a Muslim- owned shop was burnt following accusations of sex abuse of a child of from an employee of the shop. Following an argument between a Buddhist monk and two Muslim youths on the ***12th of May,*** a meeting was held on the ***next day*** between the Police and the Mosque committee of Aluthgama concerning brewing tensions between the two communities and the need for increased caution. On the same day, Muslim shops were stoned; hereafter, the BBS took to social media to broadcast a meeting that was to be held in Aluthgama on

78 Where have all the neighbours gone? Aluthgama riots and its aftermath. A fact finding mission to Aluthgama, Dharga Town, Valipanna and Beruwela https://www.academia.edu/10331700/Where_Have_All_the_Neighbours_Gone_Aluthgama_Riots_and_its_Aftermath

the ***15th of May.*** Ven. Galabodaththe Gnanasara Thero, the General Secretary of the BBS made racist statements and speeches at the meeting and hinted at violence. After the meeting, there was an incident were stones were thrown by crowds; of Sinhalese and Muslims. The attacks continued and spread to neighbouring villages.

However, the police agreed to release 7 of the 11 people arrested at the request of Gnanasara Thero, in exchange for a stop to the violence. The BBS' involvement with key political figures such as the Defence Secretary at the time, (Gotabaya Rajapaksha 2012) and the then President Mahinda Rajapaksha (2013), allowed Gnanasara to address the crowd of extremist supporters in Aluthgama during a tense and unstable situation, which allowed impunity to prevail. The General Secretary was never prosecuted for inciting violence.

The Muslim Civil Society coordinated by Shiraz Noordeen met with IGP in Aluthgama and their Military Intelligence, and, support helped give a voice to the victims and survivors of this racial violence.

ii. Riots in Kandy: Post-War ethno-religious violence in Sri Lanka can be categorised along a spectrum of intensity: (1) chronic violence, which involves continuous, low-intensity attacks, and (2) acute violence, which involves episodes of high-intensity violence[79]. One of the most recent *acute violent* incidents highlighted in this essay is a case of unrest in early March 2018 in the central part of Sri Lanka, Kandy 'which was triggered by the death of a [Sinhalese] Buddhist man[80].' On 6th March 2018, Sri Lanka was declared to be in a state of emergency[81]. As per an Amnesty International statement 'on 5 March [2018], a mob set homes, [27] shops and a mosque belonging to the local Muslim community ablaze in the Digana area of Kandy, in central Sri Lanka. This was the second serious incident of violence against a Muslim community in the country over the past week, following a chillingly similar attack in the eastern coastal district of Ampara on 26 February.'[82] [83]

According to news reports, over 1000 police men, 200 Special Task Force (STF) personnel and 200 army troops were deployed during the conflict. The 42 year old Sinhalese Buddhist man who was violently assaulted on the street on 22 February due to an attempt to overtake a three wheeler died after spending 10 days in the hospital.
An article published on 26th February 2019[84] revealed that several arrests were made in relation to the riot in Digana and proceedings were instituted against some of the perpetrators in the Magistrate's Court, without any conviction. It further reports that at that time, no indictments had been filed by the Attorney General's Department, and that people such as Amit Weerasinghe, leader of Mahasohon Balakaya and one of the chief instigators of the riots were bailed out.

Further, Galagodaththe Gnanasara Thero from a registered political party called Ape Jana Bala Pakshaya (AJBP)[85] and Amith Weerasinghe from an independent group[86] run for the Parliamentary election, which was held on 5th August 2020.

79 Gunatilleke, Gehan. The Chronic and the Entrenched: Ethno-Religious Violence in Sri Lanka. Colombo: International Centre for Ethnic Studies & Equitas – International Centre for Human Rights Education, 2018. Accessed 17 May 2021 http://ices.lk/wp-content/uploads/2018/04/The-Chronic-and-the-Entrenched-Mr.-Gihan-Book-FINAL-WEB-PDF.pdf

80 Riza, M. "Sri Lanka Imposes State of Emergency after Communal Riots." Aljazeera, March 6, 2018. https://www.aljazeera.com/news/2018/03/sri-lanka-imposes-state-emergency-communal-violence-180306080251131.html.

81 Gosh, Shilpi. "South Asia: State of Minorities." International Journal of Advanced Research and Development 3 (2) (2018).

82 Amnesty International. "Sri Lanka: State of Emergency Must Respect Human Rights." Accessed May 23, 2018. https://www.amnesty.org/en/latest/news/2018/03/sri-lanka-soe-must-respect-human-rights/

83 Rathnayaka, Madhubhashini, An analysis of ethno religious violence in post war Sri Lanka, unpublished research

84 Minor Matters. "Digana one year n: lesson learnt or mistakes repeated". Accessed 17 May 2019 https://www.minormatters.org/en/blog/digana-one-year-on-lesson-learnt-or-mistakes-repeated

85 Arjuna Ranawana. "Gnanasara nad Rathana Theros contesting General Elections". Economynext. 19 March 2020 https://economynext.com/gnanasara-and-rathana-theros-contesting-general-elections-60132/

86 Mahason Balakaya's Amith Weerasinghe among first to hand over election nominations https://www.ft.lk/news/Mahason-Balakaya-s-Amith-Weerasinghe-among-first-to-hand-over-election-nominations/56-697427

chapter six

KILLINGS

In post-colonial Sri Lanka, ethnic conflict; war; riots; insurgencies; terrorist activities and extremism resulted in mass killings. At the same time, extra judicial killings of journalists; activists; aid workers; legislators; political leaders and other politically motivated murders have prevailed. Killings of women, infants and children also have created concerns due to the increase in occurrence, and due to their connection to other crimes such as rape and sexual abuse, which will be discussed in the other sections of this working paper. Other massacres, including Udathalawinna, Welikada and Sooriyakanda have been witnessed in Sri Lanka's recent history. According to a report released by the OHCHR, it is 'estimated that 40,000 Tamils died in the final army offensive'[87] which some sources define as a 'genocide.'[88] Reinstating the death penalty in Sri Lanka in 2019 has been subjected to strong criticism as it is a major setback for human rights especially from the international community[89].

Statutory provisions against killing are enforced in the Penal Code of Sri Lanka under murder and offences. However, there are numerous cases of claims, criticisms and lamentiations that the culture of impunity in Sri Lanka has not led to justice in most of these killings, especially as it pertains to related mass killings and other politically, ethnically or religiously instigated killings. It is worth noting that paramilitary groups; police; the Sri Lankan army,; LTTE and JVP activists are accused for most of mass killings. Other evidenced issues include: a lack of legal accountability; provision on de jure impunity and de facto impunity; structural impunity such as only prosecuting the junior soldiers despite 'very finite pointers to culpability at a much higher level'; failure of justice system; lack effective prosecution; pardon biases in terms of ethnic and religious origins; and a lack of witness protection and setting agendas without witnesses (e.g. during the last phase of war in Sri Lanka).[90]

i. Mirusuvil Massacre is another landmark case in Sri Lanka, whereby the convicted murderer, army officer Sergeant Sunil Rathnayaka, who was initially sentenced to death, was released on Presidential pardon in 2019. In 2000, eight civilians including children aged 13 and 5 were murdered in Mirusuvil in Jaffna. The trial was held for 13 years. The decision violates Sri Lanka's international obligations to hold to account those responsible for crimes under international law and other serious human rights violations, as well as its obligation to provide justice that is commensurate with the crimes committed, without recourse to the death penalty. Within this case, there was no witness protection, furthermore, family members were intimidated, and Justice Sarath Ambepitiya, who was a member of the Special Bench of the Supreme Court on this case and others were killed by gunmen in 2004.[91]

One survivor who escaped the abduction became a decisive witness in this case. He helped the military police to identify the perpetrators and decipher whether the murderer disposed of bodies. According to court proceedings, evidence obtained from Major Sydney de Soyza from the military police also played a key role in this case. Organisations such as Center for Policy Alternatives (CPA) Sri Lanka, and Amnesty International called for a reversal of the decision to release the perpetrator, which was made by the current President, a few months after he was sworn in. It is reported that the families and human rights defenders did not have much of an opportunity to effectively respond to the revocation because it happened when the country was under a lock down due to COVID-19. However, the families lodged complaints before the Human Rights Commission after the presidential pardon was given. Multiple Fundamental Rights applications have been filed in the Supreme Court. First-hand information gathered after following

87 "UN Human Rights Council urges Sri Lanka war crimes Court". BBC. 16 September 2015 https://www.bbc.com/news/world-asia-34266471

88 Francis Boyle. The Tamil Genecide by Sri Lanka, SCB Distributors, 2010 https://books.google.lk/books?hl=en&lr=&id=KrcHi8tlFwwC&oi=fnd&pg=PT7&dq=Genocide+in+Sri+Lanka&ots=A1BVQ72K6k&sig=YLmWxge6xSBUcPTE4lPiX-cUTPlw&redir_esc=y#v=onepage&q=Genocide%20in%20Sri%20Lanka&f=false

89 DW. "Why is Sri Lanka Re-instating the death Penalty". Accessed 17 May 2021 https://www.dw.com/en/why-is-sri-lanka-re-instating-death-penalty/a-49469184

90 Reliefweb. "Post War Justice in Sri Lanka - Rule of Law, the criminal justice and commissions of inquiry". Accessed 17 https://reliefweb.int/report/sri-lanka/post-war-justice-sri-lanka-rule-law-criminal-justice-system-and-commissions-inquiry

91 Amnesty International. "Demand justice for Sri Lanka's mirsuvuli massacre". Accessed 17 May 2021https://www.amnesty.org/en/get-involved/take-action/sri-lanka-demand-justice-for-mirusuvil-massacre-victims/?utm_source=google&utm_medium=cpc&gclid=CjwKCAjw1K75BRAEEiwAd41h1E0bA9hk0tMYmhWNCtT2gw2xf9tsGWcbm6x3FC4zmNVByfreU7UIahoCGEYQAvD_BwE.

proceedings in the matter, indicate that the cases have been fixed for support before the apex court on 8th February 2021.
(See section 4.6 on 'Misuse of State Pardon Mechanism')

ii.The Kandeketiya murder (2014) refers to the murder of a 17 year old Sinhalese boy name Sandun who was tortured in police custody by a group of intoxicated policemen ; he subsequently died in prison due to a continuous lack of medical support. The police declined to send Sandun to a hospital when his parents who visited him complained about his weak health situation. Later, the Magistrate who heard the case denied the torture claim and medical treatment despite the lawyers' requests. The prison wardens also did not pay attention to the victim's need for medical treatment. As a result, six police officers including a sub-inspector in Kandaketiya Police SI G. Somaratne; Constables P.D. Pathmakumara Gamage; R. Pushpakumara, M. G. Abeyratne; police assistant D.M. Wijeratne and civil defence officer S.M. Jayasundara were sentenced to death and fined Rs 5,000 each in 2017 by the Badulla High Court. According to the Asian Human Rights Commission (AHRC), the victim was illegally arrested by the police.

Sandun's parents were the first ones to find out that he was tortured while he was in custody,. Sandun's brother, who was also imprisoned with him witnessed Sandun's death which distressed him immensely. AHRC reported this case to the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment.[92] The Right to Life organisation had a key role in bringing justice to Sandun by supporting his family throughout the legal process, and through raising the case with different entities such as the Medical Council; the IGP, Police Commission; the Prison Commissioner and the Prison Reforms Minister, specifically in requesting that action be taken against the responsible officers. In an interview to Daily Mirror, Phillip Dissanayake, Executive Secretary of Right to Life mentions that 'In 2011, the UN committee against torture recommended that all suspects directed to the magistrate should be questioned as to whether they had been tortured. The government has promised to execute this proposal. But this magistrate did not act according to it'. Right to Life attempted to file a writ of Mandamus against the AG, because 'the Attorney General (AG) should have filed a case under the Torture Act No. 22 of 1994 as Sandun died as a result of being tortured.'[93] Sandun's father has received death threats from a police assistant and the Attorney General, and the family have moved to Galle for their safety[94].

iii. The Ganesan Nimalaruban's case is a case of the torture and custodial death of a 28 year old Tamil political prisoner on 4th of July, 2012. Along with Fundamental Rights application, Nimalaruban's family sued the state for violating his rights but this was dismissed by the de facto Chief Justice Mohan Peiris before hearing any evidence on question, "When the prison is under siege do you want the prisons commissioner to have to read to them the Geneva Conventions?" According to the lawyer who represented the victim, the latter was severely beaten by the Special Task Force (STF) while breaking a siege in the Prison. Nimalaruban was relocated from the Vavuniya prison to Mahara prison after the siege. Another inmate also died during this incident.[95]

According to a statement by Nimalaruban's father, the victims' parents were asked to come to Ragama Hospital by the Vavuniya Police due to Nimalaruban's critical condition. Upon arrival, they were kept in custody in a lodge in Mahara, whilst some police officers tried coercing him to consume alcohol . Subsequently the victims' parents were taken to the mortuary of the Ragama Hospital and their son's dead body was revealed to them, they were asked to sign some documents by the police before a Sinhala speaking doctor, and they declined to do so. The parents were misled by the police who took them to the registrar of Birth and Death at Mahara hospital after initially lying to them that they would be taken to the Human Rights Commission after Nimalaruban's mother

92 SRI LANKA: A young man tortured to death in Kandaketiya police custody http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-077-2014/.

93 Asian Human Rights Commission. "Sri Lanka: A young man tortured to death in Kandaketiya police custody". Accessed 17 May 2021 http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-077-2014/

94 Amra ismail. "Exposing the hidden storyh behind Kandeketiya trial". Daily Mirror Online. 18 January 2017http://www.dailymirror.lk/news-features/Exposing-the-hidden-story-behind-Kandaketiya-trial/131-122322

95 "Tamil prisoner death case dismissed as it would encourage more riots". Tamil Guardian. 14 October 2013 https://www.tamilguardian.com/content/tamil-prisoner-death-case-dismissed-it-would-%E2%80%98encourage%E2%80%99-more-riots

said she would take action by complaining to the aforementioned. When the parents further refused to sign documents in front of a Tamil speaking doctor, a police officer attempted to assault the victim's mother. In this first receipt (FR) application, the Petitioners stated that they cannot expect an unbiased and comprehensive investigation by the police and prison authorities. At the same time, the parents' also had to go through a gruelling struggle to bring their son's remains to their home by overturning a court ruling which stated that he must be cremated by authorities near Colombo[96]. Nimaruban's mother Rajeswari at one time protested the decision by lying on the road, in front of a police jeep. After 19 days of continuous fighting by the victim's parents and with the support of Intervention of lawyers such as Mano Ganeshan, the convener of the Civil Monitoring Committee and other supporters, Nibalaruban's family received his body on 3rd July 2012. During this, time the family was frequently interrogated by the police and Criminal Investigation Division[97]. Protests have since continued marking the anniversary of Nimalaruban's death, calling for the release of all Tamil political prisoners in Sri Lanka.

iv. ***The torture and custodial death of a fisherman in Wadduwa Police*** which was reported in ***2012*** concerned the torture and custodial death of a 56 year old fisherman, Nimal Fernando while he was in the custody of the Wadduwa Police. The case is still on going in Panadura High Court. Though a Fundamental Rights Application was initially filed, the case dragged on because the presenting of a medical certificate to the courts by the relevant state parties was delayed. The family visited the victim in custody, where they saw him unconscious and wounded inside the prison cell. Though the family members informed the police officers, they refused the claim stating the victim might be pretending. The family and friends of the victim, alongside organisations such as Right to Life filed a fundamental rights petition, organised meetings and press briefings about Nimal Fernando's death urging people to collectively speak out against such torture[98]. Human rights activist and Lawyer Rashmi stated that the wife of the victim had filed a writ application at the Court of Appeal concerning a lack of action by the Attorney General's department and the National Police Commission in this case of police torture. The case was finally concluded after several years when the Attorney General's department served indictments in the High Court.

v. ***Welikada Prison[99] in Colombo*** witnessed a ***massacre in November 2012*** during an alleged drug raid conducted inside the prison. 790 armed Special Task Force (STF) personnel were called in to diffuse a tense situation. They were stopped at the gate by the prison guard as entering the premises with a firearm was not permitted. However, they were eventually allowed in following orders from the higher ups. Following an altercation by the inmates and the use of tear gas by the STF, some of the inmates broke into the armoury. They were then taken into custody by the army, in an incident thatresulted in the deaths of 27 inmates. Witnesses state that 8 of the killings were carried out 'execution style' by 3 persons.[100] In 2018, the Criminal Investigation Department arrested the then Superintendent of the Magazine Prison, Emil Ranjan Lamahewa who was the Commissioner of Prisons Department at the time of his arrest, as well as the Police Anti-Narcotics Bureau inspector and Prison Officer Indika Sampath over the prison massacre. The Attorney General (AG) has indicted the three accused on 33 counts of murder, conspiracy and unlawful assembly. Hearing of the matter was fixed for the 30th of October 2019 before a three judge bench of the Colombo High Court[101].

vi.Lasantha Wickrematunge, an investigative journalist, was gunned down in ***2009*** in Mount Lavinia during an era when journalists were targeted. An article written posthumously was thereafter

96 "Parents plight to recover remains of murdered political prisoner". Tamil Guardian. 8 July 2012https://www.tamilguardian.com/content/parents-plight-recover-remains-murdered-politicalprisoner?articleid=5247

97 Sivathasan, N.Tamil Political Prisoners in Sri Lanka, Sri Lanka Campaign for Peace and Justice, 2013

98 Right to Life Human Rights Centre. "People need to take to the streets to get justice". Accessed 17 May 2021 http://www.right2lifelanka.org/newsview.php?id=711

99 Tharindu Jayawardene., Bingun Gamage."The inside story of Welikada jail riot". Daily Mirror Online. 11 April 2018 http://www.dailymirror.lk/article/The-inside-story-of-Welikada-jail-riot-148543.html

100 "Sri Lanka prison chief Emil Lamahewage arrested over 2012 Welikada Prison riot in Colombo; 27 people had died in incident". First Post. 29 March 2018 https://www.firstpost.com/world/sri-lanka-prison-chief-emil-lamahewage-arrested-over-2012-welikada-prison-riot-in-colombo-27-people-had-died-in-incident-4410721.html

101 Hansi Nanayakkara. "2012 Welikada Prison's killings: Witness says hid the truth due to fear". Ceylon Today. 26 October 2019 https://archive.ceylontoday.lk/print-more/43639

released to the public.[102] The victim's body was exhumed in 2016 and a military intelligence officer was arrested[103]. However, Investigations are still on going and no progress was made in terms of legal redress in Sri Lanka. The victim's daughter in her pursuit of justice filed a civil action in the USA against Gotabaya Rakapaksha, the Defence secretary at the time. He was served with papers in 2019[104] when he arrived in the USA. The Centre for Justice and Accountability filed action against Gotabaya in April 2019 which was dismissed in October 2019[105]. The victim's daughter (Ahimsa) initiated civil action in the United States of America to hold President Gotabaya responsible for alleged involvement in the killing of her father, however, this was dismissed on the 27th of February 2020 without prejudice, leaving possibility for litigation when President Gotabaya Rajapaksa is no longer head of state as Rajapaksha was elected as president of Sri Lanka in November 2019. During the early part of 2020, the Ninth Circuit Court of Appeals allowed Ahimsa's request to vacate the lower court's ruling: 'entitled to common law foreign official immunity for acts committed while he was Secretary of Defence of Sri Lanka.' Wickrematunge was posthumously granted the UNESCO/Guillermo Cano World Press Freedom Prize 2009.[106]

vii. Shantha Dodangoda was a Sinhalese man who was murdered in 2015 in Kahawatte in the Ratnapura district during the 2015 Presidential campaign. He was gunned down by the former Deputy Minister for Power and Energy, Premlal Jayasekara, who was in the ruling party while the victim was from the Opposition party: The United National Party. Criminal proceedings were filed and Jayasekara was convicted for the shooting in 2020 along with former Sabaragamuwa Provincial Council member, Nilantha Jayakody and former Kahawatta Pradeshiya Sabha Chairman, Vajira Darshana. Jayasekara was a candidate for the 2020 Parliamentary election when he was accused in the on-going case. He was sentenced to death by the Ratnapura High Court on the 31st of July 2020. However, he was allowed to run in the Parliamentary election to be held the following week[107]. He went on to obtain a seat in Parliament following the election on the 6th of August[108]. However, Jayasekara who was in remand prison following an appeal, was disallowed from attending Parliamentary sessions by the Commissioner of Prisons. A successful writ application (CA W 295/2020) was filed by Jayasekera in the Court of Appeal and he was permitted to attend Parliament by a judgement dated 7.8.2020.[109]

viii. The Tangalle rape and murder: A 24 year old Russian female was raped while her boyfriend, a British aid worker was shot dead in 2011.[110] Eight persons were arrested including the Pradeshiya Sabha Chairman of Tangalle, a close associate of the President at the time[111]. Criminal proceedings were instituted, yet the main perpetrator was released on bail and reinstated to his political post . However, the seemingly lax approach of the Sri Lankan government surrounding the murder trial called for concerns from the United Kingdom; In fact, Prince Charles offered his support to win justice for the murdered[112] aid worker. The families of the victim and the survivor have shown massive support in the pursuit for justice. Judgement was granted in 2014 convicting the accused of murder. However, an appeal was filed on October 2017.

102 Lasantha Wickrematunge. "And then they came for me: last words of Lasantha Wickrematunge". Accessed 17 May 2021 https://en.unesco.org/courier/april-2009/and-then-they-came-me-last-words-lasantha-wickrematunge

103 Lasantha Wickrematunge. "Murdered editor's body exhumed in Sri Lanka". BBC. 27 September 2016 Accessed 17 May 2021 https://www.bbc.com/news/world-asia-37480880

104 Darkest day: 10 years lasantha Wickrematunge assassination". Sunday Observer http://www.sundayobserver.lk/darkest-day-10-years-lasantha-wickrematunge-assassination

105 "US court dismisses Ahimsa's case against GR". Daily FT. http://www.ft.lk/news/US-court-dismisses-Ahimsa-s-case-against-GR/56-696827

106 Lanka Business Online. "US court dismisses lawsuit against Gota; Ahimsa to appeal decision" . Accessed 17 may 2021 https://www.lankabusinessonline.com/us-court-dismisses-lawsuit-against-gota-ahimsa-to-appeal-decision/

107 "Ratnapura High Court sentences SLPP candidate to death". The Island Online. 2020 https://island.lk/ratnapura-high-court-sentences-slpp-candidate-to-death/

108 Arjuna Ranawana. "Sri Lanka voters elect two men allegedly involved in murders to Parliament" Economynext. 7 August 2020 https://economynext.com/sri-lanka-voters-elect-two-men-allegedly-involved-in-murders-to-parliament-72749/

109 Halkandaliya Lekamalage Premlal Jayasekera v Thushara Upuldeniya Commissioner General of Prisons and 2 others, CA W 295/2020

110 "Rajapaksa's 'political interference' may collapse murder trial". Tamil Guardian. 17 June 2014 https://www.tamilguardian.com/content/rajapaksa%E2%80%99s-%E2%80%98political-interference%E2%80%99-may-collapse-murder-trial

111 "Sri Lankan politician to appeal conviction for murder of British national". Tamil Guardian. 22 September 2017 https://www.tamilguardian.com/content/sri-lankan-politician-appeal-conviction-murder-british-national

112 "Family of murdered aid worker vow to fight for justice". Tamil Guardian. 22 December 2013 https://www.tamilguardian.com/content/family-murdered-aid-worker-vow-fight-justice

chapter seven

STATE PARDON MECHANISM: MISUSE OF POWER

This section discusses impunity in terms of pardon and release of prisoners; abuse of power; political expediency[113] as well as the socio - political and the socio- economic status of the perpetrators that have demonstrated impunity and lack of accountability. .

The Constitution of Sri Lanka provides the President with prerogative powers to grant pardon for convicted prisoners. However, this power is not entirely unfettered as it is attached to procedural exemptions[114]. However, the past year has witnessed repeated abuse of these prerogative powers vested in the President. Further, despite Article 12(1) and 12(2) of the Constitution of Sri Lanka, which upholds the rule of law and protects the citizens from discrimination, the pardons granted in the past year are prima facie discriminatory and are a display of privilege and inequality.

The pardon and release of the convicts sends a strong message about the category of persons entitled to be treated with leniency and highlights that violence against minorities may go without retribution[115]. The release also comes as an insult to the Judiciary, whereby the President can undermine its independence and integrity based on his/her whims and fancies.

The modern practice of Pardon could be considered to be a blend of ancient philosophies, as pardons can be granted to enhance justice or to be redemptive[116]. Yet, the evidence before us reveals a reversal of justice and redemption. It has been underscored that the 'presidential pardons exist to correct miscarriages of justice and are to be exercised with extreme caution and gravity.'[117]

The recent incidents of pardon in Sri Lanka have not been in alignment with the aforementioned.

Accordingly, complaints have been made by the public about the failure to release the pardon Documents and following the proviso to Article 34(1) of the Constitution when granting a Presidential pardon. Further, multiple fundamental rights applications have been filed in the interest of justice and accountability in cases where the executive played a role in impunity of the criminals[118].

i. Ven. Gnanasara Thero, the General Secretary of the Bodu Bala Sena (BBS), which is a Sinhala Nationalist organisation, has been the mastermind behind a number of violent attacks against non-Buddhist groups, including the previously noted Aluthgama riots which killed four people, injured 80, and displaced close to 8,000 Muslims.[119] These attacks in the western province were followed by conflicts in the Ampara District in the East, as well as in the Central Province. His organisation has claimed responsibility for the abduction of a pastor in 2012, and has been demanding the ban on the burqa and abaya worn by Muslim women, and has been conducting rallies that instigate hate and spread misinformation against the Muslims community. He was sentenced to 19 years of rigorous imprisonment by the Court of Appeal to be served concurrently in six years for his conduct in the Homagama Magistrates Court during the case of a missing journalist. The conviction followed a complaint made by the learned Magistrate to the Court of Appeal. In 2018, two years after the incident, the Supreme Court upheld the decision of the Court of Appeal. However, he was released from prison on the 23rd of May 2019 following a Pardon by President Maithripala Sirisena. Complaints were also made about the failure to release the Pardon Documents of the General Secretary's release. Following this, Fundamental Rights Petitions were filed in the Supreme Court by the Centre for Policy Alternative (CPA) and Sandya Ekneligoda, the wife of the missing journalist.[120]

113 CPA. ."Fundamental Rights Applications challenging the decision to pardon Sunil Ratnayake" .Accessed 17 May 2021 https://www.cpalanka.org/fundamental-rights-applications-challenging-the-decision-to-pardon-sunil-ratnayake/

114 The Constitution of Sri Lanka, 1978, Article 34(1)

115 "Presidential pardon of Gnasara Thero takes majoritarianism to the next level". Tamil Guardian . 23 May 2019 https://www.tamilguardian.com/content/presidential-pardon-gnanasara-thero-takes-majoritarianism-next-level-tna

116 Parul Kumar. "The Executive Power to Pardon: Dilemmas of the Constitutional Discourse" . NUJSLawRw 2(1) 2009, Pg 11 http://www.liiofindia.org/cgi-bin/disp.pl/in/journals/NUJSLawRw/2009/1.html?query=pardon

117 Presidential pardon of Gnasara Thero takes majoritarianism to the next level". Tamil Guardian . 23 May 2019 https://www.tamilguardian.com/content/presidential-pardon-gnanasara-thero-takes-majoritarianism-next-level-tna

118 "Amnesty calls on Sri Lanka President to revoke pardon". Tamil Guardian. 30 April 2020 https://www.tamilguardian.com/content/amnesty-calls-sri-lanka-president-revoke-pardon

119 S.S. Selvanayagam. "Galagoda Aththe Thero gets 6 - Year Jail Term for Contempt of Court", Daily Ft. 9 August 2018 http://www.ft.lk/front-page/Galagoda-Aththe-Thero-gets-6-year-jail-term-for-contempt-of-court/44-660560

120 "CPA contests President's decision to pardon Ven.

The aforementioned contempt of Court charge has been the only instance where Thero has been charged and convicted for any unlawful conduct, despite his history of dabbling in communal violence and causing ethnic unrest.[121] This, as Natali observes, sends a strong message to the ethnic and religious minorities and those who have immunity over the law.

ii. Yvonne Jhonssen, a 19 year old Swedish girl was murdered in Rajagiriya in the Colombo District in 2005 by her sister's boyfriend Shramantha Jayamaha. The cause of death was head injuries and strangulation after being chased down multiple floors in her apartment complex and being killed in a stairway. The first magistrate's inquiry was held on the same day (Thursday the 30th of June) and Jayamaha was arrested on Sunday[122]. The Colombo High Court sentenced Jayamaha to 12 years imprisonment and a fine of 300,000/-[123] under case no 2722/2005. The accused's High Court sentence was set aside and he was sentenced to death after his failed appeal to the Appellate Court in case no 303/2006.

However, he was pardoned by the ex-President Maithripala Sirisena in 2019 November[124] and a Jayamaha pleaded for public leniency regarding his release[125]. A travel ban issued by the Supreme Court around the 29th of November was enacted after he had already left the country, as testified by Controller General of Immigration and Emigration[126]. This pardon received a massive public outcry and a vigil was held in Colombo with the support of the victim's father; sister; friends and human and women's rights activists[127]. The Victim's father has openly criticised the actions of the ex-President, additionally, her friend's father Mr. Marikkar, and her sister, Caroline Johnssen-Bradley made strong statements regarding the release of her killer; the statement gained attention on social media and urged the public to remember the victim and condemn the injustice caused to her and her family[128]. The Women and Media Collective, has also voiced their concerns and condemned the pardon of the murderer, and has stood by the victim's family in solidarity[129]. They have also called for transparency and accountability of the presidential pardon of the convict. A Fundamental Rights application filed by the Women and Media Collective was fixed for 29th May 2020.[130]

Gnanasata Thero". Daily FT. 12 July 2019 http://www.ft.lk/news/CPA-contests-President-s-decision-to-pardon-Ven-Gnanasara-Thero/56-681784

121 CPA. "CPA Statement on the Presidential Pardon of Gnanasara Thero" . Accessed 17 May 2021 https://www.cpalanka.org/cpa-statement-on-the-presidential-pardon-of-gnanasara-thero/

122 Marisa de Silva, Asif Furad. "Night of clubbing ends in brutal killing". Sunday Times http://www.sundaytimes.lk/050710/news/22.html

123 Don. Shamantha Jude Anthony Jayamaha v Hon. Attorney General, CA 303/2006 with CA LA 321/2006

124 Sulochna Ramiah Mohan. "Presidential pardon does not wipe off the record of the criminal: what is wrong is wrong - Kalinga Indatissa PC". Ceylon Today. 17 November 2019 https://archive.ceylontoday.lk/print-more/45206

125 'Please give me another chance'-. Daily Mirror Online. 15 November 2019 http://www.dailymirror.lk/print/front_page/Please-give-me-another-chance-Shramantha/238-177866

126 "Royal park convict had left country prior to travel ban Court order, SC informed". Daily FT. 11 December 2019 http://www.ft.lk/news/Royal-Park-convict-had-left-country-prior-to-travel-ban-Court-order-SC-informed/56-691341

127 Yvonne Jonsson Remembered https://archive.ceylontoday.lk/features-more/4244

128 "Royal Park vVctim's Sister Speaks Out Against President's move". Colombo Gazette. 23 October 2019 https://colombogazette.com/2019/10/23/royal-park-victims-sister-speaks-out-against-presidents-move/

129 Women Media Collective. "Statement: Women's Rights Activists Respond to recent events in relation to women and justice in Sri Lanka". Accessed 17 May 2021 https://womenandmedia.org/womens-rights-activists-respond-to-recent-events-in-relation-to-women-and-justice-in-sri-lanka/

130 Lakmal Sooriyagoda. "Presidential Pardon to Royal Park Murder Convict Challeneged in the Supreme Court".Daily News. 14 November 2019 https://www.dailynews.lk/2019/11/14/law-order/202954/presidential-pardon-royal-park-murder-convict-challenged-sc?page=1

chapter eight

DISCUSSION ON FINDINGS

This section analyses the above data, along with information gathered from interviews conducted with activists; lawyers; researchers; and victim's family members. Cases coming under the purview of the national Police Commission take a long time and the success rates are very low. It ultimately recalls disheartening trends and patterns of impunity, and the sinister existence of deeply embedded systemic impunity.

8.1 Factors that Allow Impunity to Prevail

Politically instigated racism and prejudice has been the cause of impunity on the community level, both in terms of the actors as well as the authorities who turn a blind eye. While Muslims hid inside mosques during the riots in the central province, the Civil Defence Forces who were stationed outside to provide protection for survivors stood by as the mosque was being attacked. Those affiliated with monks, were given tacit privilege of impunity from their wrongful acts. This justifies an interference of politicians or parties and the fact that their behaviour creates two classes of citizens.

Delays; a lack of reactiveness and cooperation; and alarming widespread corruption by the Police are the lively examples in Sri Lanka to intensify impunity. Their refusal to record complaints of survivors, and passing on the responsibility to other police stations in an act that has discourage survivors have been observed across the board. Even in cases where a complaint is successfully filed, moving the procedure along has been a further challenge. The National Police Commission which has the authority to investigate complaints against the police has not been helpful in challenging the conduct of the police.

Many who have filed complaints with the Human Rights Commission (HRC) have not received the reference numbers of their complaints to date. The island wide lockdown due to the Covid 19 pandemic over the period led to a rise in domestic violence cases being reported and survivors seeking medical and other assistance from available sources. However, the HRC was unreachable during a significant period. Further challenges are posed from women's movements that have turned a blind eye to rape and sexual assault survivors where they have had any purported or real affiliations to the LTTE.

One of the observations is that despite there being a Victim and Witness Protection Authority, there is insufficient protection available, and thereby making the survivors and victims' families battle against impunity even more challenging and in some instances, dangerous.

A further observation concerns the legal system in itself. The technical nature of the law; and the stringent requirement for evidentiary proof have repeatedly led survivors of rape to the stand, and the validity and admissibility of witness statements coming to question. Shreen, in understanding the effects of trauma on a survivor, stated that survivors are therefore unable to relate a coherent series

of events, which could be perceived as a weak statement following brutal cross examinations of the victim. Rashmi also observed the strict application of written law by the judiciary, which fails to take into consideration the circumstances of the case, and the affected party's personal challenges in pursuing justice.

As a result of institutionalised impunity, observations were made by the participants of victim fatigue and a lack of faith in the system, including in the judiciary's ability to deliver justice.

Further, ostracisation; the social stigma of speaking out about injustice; being labelled a 'troublemaker,' accusations of being a traitor to: the institution; the individual; or country have also hindered survivor's willingness to pursue justice.

8.2 Individuals, Organisations and Other Factors That Helped Challenge Impunity

A crucial overall observation seems to be the importance of the role of victim's families; activists; organisations and the communities' support in challenging impunity. This is observed in the aforementioned case studies and in the key informant interviews that were conducted. Observations made by Natalie, Rashmi and Shreen indicate the effectiveness of collective challenges, as well as the importance of families; activists; pro bono lawyers and clergies in supporting the challenge. Human rights activist Rukshan Fernando has also observed that '... solidarity and support from few individuals and groups, rather than effectiveness of the state and statutory institutions established to deliver justice.'[131] When individual attempts at challenging impunity, either by filing a complaint or going to court were hindered by the institutionalised impunity, these individuals' stepping in served as the catalyst for progress towards accountability and justice. A lack of family support was observed as being a factor discouraging individuals from initiating the process of redress and accountability.

Based on further interviews conducted with three rights activists and one victim's family member, as well as other secondary data, the following analysis is presented, with special emphasis to relevant to themes of murder; torture; enforced disappearances and freedom of religion and belief.

In the cases discussed under disappearances, the majority of the perpetrators are security forces in Sri Lanka, which shows an alarming trend. The gravity of this is twofold whereby security forces enjoy impunity in commiting the crime and during the justice process. As a trend of militarisation has been visible in Sri Lanka since the 1970s as a result of insurrection and the war, security forces have spread their tentacles into many spheres including public service, and with the key decision makers of the country, including the President of Sri Lanka. Thus, impunity and militarisation has been normalised and integrated into the social spheres in Sri

131 Ruki Fernando. "Solidarity Acrions and Struggles for Justice in Sri Lanka". Accessed 18 May 2021 https://groundviews.org/2015/12/30/solidarity-actions-and-struggles-for-justice-in-sri-lanka/

Lanka. Disappearances related to war, insurrection and against political/human rights activists and journalists are covered in this section, which highlights the impact of war in terms of impunity in Sri Lanka.

In challenging impunity, involvement of witnesses, brave efforts by the family members and victims and strong support by human rights groups, including human rights lawyers and international agencies may be highlighted within this. One interesting factors in two of these cases is the way in which the family members (i.e. wives, mothers) become activists along the way during their fight against impunity. Sandhya Eknaligoda and Jeyakumari are inspiring examples of women who share their activism to support other families and victims.

In all the cases mentioned under torture, section police are key culprits. Cases such as Podi Kumarihamy's shows how some police officers use their official powers to fulfil their personal interests It is evident that these law enforcement authorities use existing legal provisions such as PTA to propagate violence and impunity, thereby disregarding fundamental human rights. As highlighted in interview 2, these law enforcement authorities tend to arrest innocent people under such emergency laws, and are usually unable to file FR cases under laws.

The interviewees highlighted the political and religious influences in the justice system, that give protection to the culprits, facilitated by the politicians and religious leaders; biases in the justice system; the public's lack of awareness and interest in terms of human rights, and their fear in challenging impunity; as well as citizens' frustration in the justice system and the impunity enjoyed by the accused government officials. At the same time, they also stressed that one of the key reasons that some legal cases against impunity have been having successful or have continued for many years, is due to the will and complete dedication of victims and/or their families along with continuous support by different groups and individuals.

In terms of best practices and recommendations, the interviewees cited: continuous follow up on cases with the relevant legal entities; the use of both fundamental rights applications as well as money recovery applications; maintaining a record related to the case by documenting case proceedings and other information which can be used in any instance; accessing independent commissions; public discourse on relevant cases through discussions; press conferences; media traction and other campaigns.

They further noted the need of a public movement to challenge impunity; the importance of securing existing independent commissions; increased public awareness and interest in human rights, while stressing a holistic community support for the victims. Some highlighted that, despite the challenges, the citizens should continue their struggle against impunity by considering it their responsibility to establish rule of law in the country.

chapter nine

CONCLUSION & RECOMMENDATIONS

Conclusion

The information gathered based on primary and secondary sources seem to show some common factors that have caused impunity to prevail. These include: corruption and inefficiency within the systems established to provide redress to survivors and victim's families, especially amongst those who are at the first point of contact such as the police and the other armed forces discussed in the report. There also seems to be insufficient protection provided by the authorities for witnesses and survivors of crimes committed either by state or by individual actors. Another observation is that impunity is largely prevalent and more tedious to challenge where the perpetrators are either in the armed forces, connected to political powers, or acting on a political or state agenda. However, impunity is also prevalent where the perpetrators are individual citizens such as in the rape of Kesara Kahandaliyange.

The data also shows a reluctance of survivors to pursue appeals as well as fatigue from the process. The information gathered also sheds light on very specific and urgent reforms that are needed, such as: in the National Police Commission; in preventing undue delays in the legal system; and in obtaining transparency; as well as in the implementation of existing laws while enacting other laws to fill gaps that could contribute to the prevalence of impunity such as the MMDA and rights of the LGBTQ+ community. The information also revealed the existence of a deep rooted culture of impunity within the existing systems as well as in individual cases.

However, the data gathered also shows factors that helped challenge impunity even within a strained system. Victims and survivors family members, as well as human rights activists and organisations have played a large role in providing moral support; gaining the attention of the relevant authorities such as in Rita's case; as well as the public's attention and support such as with Kesara Kahandaliyanage and Yvonne Johnssen. Their involvement has also helped maintain the privacy of the survivors (Vishwamadu Rape), as well as grant protection to survivors who are witnesses in a trial (Divya).

Victim's family members have relentlessly fought for, and continue to fight for justice and accountability despite the evident impunity, an example of this is the daughter of the murdered journalist, who continues her battle outside the country, and the wife of the murdered fisherman who in her bravery, witnessed a sliver of accountability in Court. Yet, the data also reveals that while certain tactics were successful in some cases, they have failed to bring about accountability in others. For example, public outcry and involvement in protests helped get the attention of authorities in some cases, whereas impunity prevailed in others such as in the pardon of Yvonne Johnsson's killer. Yet, the grassroots support provided by human rights activists, organisations and lawyers working pro bono have helped survivors and victims' families in their fight against impunity.

Recommendations

To the government

1. A need for Victim and Witness protection to be proactive and independent of the Police

2. Increasing the time to file fundamental rights applications.

3. Proper implementation of existing laws to meet international standards.

4. The implementation of existing laws to require legal and political support in a way that aids survivors and victims' families in challenging impunity and ensuring protection and end to harassment against HRDs who work towards accountability for violations and end to impunity.

5. A need for the public service and public administration including the police, the national police commission and the HRC to carry out the work they have been assigned to by devising strategic advocacy and lobby tools.

To the civil society

6. Advocacy for an end of interference of political parties or politicians

7. Advocacy and lobby for legal reforms: e.g. redefining torture, and abolishing Article 16 of the Constitution which allows impunity to prevail.

8. Increasing access to proper legal representation, medical professionals, and professional emotional support by the establishment of a formal system.

To the international community

9. Lobby for developing sustainable ways of upholding those affected including funding and support.

10. Lobby for developing standards and guiding principles on how the mechanism as suggested by UN working groups on enforced disappearances works. The 2019 UN working group had submitted report requesting Sri Lanka Government to develop a mechanism on missing persons, following the government's consideration to withdraw its commitments to the UN human rights commission.