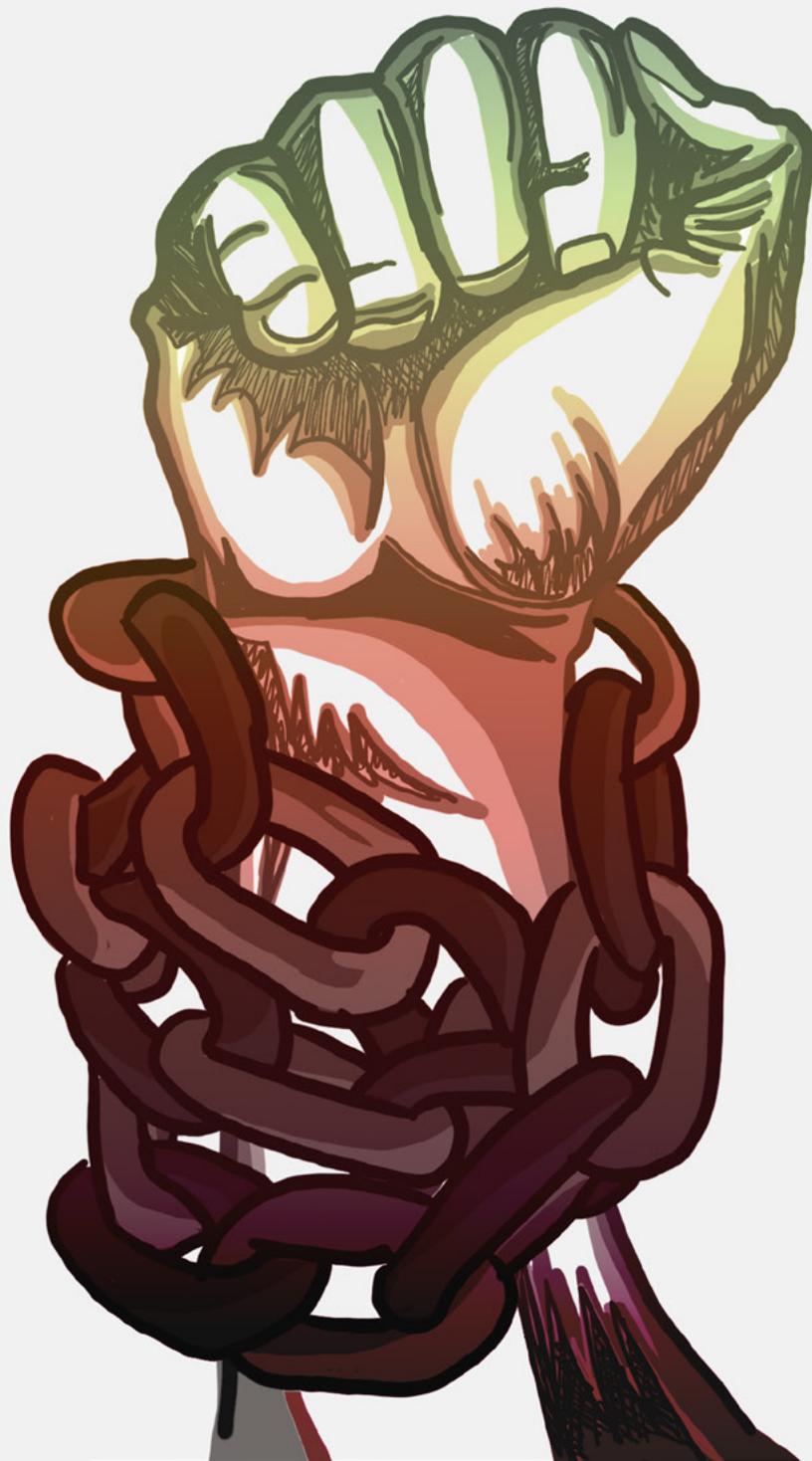


IMPUNITY IN SOUTH ASIA

South Asia: An Overview

December 2021

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abstract



Most of the South Asian States follow democratic norms and values, as may be evidenced by the fact that they hold periodic elections. However, these States also lack concrete plans and tools to combat impunity. Some studies suggest that the legislation and penal codes available in these countries are selectively enforced, whereby acts committed by erring officials are ignored.

Additionally, major incidents of human rights violations by armed forces and military establishments are often excused under the pretext of 'national security,' 'public order,' 'counter-terrorism' and so on. A culture of impunity is in a sense institutionalized in South Asia. The region is characterised as having an absence of the rule of law, and as lacking the political will to tackle injustice or hold security sectors to account. In many cases, the role of the judiciary and the national human rights institutions has been rendered helpless or dysfunctional.

This research seeks to provide insight into the state of impunity in South Asia. It aims to build a regional knowledge base on issues pertaining to impunity that cut across the region, and link them to national campaigns and advocacy efforts for the establishment of a regional human rights mechanism. It further presents an overview of impunity in South Asia based on the country papers developed by respective country authors from Afghanistan, Bangladesh, India, Nepal, Pakistan, Sri Lanka and the Maldives.

1.1 Definition and contexts of impunity in South Asia

The word impunity references the concept of the absence of the rule of law. Countries where the rule of law is not respected directly and indirectly protects perpetrators. Impunity, in this sense, is defined as the absence of accountability and the rule of law.

The Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity) define impunity as '...the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not

subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.'¹

More than 10.2 million people in the world are deprived of their liberty, and an important number among them are awaiting trial². Holding perpetrators to account and providing justice to victims remains a challenging task globally, as well as in South Asia. People's movements and the systematic intervention of civil society across the globe has aided in the establishment of legal tools and best practices to combat the culture of impunity. In Latin America, for instance, the people's quest for truth-seeking, accountability and reconciliation was undoubtedly influential. Furthermore, there have been several attempts to combat the culture of impunity through tribunals, EU human rights mechanisms and mass creation of public memories in Europe. The principle of command responsibility was stressed upon to establish a mechanism for accountability in the latter context.

South Asia, home to around 2 billion people, (i.e. almost one quarter of the world's population) is characterized by: abject poverty; political instability; growing impunity; torture; and grave violations of human rights. All South Asian countries face numerous inter-connected economic, political and sociological problems suffering from growing both internal and external political tensions resulting in negative effects on socio economic conditions. Despite vows by South Asian governments to reduce poverty, the situation remains unchanged³.

Afghanistan's last four decades have been marked by widespread human rights abuses, war crimes, and crimes against humanity. By 2000, more than 1.5 million people were killed with some two million casualties becoming permanently disabled. A Human Rights Watch report made public in 1998 claimed that the Taliban⁴ killed around 2,000 Hazara

1 The Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity). Available at <https://opil.ouplaw.com/view/10.1093/law/9780198743606.001.0001/law-9780198743606>.

2 https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_19_ENG.docx.

3 SAAPE. Poverty and vulnerability in South Asia. 2016. Available at https://saape.org/resource_category/regional-report/. Retrieved 5 February 2021.

4 Human Rights Watch, "The massacre in Mazar-e-Shar

ethnic minorities within three days. Post 9/11, the conflict has continued to escalate and thousands of civilians have been killed by the warring parties in the country. From 1 January to 30 July 2019, 3,812 civilians were killed which demonstrates the high death toll in the country⁵. The 2021 takeover of Afghanistan by the Taliban has highlighted the fear of an escalation of the already dire human rights and humanitarian crisis in the country. Taliban leaders have been reportedly involved in grave abuses of international human rights and humanitarian law, as may be evidenced by mass executions of civilians, and members of the former and ousted Afghan government. Women, children and ethnic and religious minorities are at grave risk of violence and repression, given the patterns of grave violations under previous Taliban rule.⁶

In Bangladesh, impunity is linked to the Government's suppressive attitude towards: civil society; the media; human rights defenders and minorities. Over the years, security forces have been mobilized to suppress dissenting voices and government opponents. This has resulted in arbitrary arrests, enforced disappearances, and extrajudicial killings⁷. The rights to freedom of speech and assembly are under sustained attack. Additionally, killings and enforced disappearances have been systemic. State actors like the Rapid Action Battalion and the Detective Branch of the Police were allegedly involved in 393 cases of enforced disappearances until 2017. Despite the aforementioned, there has been no credible investigation into any of these cases to establish accountability for those involved or to bring them to justice.

The culture of impunity has also prevailed in India for several decades. The Armed Forces Special Powers Act (AFSPA) has been the main facilitator of institutionalized impunity in India. Laws such as

AFSPA discriminate citizens based on race, religion and national origin. The maximum punishment for 'disturbing public order' is six months' imprisonment in all of India except in the 'disturbed area' of North East India and Kashmir, where AFSPA permits the use of force to the extent of causing death. As such, the Committee on the Elimination of Racial Discrimination observed, in its report on India in 2007, that AFSPA was a racist law and recommended its repeal on this basis. As it stands, no individual accused of crimes under AFSPA has been punished. Furthermore, vigilantes and religious fanatics have committed violence against religious minorities, marginalized communities, human rights defenders and critics of government policies – terming them as anti-nationals. Despite the ruling of the Supreme Court, the security forces continue to commit arbitrary arrests, torture, and extrajudicial killings, all whilst enjoying immunity.

In the Maldives, civilians have been subjected to decades of political subjugation since the country's independence in 1965. The situation changed in 2008, when the constitution was amended to allow a multiparty system, as well as separated powers among State organs, and guaranteed freedom of speech. However, after the election of Adulla Yameen Abdul Gayoom as the president in 2013, the newfound freedom was lost. Fundamental human rights and freedoms, including the freedom of expression, association and peaceful assembly, were impeded. Government opponents were persecuted and dehumanized, while elections were rigged and media personnel were abducted and killed. On top of this, Supreme Court justices were arrested for their verdict against government excesses.

Criticism of government policies was equated with the criticism of Islam and religious extremists and criminal gangs were mobilized to attack the critics of government policies and freethinking individuals, including bloggers. On 23 April 2017, Yameen Rasheed was found with 34 wounds in the stairwell of his apartment building in Male. He died shortly after being taken to hospital. Rasheed was a prominent blogger and social media activist known for his satirical commentaries on Twitter and his personal blog. The Government made no sincere efforts to investigate the killing of Yameen. As evidenced, impunity is somewhat

if." Accessed May 15, 2021. <https://bit.ly/2AVkbeY>. International Criminal Court, "Investigation: Situation in the Islamic Republic of Afghanistan." Accessed 15 May 2021, <https://bit.ly/31zicWX>.

5 United Nations Assistance Mission in Afghanistan. Midyear Update On the Protection of Civilians in Armed Conflict : 1 January to 30 June 2019, 2019. Accessed 22 November 2021 https://unama.unmissions.org/sites/default/files/unama_poc_midyear_update_2019_-_30_july_english.pdf

6 FORUM-ASIA. "FORUM-ASIA's Position Statement on Afghanistan." Accessed 22 November 2021 <https://www.forum-asia.org/?p=35638>.

7 Human Rights Watch. "Bangladesh." Accessed 22 November 2021 <https://www.hrw.org/asia/bangladesh>

entrenched under the guise of counterterrorism and anti-defamation laws in the Maldives. These are all used against human rights defenders, civil society organisations, media activists and political opponents. These laws give excessive powers to security forces and shield criminal gangs, as long as they support the interests of those in power.

Impunity in Nepal traces its origin to the 1970s, when political opponents of the absolute monarchy were forcibly disappeared and killed. In the early 1990s, after Nepal was ushered into an era of multi-party democracy, civil society organizations called for investigations into human rights violations committed during the authoritarian era, as well in the intervening period. However, contrary to the call and popular expectation, alleged perpetrators were inducted into political parties and elevated to positions of power and influence.⁸ The voice for accountability completely fell by the wayside.

In 1996, the then Communist Party of Nepal launched what became known as the 'People's War' against the State of Nepal. The People's War was a heavy blow to the polity that was beginning a transformation period, and pushed Nepal into an armed conflict, which lasted until 2006. During this decade, some 15,000 people were killed and an untold amount of property was destroyed. In November 2006, the parties to the conflict entered into a 'Comprehensive Peace Agreement' and agreed to a negotiated settlement to the armed conflict. One of the agreements was about transitional justice, which would, among other factors, establish accountability for the conflict era violence, hold the perpetrators to account, and provide reparation and justice to victims. However, 14 years down the line, the transitional justice process remains stagnant, with parties to the conflict attempting to delay the process with the hopes of evading responsibility. There is therefore a lingering fear of impunity becoming institutionalized in Nepal.

Meanwhile, extrajudicial killings and enforced disappearances are widely prevalent amidst severe restrictions within the civic space in Pakistan. Under the pretext of national security, the government is increasingly silencing critical voices of journalists

8 The Asia Foundation. Impunity and political accountability in Nepal. <https://asiafoundation.org/2014/03/12/new-report-examines-impunity-and-political-accountability-in-nepal/>.

and human rights defenders. Recent evidence of this is the arrest of Manzoor Pashteen, a Pakistani human rights defender and leader of the Pashtun Tahafuz Movement⁹. Aside from this, torture is routine in the country, and takes place without any fear of being prosecuted, as security forces take precedence over civilian life. Impunity is the order of the day in Pakistan.

Blasphemy related violence is rife in Pakistan. It affects hundreds of religious minorities, women and girls every year. However, no government regime has tried to address the underlying issues in earnest, nor are those responsible properly prosecuted and held to account. Rampant application of the death penalty has also been a cause of concern. Over 490 people have been executed since the government ended an unofficial ban on the death penalty in late 2014.¹⁰ Complaints of unfair trials are often reported around death penalty cases.

Lastly, in Sri Lanka, addressing the consequences of the 30-year civil war, including its subsequent war crime allegations is proving to be complicated. The exact number of killings that occurred during the war is unavailable, however, some reports estimate 70,000 to 100,000 casualties.¹¹

To date, no process of accountability has been initiated despite national calls and international pressure for this. What's more, there appears to be a lack of willingness within the police force and the Attorney General's Office to investigate violations conducted by State actors, as these entities tend to see themselves as agents of the State rather than as independent bodies.¹²

The draconian Prevention of Terrorism Act also remains in effect, facilitating torture and other abuses. The initiatives of the government are insufficient to reform the security sector and the criminal justice system as per international

9 FORUM-ASIA. "Pakistan : Release Manzoor pashteen and his fellow human rights defenders immediately." Accessed 22 November 2021 <https://www.forum-asia.org/?p=30836>

10 Human Rights Watch. "Pakistan." Accessed 22 November 2021 <https://www.hrw.org/asia/pakistan>

11 Armed Conflicts Report, 2009. Accessed 22 November https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/25/Sri_Lanka.pdf

12 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/>.

standards. Meanwhile, ultra-nationalist groups feel emboldened by delays in the accountability process. Muslims and other minority groups often face life threats and violence. In several cases, international human rights standards have not been incorporated into domestic laws, and there is no appropriate legal framework to prosecute crimes against humanity. Similarly, the Geneva Conventions have not been incorporated within the domestic framework, preventing prosecutors from trying cases related to violations in committed in war contexts.

1.2 Theoretical constructs of impunity

The words democracy and impunity are contrary to each other. Democracy is founded on the rule of law, accountable institutions, as well as transparent and inclusive decision-making processes; impunity, on the other hand, allows gross human rights violations to thrive, thereby undermining the fabric of societies and preventing the development of sustainable peace and reconciliation.¹³

Ending impunity is instrumental to fighting corruption but this needs strict law enforcement for the good of the people and tracking justice systems to encourage leaders to follow rule of law. The causes of impunity remains a key area of interest for those concerned with promoting democracy and human rights. These causes are usually centred on the State's reluctance to conduct due diligence or meet their obligations; as well as a lack of investigations; accountability; compensation; or genuine concern for the rights of victims.

Two conceptual frameworks, i.e. peace and justice are irreconcilable determiners for countering impunity. Observations from conflict protracted countries like Uganda and Sudan show that prosecutions can often proceed in parallel to peace efforts and even bolster them. The immediate reaction of any warring party confronted with an indictment will be to claim that it removes all incentives to negotiate and leaves no choice but to continue fighting.¹⁴

13 OHCHR (2013). Impunity and the rule of law. Available at https://www2.ohchr.org/english/OHCHRRReport2013/WEB_version/allegati/4_Impunity.pdf Accessed 21 February 2021.

14 International Crisis Group. "The politics of ending impunity." Accessed 22 November 2021 <https://www.crisisgroup.org/global/>

Peaceful, just and inclusive societies are major tools for ending impunity as may be evidenced by the widely accepted Sustainable Development Goal 16. This goal is largely critiqued as a 'victory for the anti-corruption movement' since it makes 'an explicit link between good governance and fighting corruption and peace, justice and inclusive development' for the first time.¹⁵ The rule of law and impunity are antithetical to each other. A human rights regime functionalizes the rule of law. When the law enforcement agencies fail to perform their duty, it inadvertently perpetuates unaccountability and leads to impunity.

1.3 Research issues

This study is dedicated to understanding some of the crucial issues related to impunity in the South Asian region. This includes the drivers and impacts of impunity on civilians as well as policies, laws and strategies adopted by countries in the region vis-a-vis international human rights standards. With this in mind, the study seeks to answer the following questions:

- How does impunity affect individuals and societies in South Asia?
- Does impunity benefit anyone? If it does, in what ways?
- How do concerned stakeholders, particularly the government, civil society and international agencies, respond to impunity?
- -What should be done to end impunity and to ensure justice to victims?

politics-ending-impunity. Accessed 21 February 2021.

15 UNDP (2015). End impunity for corruption to boost resources for development. Available at <https://anti-corruption.org/end-impunity-for-corruption-to-boost-resources-for-development/>. Accessed 21 February 2021.

1.4 Objectives

This study aims to explore the causes and consequences of impunity in South Asia through a historical perspective. It documents the trends and patterns of impunity in various countries and highlights good practices against impunity. The study finally concludes with the issues and areas that need urgent intervention if ending impunity and ensuring justice for victims is to be realized.

1.5 Methodology

This research study follows a case-study method in the following South Asian countries: Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka, whereby each case study is presented by different authors. The country authors identified unique themes to their respective chapters; for instance, enforced disappearances and extrajudicial killings were explored in the case study on Bangladesh, whereas the Armed Forces Special Powers Act (AFSPA) was an area of focus in the India study.

The studies on Nepal and Sri Lanka, on the other hand, discussed transitional justice whereas the study on Pakistan highlighted the death penalty and the government's treatment of minorities. These authors collected emblematic cases representing all themes or types of issues related to the respective theme(s) of their study. They also reviewed the initiatives taken to address impunity, including court verdicts, civil society and national human rights institutions (NHRIs) interventions, government responses and international responses to local initiatives.

1.6 Limitations of the study

Impunity enables an environment where violations are allowed to continue. The historical chronology shows conflict drivers around the world are often related to chronic impunity and a lack of accountability. Where impunity prevails, human rights become the first casualty. This overview is mainly based on the country papers written by the respective country authors. The overview further includes some literature to substantiate the issues.



chapter two

OVERVIEW OF HUMAN RIGHTS IN SOUTH ASIA

The Islamic Republic of Afghanistan has remained in chaos since the Soviet-Mujahedeen conflict and subsequent tensions between the Mujahedeen of different factions throughout the 1980s and 1990s. These conflicts unleashed massive human rights violations and abuses, mass killings, and a context where extrajudicial practices prevailed over the rule of law. Since 2001, considerable achievements have been made in the area of human rights, such as the Constitution of 2004, the Elimination of Discrimination against Women Law in 2009, and the establishment of the Afghanistan Independent and Human Rights Commission.

The creation of legal systems and several civil society organizations have also been part of these achievements. The country has also ratified two core international human rights treaties; i.e. the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD). However, with the ongoing armed conflict, these hard-won gains are more fragile than ever. If these achievements are not supported and consolidated, it is possible that they may roll back as the overall human rights situation is deteriorating on several fronts.

Despite the aforementioned achievements, thousands of civilians have been killed and wounded, ultimately challenging international norms and principles related to human rights and democracy, that is, Geneva Conventions and other international humanitarian laws. Both the State and non-state actors such as the Taliban and other terrorist networks have been responsible for these casualties since 2009.¹⁶

Following a 2014 military drawdown, the country witnessed an exponential surge in the security situation which resulted in catastrophic human casualties and civilian displacement. In addition to this, there are clear indications of declining respect for human rights in Afghanistan. The surge in civilian casualties; alarming level of women rights violations; deteriorating security; recurring impunity of abusers; growing corruption; weak rule of law and accountability; combined with a lack of political will indicate waning determination on the part of the Afghan government to respect, protect and defend human rights. Furthermore, instances of war crimes and crimes against humanity were evident throughout the last four decades in Afghanistan. Even so, there are no prospects for remedial actions for victims nor are there accountability measures to bring perpetrators to justice.

¹⁶ UNAMA, Afghanistan: Human Rights and Protection of Civilians in Armed Conflict a Special Report on Kunduz Province. 2015, Accessed 15 May 2021, <https://bit.ly/31VM2W4>.

The People's Republic of Bangladesh emerged from its colonial legacy in 1972 to achieve self-determination but resorted to gross human rights violations at its inception; despite this, it is virtually considered to be a democratic country respecting human rights and the rule of law. The country has a bitter history that occurred during the conflict period in 1970. Here, large scale enforced disappearances, extrajudicial killings, arbitrary detention, and custodial torture have been the norm. Within only three and a half years after the independence, there have been reports of thousands of incidents of enforced disappearances and extrajudicial killings of opposition political activists from the leftist political parties.

All these gross human rights violations have taken place with blatant impunity. This has challenged its constitution and the basic principles enshrined in the Declaration of the Independence of Bangladesh, which ultimately calls for equality, human dignity and social justice for all citizens.¹⁷ These gross human rights violations have taken place with blatant impunity.

Since the democratisation process began in the 1990s, successive governments have tolerated extrajudicial killings that the law enforcement agencies committed and have granted impunity to these perpetrators. Under the guise of the global 'war on terror' project, the Bangladeshi government has started using the armed forces to curb crimes and recover illegal arms under an initiative known as 'Operation Clean Heart'. It began on 16 October 2002 and ended on 9 January 2003 resulting in around 58 deaths.¹⁸

Custodial torture has been a way of policing throughout the history of law enforcement in Bangladesh, including during the colonial and post-independence periods. The notion of criminal investigation has been closely associated with the use of torture as an integral part of the process. Torture is always used to coerce confessions by the law-enforcement agency involved in the given case, and has been used for extorting bribes from the detainees and suspected offenders.¹⁹

17 Banglapedia - National Encyclopaedia of Bangladesh. "Declaration of Independence." Accessed 22 May 2021 http://en.banglapedia.org/index.php?title=Declaration_of_Independence

18 Nick Cheesman. "Fighting lawlessness with lawlessness (or) the rise & rise of the rapid action battalion." Accessed 22 November 2021 <http://alrc.asia/article2/2006/08/fighting-lawlessness-with-lawlessness-or-the-rise-rise-of-the-rapid-action-battalion/>

19 FORUM-ASIA. "Bangladesh Country Report on Impunity." <https://www.forum-asia.org/uploads/wp/2021/10/South-Asia-Impunity-Report-Bangladesh.pdf>.

India is known as the world's largest democracy and is a signatory to a number of international human rights instruments, and has enacted laws that guarantee human rights. However, the country witnesses the violations of human rights and the law promoting impunity. This is due in part to laws that enable impunity (e.g. the Armed Forces Special Powers Act, and provisions of the law that require sanctions for the prosecution of public officials), as well as failure to enact laws, as may be evidenced by its failure to ratify the Convention Against Torture or enact domestic law against it. It is also due to structural lapses whereby law enforcement agencies fail to take action against perpetrators in light of caste and gender biases.

Recent updates justify the Indian government preferring 'electoral autocracy' and challenging 'free democracy' in the light of a 'multiyear pattern in which the Hindu nationalist government and its allies have presided over rising violence and discriminatory policies affecting the Muslim population.²⁰ The Democracy Index published by the Economist Intelligence Unit of the United Kingdom downgraded India to a 'flawed democracy.' This downgrading is attributable to 'democratic backsliding by the authorities and crackdowns on civil liberties,' the handling of the COVID-19 pandemic, and the undermining of secularism of the country through introduction of the Citizenship Amendment Act, which introduces 'a religious element to the conceptualization of Indian citizenship.'²¹

Additionally, India was ranked 142nd in a 2021 World Press Freedom Index of 180 countries.²² This media ranking was granted in light of the government's attempts to: portray critical views as 'anti-national' and persecute oppositional voices through criminal prosecution using sedition laws, and anti-terror laws. Furthermore, attacks against journalists has made India one of the most dangerous countries in the world for journalists.

The Maldives has undertaken its journey of democratisation with the State outlining its commitment to respect human rights amidst the continuation of a legacy of political violence and persecution. The move to democratise the country was interrupted by a coup d'état in February 2012.

After eight years of turmoil following the disputed transfer of power, the Maldives held presidential elections in September 2018 whereby President Ibrahim Mohamed Solih was elected by an overwhelming majority of Maldivian people in a shock victory for the Maldivian Democratic Party, and other political parties that allied to vote-out former president Abdulla Yameen Abdul Gayoom.

20 Freedom House. "India: Freedom in the World 2021 Country Report." Accessed 7 October 2021, <https://freedomhouse.org/country/india/freedom-world/2021>.

21 Economist Intelligence Unit. "Democracy Index 2020." Accessed 7 October 2021, <https://www.eiu.com/n/campaigns/democracy-index-2020/>.

22 Reporters without Borders. "India : Modi Tightens His Grip on the Media." Accessed 7 October 2021, <https://rsf.org/en/india>.

The Federal Democratic Republic of Nepal remained under political unrest since the Rana regime in the 20th century. The 30-year-long Panchayat regime imposed in 1959 was collapsed through the popular movement in 1990. The country remained peaceful until 1996 under the multi-party democracy. However, in 1996 the Maoist put forth a 40-point memorandum to the then Council of Ministers demanding to establish People's Republic and announced the 'People's War'.²³ This war shaped an armed conflict that took the lives of over 13,000 people, hundreds of thousands wounded and a similar number displaced.²⁴

These political incidents and movements have a single agenda of structural reform process in Nepal and the outcome of over one decade of negotiations among the former ruling Monarch, Nepali political parties and the Maoist movement, under the impetus of civil society mobilisation for change – with demands ranging from power, rights and dignity for people at the community level. The peace process initiated in 2006 after another round of a 19-day popular movement put an end to the armed conflict in Nepal in 2006, has sought to address popular demands for inclusive democracy.²⁵

The constitution making process that ensured structural reform started in 2008 and was only completed in 2015 after two rounds of elections in the Constituent Assembly and after rigorous discussions, confrontations and negotiations. All in all, the constitution guarantees human rights as fundamental and aims to strengthen the scope of national human rights institutions and encourage constitutional commissions formed by community led initiatives. These commissions ensure the accountability of the constitutional mandates and human rights treaties and conventions ratified by Nepal.

However, there is still a gap in the proper implementation of the rule of law and the accountability of law enforcement agencies towards constitutional mandates. Nepal has, thus, given an example of negotiating politics for the peace by ensuring the rule of law and human rights. Nepal is ahead of other South Asian countries as far as ratification of international human rights instruments since economic, social and cultural rights such as the right to health, the right to housing, the right to education and the right to food are enshrined in the Constitution as fundamental rights; however, their proper implementation at the national level is still pending.²⁶

23 <https://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm>.

24 https://www.ohchr.org/Documents/Countries/NP/OHCHR_ExecSumm_Nepal_Conflict_report2012.pdf.

25 Khatiwada, PP. The Nepalese peace process: faster changes, slower progress. IPS Paper No. 9. Berghof Foundation, 2015. Accessed 22 November <https://berghof-foundation.org/library/the-nepalese-peace-process-faster-changes-slower-progress>.

26 Khatiwada, PP. Nepal poverty report 2016. https://saape.org/wp-content/uploads/2020/07/Nepal-PR-2016_opt.pdf.

The Islamic Republic of Pakistan is constitutionally a theocratic State and may even be considered a hybrid State as it oscillates between military rule (direct or indirect), and limited civilian rule. Since the 1980s, the military has increasingly relied on the religious clergy for political objectives, which has led to the marginalization of religious minorities in the country.

Furthermore, the human right to religious freedom is almost non-existent in Pakistan for both sectarian and religious minorities. This often means that there is gender-based violence and a denial of fundamental rights to ethnic and linguistic minorities which contravenes the fundamental rights that are subsequently outlined in this chapter. All of these are justified in the name of religion. It also extends to denial of freedom of expression and speech often clamped down for the 'glory of Islam' and 'integrity of Pakistan.'

Pakistan's Constitution defines religious minorities as 'non-Muslim,' meaning any person who is not Muslim, and includes persons belonging to the Christian, Hindu, Sikh, Buddhist or Parsi communities, as well as persons of the Ahmadi group (also referred to as Qadiani Group or the Lahori Group), Bahais, or persons belonging to any of the scheduled castes.

The Democratic Socialist Republic of Sri Lanka remained in conflict for a long period of time, and witnessed riots, insurgencies, terrorist activities and general extremism, which resulted in: mass killings, torture and enforced disappearance. Extra judicial killings of: journalists; activists; aid workers; legislators; political leaders and other politically motivated murders prevailed. Killings of women, infants and children are also an issue of concern, especially due to the increase in the occurrence of this crime, and its connection to other crimes such as rape and sexual abuse.

Massacres like Welikada that took place during the 1983 Black July pogrom against Sri Lankan Tamil minority in Colombo and Sooriyakanda, that is, mass burial ground of murdered school children from Embilipitiya Maha Vidyalaya (Embilipitiya High School) have also been reported in the recent history in Sri Lanka. According to a report released by the UN human rights office, approximately '40,000 Tamils died in the final army offensive' (BBC, 2015) which some sources define as a 'genocide'.²⁷ The reinstating of the death penalty in Sri Lanka in 2019 has been subjected to strong criticism as it has been viewed as a major setback for human rights.²⁸

Lack of legal accountability; provision of de jure and de facto impunity; structural impunity such as only prosecuting the junior soldiers despite 'very finite pointers to culpability at a much higher level'; the failure of the justice system; a lack effective prosecution; pardon bias on the grounds of ethnic and religious origin; a lack of witness protection; and setting stages without witness have been highlighted as key issues.

27 Francis Boyle. *The Tamil Genocide by Sri Lanka*. SCB Distributors, 2010.

28 Human Rights Watch. "Sri Lanka: Resuming death penalty a major setback." Accessed 22 November <https://www.hrw.org/news/2019/06/30/sri-lanka-resuming-death-penalty-major-setback>.



chapter three

the driving impacts of
IMPUNITY IN SOUTH ASIA



The drivers of impunity in South Asia are closely associated with the geo, socio-political and economic situations of the countries in the region. This section highlights major driving factors of impunity: political economy, commitment towards democracy ensuring rule of law and social justice, accountability of the States to fulfil the entitlements and so forth.

3.1 Political economy

Afghanistan's protracted armed conflict has the underlying notion of political economy through involvement of several other anti-governmental elements. The Taliban along with the Haqqani Network and the Hezbe Islamic of Gulbuddin Hekmatyar gained new momentum and became well-organized, the ISIS group, a composition of both Afghan and foreign fighters, restored and mobilized their destructive campaign. All these have opened different fronts, each struggling to expand their geographical sphere. As a result, the battleground became highly complicated and multifaceted (Rangelov and Theros, 2019, p.207)²⁹.

Afghanistan is naturally well-stocked with natural resources. However, millions of dollars' worth of these resources are being extracted annually by the aforementioned networks, all while being 'unaccompanied by payment of applicable royalties and taxes to the State' (United States Institute of Peace).³⁰ The economic motives behind these conflicts is clearly reflected to manipulate the political situation and enjoy the black-market economy. These networks of public and private actors are responsible for some of the most terrible human rights violations but also 'benefit the most from the political economy of counterterrorism and State-building.'

Bangladesh provides an illustration of how external powers negotiate with internal political and military elites with the aim of assuming power via 'election engineering' for their strategic, geopolitical, and financial gains. Political developments like the assurance of impunity for top level army officers in

return for the help of the power at that time and the strengthened negotiation with United States (US) Head of State were possible after the change of governmental power in Bangladesh. Among others it had the objectives of 'making progress on Indo-Bangladesh and counter-terrorism issues.'³¹

India is another example of how social and political issues promote impunity in the country. India symbolises the deeply rooted hierarchies arising out of caste and other identity markers. The caste system, which is a part of the Hindu religion, is one of the oldest and longest surviving social hierarchies in the world. While article 14 of the Constitution of India guarantees equality irrespective of gender, caste or other social backgrounds, it is yet to be realised; in reality, caste-based discrimination is still widely practiced in India. Minorities particularly Muslims, face marginalisation and persecution. This marginalisation has been felt acutely from 2014 and 2019 when the Hindu right won national elections with an overwhelming majority.³²

Historically, India has witnessed several instances of communal strife, and violence against minorities and marginalised groups. In light of the inequalities and hierarchies, victims from underprivileged backgrounds find it difficult to approach authorities and seek legal remedies. State authorities are not equally responsive to members of marginalised groups and seek to protect persons belonging to privileged backgrounds. Victims often face secondary victimisation when they attempt to access justice. Examples include mob lynching cases and Hathras which are discussed in subsequent sections of this report.

Recently, the Indian government has been charged with involvement in systematic repression of critics and opposition. Journalists, academics, and activists have been targeted for voicing their opinions against the government. It is not a malaise of the present government alone; successive governments have persecuted their critics using criminal defamation laws, sedition and other anti-terror or preventive detention laws. Here, governments resort to

29 Rangelov Labor and Marika Theros, "Political Functions of Impunity in the War on Terror: Evidence from Afghanistan." *Journal of Human Rights* 18(4) (2019).

30 William Byrd and Javed Noorani, "Industrial-Scale Looting of Afghanistan's Mineral Resources." *United States Institute of Peace*, Accessed 15 May 2021, <https://bit.ly/3ivyY1Y>.

31 WikiLeaks, "THE ELEPHANT IN THE ROOM--FIXING CIVIL MILITARY RELATIONS IN BANGLADESH." Accessed 22 November 2021 https://wikileaks.org/plusd/cables/09DHAKA106_a.html

32 Human Rights Watch "India: Government Policies, Actions Target Minorities." Accessed 1 November 2021, <https://www.hrw.org/news/2021/02/19/india-government-policies-actions-target-minorities>.

weaponising the police to carry out their political vendetta. They are subsequently able to execute arbitrary arrests; foist false cases; use preventive detention laws; selectively prosecute some cases and avoid accountability for their political ends, due to their control over the police and other investigating and law enforcement agencies.³³

Meanwhile, torture in Maldivian prisons, especially during the presidency of Maumoon Abdul Gayoom who was in power from 1979 to 2008, remains well-documented.³⁴ Historians claim that over a hundred individuals were extra judicially killed in the Gayoom-era prisons. Other forms of persecution included internal exiling of political opponents, which is a practice that dates back to ancient times in the Maldives, and is still legally sanctioned as a penalty for various offences under the Maldivian Penal Code.

Sexual assault and rape at the hands of security forces were repeatedly mentioned by torture survivors from the 1980s and 1990s. In fact, many interviewees noted that systematic sexual assault was a routine technique used to intimidate and humiliate detainees while in police custody. Although it is less reported today, the lack of police action in recent reports of rape and sexual assault suggests that the police are unattuned to the severity and urgency of such allegations.³⁵ Police brutality during arrest and the use of excessive force despite the provision of guidelines was noted even after changes to police leadership. A year ago, leaked footage implicated the police in brutalising suspects during a narcotics raid.³⁶

In Nepal, the causes of impunity are mostly connected to power politics. Moreover, the Police's habit of using excessive force, such as in the case of the Rolpa District's Local Festival, and impunity enjoyed by the security personal may

33 Prashant Bhushan, "Is CBI the Handmaiden of the Government?" The Hindu, 20 August 2017, <https://www.thehindu.com/opinion/op-ed/is-cbi-the-handmaiden-of-the-government/article19272931.ece>.

34 Redress. This Is What I Wanted to Tell You. London, UK 2012. Accessed 19 May 2021 <https://www.refworld.org/pdfid/5064180e6a5a.pdf>

35 Aishath Shany, "Safari assault case: police admits to not conducting alcohol test on suspects," Raajje, 1 July 2020 <https://raajje.mv/81785>

36 Mohamed Junayd, "7 officers suspended as police brutality probe underway," The Maldives Independent, 9 July 2019 <https://maldivesindependent.com/crime-2/7-officers-suspended-as-police-brutality-probe-underway-146511>

lead unsatisfied youths to armed conflict. This forecast is based on the documentation of human rights violation cases around the country, and was protected by the government. The then Maoist Party declared 'underground armed struggle' and established the lack of political accountability in law enforcement, thereby promoting impunity and fuelling the violence.³⁷

Political leaders did not take the opportunity to address violations of human rights during the conflict by ensuring truth, justice and reparations to victims, due to their shaky commitment and integrity towards the constitution; laws; policies and human rights principles. In fact, the country's leaders have largely avoided their responsibility and ignored victims' desires for truth, justice, reparation and institutional improvement. As a result, impunity has been vividly highlighted. Although, the constitution and laws of Nepal have guaranteed the right to seek justice in various circumstances, the implementation aspect is poor in under the control of political forces and other powerful entities.³⁸

Since 1953 religion has been used as a tool to bring down governments in Pakistan. Disruptions in civilian democracy by intermittent military coups have given the military extreme power.

Arzoo is a 13-year-old Christian girl who was married off to a 44-year Muslim man without her consent. Her next-door neighbor Ali Azhar abducted her on October 13, 2020, and subsequently married her. According to the National Database, Arzoo is 13 years old, however, a fake birth certificate showing her to be 18 years was presented before the police. According to Pakistani law, having sexual intercourse with a girl younger than 16 is statutory rape, and marriage cannot happen before 18 years of age. However, the police did not register the case under the Child Marriages Restraint Act, despite the fact that Arzoo's family were ready to allow a medical examination to determine her age. While the police did ultimately take action, the 13-year-

37 INSEC. Nepal Human Rights Year Book. Kathmandu : INSEC, 1994.

38 INSEC. Nepal Human Rights Yearbook. Kathmandu: INSEC, 2020. Accessed 14 August 2021. <https://www.insec.org.np/hr-year-book/>.

old seems to have filed a constitutional writ protection in the Sindh High Court at Karachi.

3.2 Human rights and the rule of law

The Afghan government is largely charged of being incapable or reluctant to prioritize rule of law. The government is entangled with “friend-enemy antithesis” to provide substantiated narratives to justify the war on terror for an unforeseeable future. The approval of the General Amnesty and National Reconciliation Law in Afghanistan directly provides amnesty to all alleged perpetrators of war crimes and crimes against humanity both in the preceding decades, as well as in the present and future. According to this law, different factions of belligerent groups who are engaged in large-scale violations of human rights and atrocities gained legal protection (Human Rights Watch, 2010). If the current Afghan peace talks with the Taliban result in a political agreement, then the group would also be able to come to Kabul without any legal accountability just as Gulbuddin Hekmatyar did. So far, around one thousand Taliban prisoners, 400 of which are hard-core inmates have been released from the Afghan detention facilities without any legal accountability. The approval of this law has turned impunity from a mere culture to a legal foundation for war criminals.

Aside from this, the last few decades have amounted in numerous reports about the Afghan military forces and its international allies who have been involved in human rights violations during the counterinsurgency campaign. The international forces have particularly enjoyed long years of impunity in Afghanistan, and have allegedly been involved in war crimes and crimes against humanity (Peltier and Faizi, 2020).

In the Maldives, torture especially during the presidency of Maumoon Abdul Gayoom, who led the country from 1979 to 2008, was well-documented (Redress, 2012). Historians claim that over a hundred individuals were extrajudicially killed in the Gayoom-era prisons. Other forms of persecution included internal exiling of political opponents, which is a practice that dates back to ancient times in the Maldives, and is still legally sanctioned as a penalty for various offences under the Maldivian Penal Code.

Sexual assault and rape at the hands of security forces were repeatedly mentioned by torture survivors from the period spanning the 1980s and 1990s. Police brutality during arrest and the use of excessive force despite of guidelines was noted even after changes to police leadership. A year ago, leaked footage implicated police in brutalising suspects during a narcotics raid. Protestors were also pepper-sprayed and obstructed from protesting rape and child abuse in July 2020. These trends sadly demonstrate that the ‘muscle memory’ reflexes of the law enforcement still jolt towards brutality and torture. None of the perpetrators have been reprimanded through open and transparent processes (Powell & O’Leary, 2020)³⁹.

Since the beginning of this year, there has been another spike in the number of cases of rape and child abuse in the Maldives, usually implicating victims’ family members. The UNICEF Maldives stated early this year that over 1200 cases of abuse and violence against children were reported to the Maldives Police Service (MPS) in 2019⁴⁰, whereas the previous Minister for Gender, Family and Social Services said that there are ‘four cases of child abuse reported per day.’⁴¹ The local media on the other hand, reported 22-32 cases in March and April 2019 alone.⁴² On top of this, activists, journalists and lawyers have suffered arbitrary arrests, physical attacks and extrajudicial killings. Anti-government protests are marked by exceeding numbers of detainees, many of whom survived torture at the hands of riot police and correctional officers over the decades.

In Nepal, during the decade long armed conflict, the police’s exercise of using excessive force and the impunity enjoyed by the security personal

39 Luke Powell and Abigail O’Leary, “British tourist ‘dragged’ from Maldives beach by police for wearing a bikini,” *The Mirror*, 7 February 2020, accessible at: <https://www.mirror.co.uk/news/uk-news/british-tourist-dragged-maldives-beach-21451196>

40 UNICEF. “UNICEF Maldives Office press statement on the case of a 2-year-old child being sexually abused and the many similar cases that have come to the public’s attention in the days since.” Accessed 22 November 2021 <https://www.unicef.org/maldives/press-releases/unicef-maldives-office-press-statement-case-2-year-old-child-being-sexually-abused>

41 “Shidhatha: 4 cases of child abuse reported per day,” 9 January 2019 Sun Media Group, accessible at: <https://en.sun.mv/51723>

42 “22 cases of child sexual abuse in April,” *The Maldives Independent*, 19 May 2019, <https://maldivesindependent.com/crime-2/22-cases-of-child-sexual-abuse-in-april-145405>

have may lead the unsatisfied youths to the armed conflict. Even after more than a decade, the political parties didn't use opportunity to address the violations of human rights during the conflict by ensuring truth, justice and reparation to victims because of their frazzled commitment and integrity towards the constitution, laws/policies and human rights principles.

The political leaders have largely avoided their responsibility and the victims' will for truth, justice, reparation and institutional improvement have been neglected and denied. As a result, impunity became apparent. Although, the constitution and laws of Nepal have guaranteed the right to seek justice in any circumstance, individuals have faced barriers created by the political forces and the existing power structure. The crux of the rule of law is to end impunity but the practice doesn't ensure the constitutional thrust of access to justice for all, nor does it ensure that the law is equal for everyone.

Some key factors that fuel impunity in Sri Lanka include: continuous emergency laws; the Prevention of Terrorism Act no 48 of 1978(PTA)⁴³, which provides broad powers to search, arrest and detain suspects; immunity provisions for the President under the 1978 Constitution⁴⁴ (Subject to the exceptions under the 19th amendment to the Constitution⁴⁵); and the conferral of immunity on State officials using emergency laws; 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 at the time prioritized good governance and made some efforts to address some of these issues, such as through initiating the 19th amendment to the Constitution of Sri Lanka.

However, after the new President Gotabaya

43 Prevention of Terrorism Act no 48 of 1979 [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/8a597180e56d83edc125773700393abb/\\$FILE/Prevention%20of%20Terrorism%20Act.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/8a597180e56d83edc125773700393abb/$FILE/Prevention%20of%20Terrorism%20Act.pdf)

44 The Constitution of Sri Lanka <https://www.parliament.lk/files/pdf/constitution.pdf>

45 19th Amendment to the Constitution of Sri Lanka, 2015 <https://www.parliament.lk/files/pdf/constitution/19th-amendment-act.pdf>

Rajapaksha came into power in November 2019, he openly declared his intention to amend the constitution in his inaugural speech, which some political analysts/experts fear as 'the first step to autocracy.'⁴⁶ The draft 20th Amendment as gazetted on 28 August 2020 grants immunity for the President from all legal action and grants powers to the president to make crucial appointments such as: Judges of the Supreme Court; the Chief Justice; the Attorney General; members of the Judicial Service Commission (JSC); as well as the Police Commission who would ultimately appoint 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 for the government of Sri Lanka's explanation and mechanism on missing persons in Sri Lanka following the government's consideration to withdraw from its commitment to UN human rights commission.

3.3 Corruption

Widespread issues of corruption have become a daily occurrence in South Asian States, especially in public institutions, which acts as the main law enforcement bodies. Corruption has therefore emerged in South Asia as a matter of pressing concern in criminal justice. The executive and the judiciary organs, as well as the legislative and parliamentary bodies have been known to facilitate widespread cases of corruption. Corruption has been looming over all of public institutions; consequently under a widespread climate of corruption and impunity, perpetrators are rarely held to account and the victims are rarely able to gain legal redress (Human Rights Watch, 2015).

According to Transparency International's annual perception index from 2018, Afghanistan is ranked among the 4th most corrupt countries in the world (TOLO News, 2018). Most of the Afghan public has

46 <https://srilankabrief.org/2020/01/sri-lanka-amending-the-constitution-will-be-the-first-step-to-autocracy-kumar-david/>; http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=216470

little to no access to formal judicial institutions across the country. Many legal cases are dealt with informally through traditional processes such as local Jirga (s). As a result, the people have lost trust in the formal legal systems amidst a climate of impunity, which furthered the Taliban propaganda machine (Yasa, 2020, p.1).

A bike had been stolen from my village, and when people went to file a complaint with the local officials, they demanded a bribe. ‘We had to bribe our way out, and by the time we got hold of the bike, we had already paid double the amount the bike was worth’

- Case of Afghanistan, Source: VOA, 2015

According to World Justice Project (2016), more than half of Afghans (i.e. 58%) have paid a bribe to process a government permit in Afghanistan.

Afghan Survey Perception of the Courts



Source: World Justice Project

The alleged cases of corruption in the Afghan parliament range from receiving bribes in return for votes of confidence and arranging lucrative contracts, to undue interference in government recruitment, and illegal mining (Afghanistan Analysts Network, 2018)⁴⁷.

Brokering the process of facilitating the preferred party to assume to the State’s power the US energy company Conoco Phillips is awarded two offshore gas blocks, without bidding, for natural gas exploration and bargains for all the offshore gas blocks and coal mining by the US companies.⁴⁸ It also benefits India in many ways, for instance in its desire to gain access to Bangladeshi territory and borders via transit facilities.⁴⁹

47 Afghanistan. Problem faced by criminal courts. Accessed 22 November 2021 <https://www.afghanistan-analysts.org/en/>

48 WikiLeaks. “Ambassador urges prime minister’s adviser to accelerate energy sector development.” Accessed 22 November 2021 https://wikileaks.org/plusd/cables/09DHAKA741_a.html

49 WikiLeaks. “Hasina advisor: prime minister focused on achieving her objectives despite obstacles.” Accessed 22 November 2021 https://wikileaks.org/plusd/cables/09DHAKA535_a.html

Such exchange of interests involving grabbing the State's power and offering multiple financial and geopolitical facilities in return to the facilitators of the power-mongering brokers is inseparably part of the process of impunity. The aforementioned examples clearly indicate that the diplomatic community not only maintains silence on the consecutively held sham elections but also keeps mum on consistent violations of human rights, such as enforced disappearances, extrajudicial killings, knee-capping, and systemic torture so long as this is undertaken by their preferred political regime.

Having strong and aggressive political manpower matters significantly in developing countries like Bangladesh where dysfunctional institutions are in place. In a context where external influences contribute largely to determine the political fate of the people, an overwhelming control of the political entity and external influential groups over the institutions plays a key role in the trade of impunity. In other words, the bureaucracy; election commission; law-enforcement agencies; intelligence units; security forces; and the judiciary need to collaborate and comply with the undercurrent call for subjectively manoeuvring the electoral system and replacing the people's franchise. The current condition offers an understanding that impunity and rewards go hand in hand.

3.4 Violence and discrimination

*'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.'*⁵⁰

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

The Penal Code of Sri Lanka criminalizes a number of sexual offences including rape⁵¹, statutory rape 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 and access to justice is severely hindered with many cases going unreported⁵². Furthermore, there is no recognition of conflict related rape in Sri Lanka, despite the numerous cases of this that arose from the 30-year civil war.⁵³

50 Heleen Touquet. Unsilenced: Male Survivors Speak of Conflict Related Sexual Violence in Sri Lanka. Truth and Justice Project, 2018, pg 11. Accessed 22 November 2021 https://itjpsl.com/assets/ITJP_unsilenced_report-final.pdf

51 Senanayake S.M.H.M. K. "Reasons of female children for elope with boyfriends in Anuradhapura district of Sri Lanka." *Medico-Legal Journal of Sri Lanka*, 5(1), 2017, pg.6–11. DOI: <http://doi.org/10.4038/mlj.v5i1.7347> pg. 1

52 Rape and Sexual Violence in Conflict: Definitions Under Domestic and International Law. Centre for Equality and Justice: Sri Lanka, 2018, pg 9 <http://cejsrilanka.org/wp-content/uploads/Rape-and-Sexual-Violence.pdf>

53 Ibid. pg. 15



chapter four

**COMBATTING IMPUNITY
IN SOUTH ASIA**

Bangladesh's Judiciary plays a complicit role in ensuring impunity. There are instances that key players from the judiciary and executive sectors issued rulings against directing the 'government to show why appropriate actions should not be taken against the officials Rapid Action Battalion (RAB), Major Wahiduzzaman and Lieutenant Hasan and their companions for the killings of Lutfor Rahman Khalasi and Khairul Haque Khalasi in custody in Madaripur.⁵⁴ The National Human Rights Commission (NHRC) took the stand on behalf of the perpetrators to deny justice to the victims. Limon Hossain's case is one of many examples to that fact.⁵⁵

Despite having an unhindered financial resource flow for carrying out human rights activities, the mainstream civil society organisations in Bangladesh stay away from raising their voices against gross human rights violations such as: enforced disappearances; extrajudicial killings; knee-capping; custodial torture; arbitrary detention; fabrication of criminal cases; and repression against political opposition and independent media. They are mostly afraid of losing their undisturbed funding flow. The Government of Bangladesh, which essentially enjoys a one-party rule without any electoral accountability, invests in its legislative and administrative power to ensure impunity. In response, international human rights organisations have contributed to keep Bangladesh's human rights discourse alive on international platforms. Most of these international and regional organisations have made joint submissions to the UN Human Rights Committee and the Committee Against Torture to review Bangladesh's human rights situation under the treaties. Concerns over impunity has been one the main focus in all the reports.

Almost all the South Asian countries are State Parties to the major international treaties⁵⁶ such as: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on

54 "Explain 'crossfire' in 48 hours." The Daily Star, 18 November 2009 <http://archive.thedailystar.net/newDesign/cache/cached-news-details-114504.html>

55 Ain O Salish Kendra, 11 March 2011, BANGLADESH: RAB's shooting incident, <http://www.askbd.org/ask/2011/03/11/bangladesh-rabs-shooting-incident/>

56 UN Treaty Bodies Database. "Ratification Status for Bangladesh." Accessed 22 November 2021 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=14&Lang=EN

Economic, Social, and Cultural Rights (ICESCR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Rome Statute for the International Criminal Court; and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Countries such as Bangladesh and Nepal have also submitted their periodic Universal Periodic Reviews (UPRs).

The major mandates of the Special Procedures individually and collectively issued public statements expressing their concerns. In Bangladesh, the Working Group on Enforced or Involuntary Disappearances (WGEID), the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, the Special Rapporteur on Independence of Judges and Lawyers and several others have requested an invitation and a reminder for a country visit to Bangladesh. However, the government has not responded to some of these requests.⁵⁷ The continued recurrence of gross human rights violations with impunity and non-cooperation with the major mandates of the Special Procedures on Country Visits establish the fact that the Bangladeshi Government disregards the UN human rights mechanisms.

Although **the Maldivian State** is abolitionist in practice, recent years have seen governments take active steps to resume the death penalty for murder. Even though the death penalty for apostasy is not enforced, the prospect of investigations into blasphemy puts the accused at risk of vigilante violence in the Maldives, as may also be seen in other South Asian Muslim majority countries.

Provisions in the Penal Code⁵⁸, drafted with the help of the United Nations Development Programme (UNDP), the University of Pennsylvania and a Maldivian legal expert make provisions that allow for Islamic Sharia punishments at the discretion of judges. Chapter 610 of the Penal Code criminalises 'Criticising Islam,' grading the offence as a Class 1 Misdemeanour. Article 1205 of the Penal Code, also states that if the offence is predetermined in

57 Office of the High Commissioner for Human Rights. "View Country Visits of Special Procedures of the Human Rights Council since 1998." Accessed 22 November 2021 <https://spinternet.ohchr.org/ViewCountryVisits.aspx?visitType=all&country=BGD&Lang=en>

58 See The Penal Code of the Maldives (in Dhivehi) <http://mvlaw.gov.mv/pdf/ganoon/chapterVIII/9-2014.pdf>

the Quran, then the judge has the discretion to mete out the punishment prescribed in Islamic Sharia.

The country also has the Maldives Religious Unity Act which predates the democratisation project embarked on in the early 2000s. The 2008 Maldivian Constitution is silent on 'freedom of religion or belief,' while explicitly drawing perimeters on free speech through Article 27; stating that free speech is only allowed to the extent to which it does not contravene Islamic tenets.

The Act states that any statement or action that contradicts with the 'religious unity in the Maldives since time immemorial' shall be a criminal offence. Depending on the severity of the offence, convicts can be fined over USD 1000 or imprisoned for up to five years. In recent years, human rights activists and liberal politicians have been routinely accused of anti-Islamic activity by rival political parties in the Maldives. These accusations of blasphemy or irreligious behaviour are usually first initiated by the political opposition and clerics aligned with politicians. Smear campaigns are run online, eventually manifesting in protests and increasing calls for violence against the individuals.

In **Nepal**, constitutionally, a functional and independent justice system by applying the principle of separation of power is assured. Justice in Nepal shall be exercised by courts and other judicial bodies. The Supreme Court is the court of record and supreme body of justice in Nepal, and operates and functions as per its jurisdiction. The Supreme Court shall have the final authority to take legal decisions, and to interpret the country's Constitution and laws.

The High Court has a jurisdiction to: issue necessary and appropriate orders, for the enforcement of fundamental rights, or for the enforcement of any other legal right for which no other remedy has been provided; or for which the remedy even though provided appears to be inadequate or ineffective; or for the settlement of any legal question involved in any dispute of public or private interest. This court conducts the hearing in the appeal made on the decision by the district courts. District Court exercises power to: originally try and settle all cases under its jurisdiction; try

petitions under law; including petitions of habeas corpus and prohibition; hear appeals under law from decisions made by quasi-judicial bodies; hear appeals from decisions made by Local level judicial bodies formed under the State law; institute contempt proceedings; and punish contempt under the Federal law if anyone makes obstruction in the dispensation of justice by, or disregards any order or judgment by, it or any of its subordinate courts.

Aside from this, special courts, judicial bodies or tribunals can be formed for special issues and cases. There are local judicial committees in 753 local governments with a quasi-judicial role.

Civil society organizations along with the families and victims themselves are continuously advocating for ending impunity in Nepal. The reluctances of political stakeholders and security agencies have been exposed over time. Recently, civil society, the victims and their families have shared their dissatisfaction with the appointment of persons to the transitional justice commissions.

The parliament has failed to initiate any conversation/discourse on the issue of transitional justice concerns since it started its business in 2018. The judiciary has questioned and has ordered for the application of adequate systematic legal measures for ending impunity. However, the failure has continued. The international community has been engaged during and after the Comprehensive Peace Accord to ensure peace in Nepal. But their priority and engagement reduced after the reintegration of the rebellion army into the Nepal Army and management of the weapons. The international community, political stakeholders (i.e. the government and opposition), and security agencies collaboratively settled the armed issues and directed the social dynamics toward peace. The question of justice remains neglected to date.

The prolonged process of transitional justice started right after the Comprehensive Peace Accord. Advocacy Forum Nepal (2014) presents that the process for transitional justice formally started in June 2007 when the then Ministry of Peace and Reconstruction unveiled the draft TRC bill. It further states that the government tabled the bill for the Truth and Reconciliation

Commission on 4 December 2009, after making some cosmetic amendments and registering the bill on 17 February 2010. The proposals carried the rhetoric of national reconciliation and attempted for blanket amnesty via a controversial clause which was denied by the victims, civil society and the international community. As a result, they were repealed after a series of civil advocacy and campaigns.

In **Pakistan**, the Judiciary is riddled with fear of societal reaction and consequences of judges decisions. In some instances, such as enforced disappearances and denial of freedom of speech and expression, certain judges of the High Court and the Supreme Court have handed down admirable judgments, but these are few and far between.

High Courts and the Supreme Court have acquitted all such accused that have come before them in terms of the notorious blasphemy law. Nevertheless, constitutional challenges to the blasphemy law have been struck down. The government actively encourages the impunity by invoking further restrictions. For instance, the requirement for Ahmadis to declare themselves Non-Muslims in order to obtain ID cards was legislated by the current government. Similarly, the previous government was removed by the opposition and religious clerics when it tried to undo the injustice to the Ahmadi community's voting rights.

Combatting impunity in **Sri Lanka** has been a Herculean task when the struggle of victims and their families does not end in holding perpetrators accountable. Survivors subsequently become witnesses to the cycle of of grave human rights violations. Family members of disappeared persons, specifically mothers, identified 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 a 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 enabled them to win public interest in their political campaigns. Reports from the Western, Southern and Sabaragamuwa Disappearances Commission (1994), as well as the annual report of Human Rights Task Force (1992) played important roles such as in the recommendation for a full-scale investigation⁵⁹.

59 Southern and Sabaragamuwa Disappearances Commission (1994) and the annual report of Human Rights Task Force (1992) https://reliefweb.int/sites/reliefweb.int/files/resources/04234216454178AFC12576B20038FF61-Full_Report.pdf.

Abduction & disappearance of 11 youth and men

Between 2008 and 2009 in Kotahena and in various suburbs in Colombo, there was an ongoing case whereby 14 navy personnel including former Navy Commander Admiral of the Fleet Wasantha Karannagoda were accused of being perpetrators. This case following a Habeas Corpus Application (2011) and an appeal is now also being considered by the Presidential Commission of Inquiry, which has been appointed to look into alleged political victimization of public servants after some of the perpetrators complained that they were subjected to political victimization after being named as perpetrators for the relevant case.

In July 2020, an interim injunction was issued by the Court of appeal by preventing further action. This followed a petition filed by Wasantha Karannagoda. After the Attorney General filed objections against petition, the Court ordered the case to be called on 4 of December 2020⁶⁰. The parents of the disappeared children claimed that the aforementioned commission was biased towards the perpetrators⁶¹.

Prevalence of impunity in security forces, Criminal Investigation Department (CID) struggling to reach the naval officers for questioning, political interventions, threats to the lawyer representing the victims and victims' family members (i.e. a father of a child who is abducted, also later abducted), prolonged delays and interestingly 'one of the judges hearing the case first being recused himself on the grounds that he had worked for Karannagoda as a private lawyer' are visible in the process of this case.

60 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>.

61 Voice tube. YouTube Video, 11:19. 23 July 2020 <https://www.youtube.com/watch?v=XZV10EQ7FZ8>

chapter five
findings



Impunity in South Asia exists within a deeply rooted geo-political and socio-economic base structure. Theoretically, there are avenues that victims can use to seek remedy for human rights violations in almost every country in South Asia, however, this is not always possible in practice.

In Afghanistan, the approval of the Amnesty Law of 2007 strengthened the existing culture of impunity and legalized the phenomenon. This country witnesses very little political will as far as achieving legal reforms and providing justice, as most of the corrupt power holders and local officials who have clung to power have common interests in the illicit economy of counterinsurgency. Therefore, building a strong rule of law would pose as an existential threat to them.

The Afghan public has lost confidence in the country's legal system and instead refers to informal court structures such as Jirga, mullah, and shura. This is due to: widespread corruption; bureaucracy; and a lack of access to the formal justice system, especially in the countryside and in the areas beyond the government's control. Despite the availability of financial, technical, and human resources, establishing a strong rule of law and effective law enforcement bodies has not been a priority for successive governments in Afghanistan over the last two decades. This is partly because of security deterioration in different parts of the country, as much of the efforts were focused on counterterrorism.

Entrenched and systematic corruption in Afghanistan's administrative systems, mainly in the legal system has been a key barrier to the rule of law; therefore, many legal cases remained unresolved and perpetrators went unpunished. Increased armed conflict and insecurity, especially in the provincial districts, have led to severe civilian casualties and human rights violations. This paved the way for the emergence of illegal armed groups involved in human rights abuses. As a result, the Afghan government could not bring them to justice.

In Bangladesh, the Judiciary and quasi-judicial institutions do not function with the objective of protecting human rights or administering justice. Bangladesh's policing system controls the complaint mechanisms and crime investigation⁶².

During the aforementioned processes, the police, who actively helped the incumbent government to retain power through consecutively rigged elections, usually block the paths to justice.⁶³ The prosecutors, and lawyers who work under the Office of the Attorney General, are recruited from the ruling party and hardly demonstrate efficiency or commitment to uphold the rule of law. They systematically play a role that ensures impunity to the perpetrators and allegiance to the incumbent government.⁶⁴

The culture of impunity is also accompanied by a pattern of rewarding the perpetrators with State honours,⁶⁵ such as feasts for aiding in the facilitation of rigged election.⁶⁶ Moreover, the police chief from the 2018 election period was rewarded with the post of ambassador of Bangladesh to Saudi Arabia, despite the fact that his tenure was marred by numerous extrajudicial killings, enforced disappearances, torture and arbitrary detention in fabricated cases.⁶⁷ Similarly, the 2014 election-time police chief was rewarded with the position of ambassador of Bangladesh to Spain for his role in disappearing and extra-judicially killing numerous supporters of the opposition political parties around the time of the election.⁶⁸

62 Asian Legal Resource Centre. "BANGLADESH: Endemic torture continues despite enactment of anti-torture law." Accessed 22 November 2021 <http://alrc.asia/a-written-submission-to-the-un-human-rights-council-by-the-asian-legal-resource-centre-2/>

63 Sheikh Sabiha Alam, "Digital Security Act Three cases filed on average every day," Prothom Alo, 26 June 2020 <https://en.prothomalo.com/bangladesh/crime-and-law/three-cases-filed-on-average-every-day-2>

64 Asian Human Rights Commission., "BANGLADESH: End the politically chosen 'disposable' attorney and prosecutorial system." Accessed 22 November 2021 <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-016-2009/>

65 Muktadir Rashid., "Police week awards trigger criticism: ADC awarded for arresting Shahidul Alam, DC for quota reform leader." New Age, 8 February 2019 <https://www.newagebd.net/article/64173/police-week-awards-trigger-criticism>

66 "Feast for cops after 'fair polls'", The Daily Star, 7 January 2019 <https://www.thedailystar.net/frontpage/news/cops-celebrate-countrywide-helping-hold-fair-polls-1683994>

67 "Javed Patwary appointed ambassador to Saudi Arabia." The Daily Star, 13 April 2020, <https://www.thedailystar.net/city/news/javed-patwary-appointed-ambassador-saudi-arabia-1892695>

68 "Hassan Mahmood made envoy to Spain." Dhaka Tribune, 30 August 2015 <https://www.dhakatribune.com/uncategorized/2015/08/30/hassan-mahmood-made-envoy-to-spain>

Bangladesh's Judiciary has exposed its failure in providing remedy to the victims of enforced disappearances and extrajudicial killings, except in cases where the victims have some relation to the incumbent ruling party.⁶⁹ The Bangladesh Election Commission has colluded with the incumbent government to ensure doctored outcomes that led to one-party rule in the country. Ballot-stuffing is usually done overnight on the election eve under the control of the: Election Commission; Police; Rapid Action Battalion; Intelligence Agencies; and the ruling party.⁷⁰

The Maldivian government formed in 2018 began a process of democratic consolidation after more than six years of political conflict. New mechanisms were introduced to strengthen the democratic rule and provide justice where it had been delayed. Nonetheless, the mechanisms fell short due to political meandering and failure to follow internationally recognised processes.

The hesitancy to engage experts and foreign assistance has added to the systemic issues in the country's human rights commitments. There is also an alarming gap between the law and actions. Positive amendments show commitment to improvement; however, it has not produced results as many of these new amendments are not systematically enforced. While the Government campaigned on a platform to serve justice and eliminate fear, it has taken backward steps by allowing religious groups to intimidate and threaten human rights groups.⁷¹

The Government can only prevent religious violence if it takes substantive and clear steps to curb extremism. The new amendments to the counterterrorism legal framework, criminalising support for terrorism and emphasising rehabilitative needs, are praiseworthy. International organisations and foreign governments must closely monitor the enforceability of these new amendments.

Nepal's transitional justice which first started in 2006 has adopted the adequate principles of justice and human rights in its preliminary guiding document (i.e., the Comprehensive Peace Accord). The government of Nepal and political stakeholders started negotiations for political settlement and concluded the major part of the peace process (armed reintegration, weapon management and new constitution) in 2015. The needs of conflict victims took a backseat in mainstream political discourse, and it was up to victims and their families to champion their agenda for justice, with some help from CSOs.

The International community continued their engagement for justice throughout the first constituent assembly, however, they eventually neglected calls for justice after the political settlement progressed towards a peaceful direction. The accountability to claim justice has been violated by both the State and then Maoist rebellion. Both forces agreed to promulgate the law for transitional justice. The law was framed too but with inadequate provisions. The provision indicates an appointment of the government officials who cannot lead the process to identify truth for recommending justice or reparation.

69 Civil Society Joint Alternative Report on Bangladesh Submitted to the Committee against Torture to the UN Committee Against Torture. Accessed 22 November 2021 https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BGD/INT_CAT_CSS_BGD_35328_E.pdf

70 "Ballot stuffed in 33 out of 50 constituencies at night before voting day: TIB." Prothom Alo English, 16 January 2019, <https://en.prothomalo.com/bangladesh/Ballot-stuffed-in-33-out-of-50-constituencies-at>

71 Human Rights Watch. "Maldives: Extremist group threatens rights activists." Accessed 22 November 2021 <https://www.hrw.org/news/2020/06/25/maldives-extremist-groups-threaten-rights-activists>

While Pakistan has ratified the International Covenant on Civil and Political Rights (ICCPR), its commitment to its principles remains questionable. The Pakistani Constitution embodies many of the rights granted under ICCPR, but these rights are subject to exceptions and broad restrictions that practically inhibit their power. There is no corresponding domestic legislation for the implementation of the ICCPR in Pakistan. Pakistan's reservations nullify the basis of the ICCPR, thereby enabling rights to be violated with impunity.

While the Pakistani Constitution promises equality of citizenship, it is not always observed in practice. Mob violence and street protests by the clergy often sway public opinion to the point that any implementation of the Constitution or the ICCPR remains a distant dream. As a theocracy, Pakistan is unable to place fundamental rights above the dictates of what it terms Sharia law. Sharia law itself, is subject to the most retrogressive and reactionary interpretation by clerics as well as the judiciary.

The judiciary's role is not that of a counter-majoritarian force but one that enables impunity in Pakistan. Nonetheless, the superior judiciary plays an important role as a last resort in Blasphemy cases, whereby it acquits the accused and stops the implementation of the death penalty envisaged under it.

The 'Culture of impunity' has been a persisting historical trend in Sri Lanka whereby victim's families and survivors do not receive redress, and perpetrators are not brought to justice⁷². Despite this, some of the survivors and victim's families have been challenging impunity throughout these years amidst the practical challenges such as the slow rate of progress of legal proceedings, which is evident from statistics provided by the Sri Lanka police.

72 ICJ. Authority without accountability: The crisis of impunity in Sri Lanka. 2012. Accessed 22 November 2021 <https://www.refworld.org/pdfid/50ae365b2.pdf>



chapter six

CONCLUSION & RECOMMENDATIONS

6.1 Conclusion

Impunity leaves deeply disastrous effects in South Asia not only to the cognitive, productive, economic and political life of the victims but also to the psycho-social mind-set of the society as a whole. Studies suggest that individual victims of gross violations of human rights who have been denied access to justice develop Post-Traumatic Stress Disorder (PTSD), along with loss of memory; nightmare; excessive fear; loss of attention; loss of self-esteem; self-isolation; distrust; withdrawal from normal life events; as well as a refusal to participate in civil, cultural and social interactions.

In the absence of effective mechanisms of accountability, people occupying public official portfolios have developed a habit of abusing political, administrative, judicial, and other institutional powers. Many stakeholders contribute to the trade of impunity from the political, bureaucratic, financial, legal, judicial, and diplomatic sectors.

One of the crucial factors for growing impunity in South Asia is the State's level of disrespect towards the notion of human rights and social justice. There are clear indications of declining respect for human rights. More specifically, the surge in civilian casualties; an alarming level of women rights violations; deteriorating security; recurring impunity of abusers; growing corruption; and the weak rule of law and accountability, combined with a lack of political will indicate a waning determination on the part of the Afghan government to respect, protect and defend human rights.

Lastly, the instances of war crimes and crimes against humanity amidst the political expediency that took place in the last four decades in Afghanistan justifies that there are no prospects for any remedial action for victims, nor are there accountability measures for perpetrators to be brought up to justice.

Impunity is an inseparable part of the national policies of South Asian countries. However, victims of gross human rights violations and of ordinary crimes remain uncertain of the possibility of receiving 'justice' in a speedy and just manner. Within the given context, the perpetrators are confident that nothing will happen to them. The society is given a general message that 'there is no shame in violating rights', as long as the offenders are somehow associated with the ruling party.

Some common factors that allow impunity to prevail seem to be corruption, and inefficiency within the systems established to provide redress to survivors and victim's families, specifically amongst those who are at the first point of contact such as the police. Insufficient protection provided by the authorities for witnesses and survivors of crimes committed either by State or non-state actors is another factor. Impunity is largely prevalent and more tedious to challenge where the perpetrators are either the armed forces, those connected with political powers, or those acting on a political or State agenda. Impunity is also prevalent where the perpetrators are individual citizens such as in the rape cases.

6.2 Recommendations

To the governments of South Asia:

1. Take practical steps towards ending impunity by strengthening democratic values and principles such as the protection and promotion of human rights, the establishment of social justice, upholding the rule of law, holding periodic elections and providing transitional justice for all survivors and victims.
2. A thorough investigation into the cases of severe human rights violations, war crimes and crimes against humanity ensuring justice to the victims of enforced disappearances and returning all the disappeared or missing persons to their families.
3. Adoption of peaceful means for forging consensus among conflicting parties such as through peace dialogues by preventing politicization of the processes, creating platforms for the victims for hearing their voices and bringing violators to legal action based on principles of inclusivity, and the respect for human rights and democracy.
4. Domestication and implementation of the ratified international standards through strong commitments towards legal reforms and through omitting discriminatory laws and policies, and allocating resources for transformation of the justice mechanisms to end the culture of impunity and enabling the provision of universal and unhindered access to justice through judicial sensitization.
5. Creating an environment for the free flow of financial resources to independent human rights groups, allowing them to work independently based on the principle of sustainability in compliance with the international standards.
6. Parliamentary or legislature engagement by framing a national roadmap to conclude the concerns of justice in the cases of human rights violation caused during the conflict.
7. Gender sensitization policies and programmes for civil servants, police officers, judicial officers, medical professionals, as well as mandatory gender sensitization training courses which should be offered periodically.
8. Regional platforms in South Asia that allow for the establishment of a human rights mechanism that can initiate vibrant discourse on accountability, justice and human rights principles.

To the international community:

1. Continuously lobby South Asian States encouraging them to: meet international human rights obligations, strengthen the rule of law, and facilitate the restoration of electoral democracy in a transparent, fair and participatory manner in countries such as Bangladesh.
2. Remind South Asian States to fulfil their anti-corruption pledges under the UN anti-corruption conventions.
3. Remind State and non-state warring parties to avoid attacking civilian targets as per the humanitarian laws like Geneva Conventions.
4. Support the ongoing peace process to ensure strengthened human rights.

To the stakeholders (political leaders, human rights activists and civil society campaigners):

1. Facilitate truth-seeking, justice, reparations and institutional reforms in the transitional justice process.
2. Facilitate the elected representatives, civil society, victims and their families, and society for negotiation of the justice to end impunity with the guarantee of minimum legal consequences.
3. Share key gaps in the law and in resources for performance so that collaboration with CSOs, victims and expert institutions can better collaborate for reducing gaps and strengthening networks of South Asia for the common cause to end impunity.