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Driving Forces of Impunity in South Asia: A Human Rights Framework

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Abstract

This paper is the outcome of a research on impunity in South Asia. Undertaken by Forum Asia in 2021, the research collected cases from Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka. The cases related to impunity were collected by the country researchers deputed in these countries. The lead author and co-author of this paper were the main contributors in compiling the country reports, processing the data, editing them and publishing them as country reports and South Asia regional report. Out of the huge compilation, this paper mainly sketches the debates over the constructs on impunity prevailing in these countries. The paper highlights how these countries are combatting impunity with respect to the drivers and to what extent this effort is compatible in the realm of global human rights framework. Impunity is found deeply routed in South Asia both in the cognitive, productive, economic, and political lives of the victims as well as on the psychosocial mindset of society. Individual victims of gross violations of human rights have been denied access to justice at large. This develops post-traumatic stress disorder (PTSD) along with loss of memory, nightmares, 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. The paper concludes that most South Asian states follow democratic norms and values as they hold periodic elections and form governments. These states, however, severely lack concrete plans and tools to combat impunity. The paper suggests the vibrant role of the legislation penal codes in these countries to make accountable to the stakeholders involved in impunity matters both as perpetrators and those acting against the perpetrators.

Keywords: impunity, legislation, accountability, armed forces, Human Rights

Driving Forces of Impunity in South Asia: A Human Rights Framework

The word impunity refers to the absence of the rule of law. Countries where the rule of law is not respected directly and indirectly protect perpetrators. In this sense, impunity 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 as cited by Oxford Public International Law (OPIL) defines 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 (OPIL, p 5, 2018).

More than 10.2 million people in the world are deprived of their liberty, and an important number among them are awaiting trial (United Nations, 2015). Holding perpetrators accountable and providing justice to victims remains a challenging task globally and in South Asia. People's movements and the systematic intervention of civil society across the globe have 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 to establish a mechanism for accountability in the latter context (FORUM-ASIA, 2021).

Ending impunity is instrumental in fighting mismanagement, but strict law enforcement is needed for the good of the people, and the justice systems should be tracked to encourage leaders to follow the rule of law. The cause of impunity

remains a key area of interest for those 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 parallel to peace efforts and even bolster them. According to International Crisis Group (ICG), 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 (ICG, 2009).

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-mismanagement movement' since it makes 'an explicit link between good governance and fighting mismanagement and peace, justice and inclusive development' for the first time (UNDP, 2015). The rule of law and impunity are antithetical to each other. A human rights regime functionalizes the rule of law. When law enforcement agencies fail to perform their duty, it perpetuates unaccountability and impunity.

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 promising 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.

Methods and Materials

This paper is based on a research on impunity in South Asia carried out by Forum Asia in 2021. Focused on advocacy, the study followed a case-study method in the South Asian countries: Afghanistan, Bangladesh, India, Maldives,

Nepal, Pakistan and Sri Lanka whereby each case study is presented by different researchers. The country researchers identified various themes in their respective chapters. To cite some of them, for example, forced disappearances and extrajudicial killings were explored in the case study on Bangladesh, whereas the Armed Force Special Power Act (AFSPA) was an area of focus in the India study. The studies on Nepal and Sri Lanka discussed transitional justice, whereas the study on Pakistan highlighted the enforced death penalty and the government's treatment of minorities. The researchers of the respective countries, furthermore, collected emblematic cases representing all themes or types of issues related to the respective theme(s). 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. The lead author of this paper contributed to the study as the main researcher on impunity in South Asia whereas the co-author's role was to coordinate all the country researchers as well as compiling and editing the research papers. This paper is the further analysis of the research carried out by Forum Asia including theoretical debate and constructs related to impunity in the case of South Asia.

The research is an anthology of various themes and sub-themes related to impunity. This paper mainly analyses how the selected countries of South Asia have been struggling to combat impunity against the driving forces and to what extent this effort is compatible in the realm of overall human rights framework in the globe.

Findings

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 (FORUM-ASIA, 2021). This section highlights major driving factors of impunity: political

economy, commitment towards democracy ensuring the rule of law and social justice, accountability of the states to fulfil the entitlements and so forth.

Afghanistan's protracted armed conflict has the underlying notion of political economy through the involvement of several other anti-governmental elements. The Taliban, along with the Haqqani Network and the Hezbe Islami 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 & Theros, 2019).

Afghanistan is naturally well-endowed with natural resources. However, the networks extract millions of dollars' worth of these resources annually, all while being 'unaccompanied by payment of applicable royalties and taxes to the state'(Byrd & Nooranee, 2017). The economic motive behind these conflicts is clearly reflected in manipulating the political situation and enjoying the black-market economy. These networks of public and private actors are responsible not only for some of the most terrible human rights violations but also benefitting political economy on matters related to counterterrorism as well as 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 aimed to make progress on Indo-Bangladesh and counterterrorism issues (WikiLeaks, 2009).

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, a part of the Hindu religion, is one of the world's oldest and longest surviving social hierarchies. 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 since 2014 and 2019, when the Hindu Right won national elections with an overwhelming majority (Human Rights Watch, 2021).

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 using the weaponize 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 (Bhushan, 2017).

Meanwhile, torture in Maldivian prisons, especially during the presidency of Maumoon Abdul Gayoom, who was in power from 1979 to 2008, remains well-documented (Redress, 2012). 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 to ancient times in the Maldives and is still legally sanctioned as a penalty for various offences under the Maldivian Penal Code (FORUM-ASIA, 2021).

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.³ 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 (Junayd, 2019).

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 lead unsatisfied youths to armed conflict. This forecast is based on the documentation of human rights violation cases documented by Informal Sector Service Centre (INSEC) around the country. The then Maoist Party declared an 'underground armed struggle' and established the lack of political accountability in law enforcement, thereby promoting impunity and fuelling the violence (INSEC, 1994).

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 to 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

³ Aishath Shany, "Safari assault case: police admits to not conducting alcohol test on suspects," *Raajje*, 1 July 2020 <https://raajje.mv/81785>

right to seek justice in various circumstances, the implementation aspect is poor under the control of political forces and other powerful entities (INSEC, 2020).

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. A case documented by Forum Asia (2021) presents a 13-year-old Pakistani Girl who was married off to a 44-year Muslim man without her consent. For this a fake birth certificate was showed claiming the girl crossing 18 years. The case was taken to the police office but the police officials did not register the case under the Child Marriages Restraint Act. By pressure of the public, the police did ultimately act (Forum, Asia, 2021, p. 21).

Human Rights and the Rule of Law in South Asia

The Afghan government is largely charged of being incapable or reluctant to prioritize the 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, 2020). 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.

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 to ancient times in the Maldives and is still legally sanctioned as a penalty for various offences under the Maldivian Penal Code.

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 2019 (UNICEF, 2020), whereas the previous Minister for Gender, Family and Social Services said that there are 'four cases of child abuse reported per day Shidhatha (2019). The local media, on the other hand, reported 22-32 cases in March and April 2019 alone. 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 may have led the unsatisfied youths to the armed conflict. Even after more than a decade, the political parties didn't use the opportunity to address human rights violations 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 (Forum Asia, 2021).

Some key factors that fuel impunity in Sri Lanka include continuous emergency laws; the Prevention of Terrorism Act no 48 of 1978(PTA) (ICRC, 1979), which provides broad powers to search, arrest and detain suspects; immunity provisions for the President under the 1978 Constitution (Subject to the exceptions under the 19th amendment to the Constitution) (Parliament of Sri Lanka, 2015); 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 prioritized good governance and made some efforts to address some of these issues, such as initiating the 19th amendment to the Constitution of Sri Lanka. However, after the new President Gotabaya 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 initiating autocracy. 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 (FORUM-ASIA, 2021).

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 of 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' (The Daily Star, 2009). 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 of that fact (Ain O Salish Kendra, 2011).

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, kneecapping, 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. International human rights organisations have contributed to keeping 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 have been a main focus of all the reports.

Bangladesh and Nepal have 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 (OHCHR, 1998). 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 Code⁴, 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 the Quran, then the judge has the discretion to mete out the punishment prescribed in Islamic Sharia.

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

⁴The Penal Code of the Maldives (in Dhivehi) <http://mvlaw.gov.mv/pdf/ganoon/chapterVIII/9-2014.pdf>

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 individuals (FORUM-ASIA, 2021).

In Nepal, constitutionally, a functional and independent justice system can be achieved by applying the principle of separation of power. Justice in Nepal shall be exercised by courts and other judicial bodies. The Supreme Court shall have the final authority to take legal decisions, and to interpret the country's Constitution and laws. There is a provision for the High Court, district court, and special courts with different jurisdictions to issue necessary and appropriate orders.

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 ordered 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 the 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 (Forum Asia, 2021).

In Pakistan, the Judiciary is riddled with fear of societal reaction and consequences of judge's 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 impunity by invoking further restrictions. For instance, the requirement for Ahmadis to declare themselves Non-Muslims 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.

Combating 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 grave human rights violations. Family members of disappeared persons, specifically mothers, identified themselves as strong witnesses as they were present at the scene of the 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 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 the public's interest in their political campaigns. Reports from the Western, Southern and Sabaragamuwa Disappearances Commission (1994), as well as the annual report of the Human

Rights Task Force (1992), played important roles such as in the recommendation for a full-scale investigation (Southern and Sabaragamuwa Disappearances Commission, 1994).

Conclusion

Impunity has deeply disastrous effects in South Asia not only on the cognitive, productive, economic, and political lives of the victims but also on the psychosocial mindset of society. 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, nightmares, 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's rights violations, deteriorating security, recurring impunity of abusers, growing mismanagement, 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, such as in Afghanistan, justify 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 ordinary crimes remain uncertain of the possibility of receiving 'justice' in a speedy and just manner. The perpetrators are confident that nothing will happen to them within the given context. Society is generally told that 'there is no shame in violating rights' if the offenders are somehow associated with the ruling party.

Some common factors that allow impunity to prevail seem to be mismanagement and inefficiency within the systems established to provide redress to survivors and victims' 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.

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