

## A Comment

### **The Pardon in the Mirusuvil Massacre: Sri Lanka's Elusive Quest for Justice**

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On 26<sup>th</sup> March 2020, President Gotabaya Rajapaksa pardoned former Army Staff Sergeant R. M. Sunil Rathnayake, a convicted death row prisoner. The pardon was met with mixed reactions in Sri Lanka. At one end of the spectrum was concern and condemnation for pardoning a convicted criminal while others welcomed the pardon and for releasing a former military person. Notable is the timing of the pardon. The pardon was granted when Sri Lanka is facing an unprecedented public health emergency with Covid-19 and with focus primarily on dealing with the response and related issues. This is also in a context when civil society<sup>1</sup> has called for urgent prison reforms and the Government has set up a committee<sup>2</sup> to examine how to address the overcrowding and other concerns in the prisons in Sri Lanka, creating the expectation that cases involving inmates for lesser crimes or unable to pay bail will be given due attention. It was in this midst, when attempts are seemingly made to address prison reforms, that President Rajapaksa chose to keep to his earlier pledge<sup>3</sup> and pardon a convicted criminal.

Concern with the granting of the pardon is compounded with the numerous challenges confronting the justice system with very few cases linked to the wartime violations having

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<sup>1</sup> 'Letter On Prison Reforms In The Wake Of COVID19' <<https://www.cpalanka.org/letter-on-prison-reforms-in-the-wake-of-covid19/>> accessed 31 March 2020.

<sup>2</sup> The Committee consists of Commissioner General of Prisons Janasiri Thennakoon, President of the Bar Association of Sri Lanka (BASL) Kalinga Indatissa PC, Legal Advisor to the President Harigupta Rohanadeera, Prisons Commissioner Venura Gunawardena, BASL Secretary Kaushalya Navaratne, and several others. See, Daily FT, 'President Seeks Relief For Prisoners Amidst Fears Of COVID-19 Spreading To Prisons' (2020) <<http://www.ft.lk/news/President-seeks-relief-for-prisoners-amidst-fears-of-COVID-19-spreading-to-prisons/56-698004>> accessed 31 March 2020.

<sup>3</sup> 'Gotabaya Pledges To Release Imprisoned War Heroes By Nov. 17' (*Adaderana.lk*, 2019) <<http://www.adaderana.lk/news/58267/gotabaya-pledges-to-release-imprisoned-war-heroes-by-nov-17>> accessed 31 March 2020.

concluded and with justice delivered to the victim.<sup>4</sup> Despite over a decade after the war and the many promises for justice in the Sri Lankan courts, only one other case witnessed perpetrators held accountable for murder and other violations that occurred during the war years.<sup>5</sup> Thus, Sri Lanka is facing entrenched impunity with little to no hope of accountability in Sri Lanka.

Further, this particular case highlights how a Presidential Pardon has been used by the Executive for purposes outside of remedying any miscarriage of justice. In this case, the convict was provided due process with a trial that spanned over a decade with his conviction affirmed by a five-judge bench of the Supreme Court in Sri Lanka. As noted in this paper, a pardon based on political consideration than on the miscarriage of justice undermines judicial proceedings and the rule of law.

The trend of using the power of pardon as listed in this document raises serious concern as to the Executive abusing his power for political considerations. These troubling developments warrant further scrutiny and the present note sets out the key issues and areas for reflection. The first part of the note examines the timeline of the case including the delays and obstacles faced with the second part discussing issues around the power to pardon and developments in the area.

### **SECTION I: Timeline of the Mirusuvil Massacre Case**

- **19th December 2000**- Raviwarman, Thaivakulasingham, Wilvarasa, and his two sons; 5 year old Prasad, and 13 year old Pradeepan Jayachandran, Gnanachandran and his 15-year-old son Shanthan and Maheshwaran were among those displaced from Mirusuvil and resettled in a camp at Udupitty. They had obtained permission from the Sri Lanka Army to visit their homes and see their properties.<sup>6</sup> Later, it was reported that the group went missing<sup>7</sup>.
  
- **24th December 2000**- One of the missing, Maheshwaran, escaped from army custody with severe wounds and injuries all over his body as a result of torture and gave information and details of the remaining eight.
  
- **25 December 2000**- Exhumation of the mass grave contained the corpses of eight persons.
  
- **25 December 2000**- The case was taken up at the Chavakachcheri Magistrate's Court and subsequently 14 army personnel were taken into custody.

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<sup>4</sup> 'The Need For Accountability In Sri Lanka's Criminal Justice System: A Glance At Seven Emblematic Cases' (*Centre for Policy Alternatives*, 2019) <<https://www.cpalanka.org/the-need-for-accountability-in-sri-lankas-criminal-justice-system/>> accessed 31 March 2020.

<sup>5</sup> The Supreme Court held that the evidence had established beyond reasonable doubt that the Appellants are guilty of the offences with which they have been convicted which were unlawful assembly, abduction, rape and murder, See, Somaratne Rajapakse others v. Hon. Attorney General (Krishanthi Kumaraswamy Rape Case) (2010)2 Sri L.R.113

<sup>6</sup> See the Supreme Court SC TAB 01/2016

<sup>7</sup> CHRDLanka, 'Army Sergeant Found Guilty Mirusuvil Massacre Case' (*Srilankachrd.org*) <<https://srilankachrd.org/la-mirusuvil.php>> accessed 30 March 2020.

- The case was transferred to the Anuradhapura Magistrates Court at the request of the suspects to the Attorney General's Department linked to security fears<sup>8</sup>.
- **22 July 2002** and **29 November 2002**- The case was taken up at the Anuradhapura Magistrate's Court.
- **November 2002** - Chief Justice appointed a trial-at-bar at the High Court, Colombo and nominated three judges for a Trial at Bar.<sup>9</sup>
- **27 November 2002**- The Trial at Bar commenced at the High Court Colombo. While five were indicted, the rest were released on bail.
- **January to July 2003** – The trial was held at the High Court, Colombo. Later a legal issue cropped up as to whether confession made to a military police is admissible in Court whereupon the judges ordered the defence counsel to obtain an opinion from the Supreme Court.
- **16 March 2004** - A Special Bench of the Supreme Court comprising five judges dismissed petitions of appeal challenging the admissibility of the confession made to a military police.<sup>10</sup>
- **4 November 2004**- The trials resumed at the High Court with the case continuing from the point it ended during the last date.
- **20 November 2004**- Justice Sarath Ambepitiya was killed by gunmen. The Chief Justice appointed a new judge and the case was fixed for December 16, 2004.
- **16 December 2004**- The case was further postponed to 19 January 2005 due to the non appointment of a new judge.
- The Trial at Bar proceeded in in the High Court of Colombo. At the beginning of 2007 the case was stopped temporarily. In September 2008, a new date for the next hearing was informed.
- **11 November 2008**- The case was taken up before the Colombo High Court.
- **28 April 2011**- The three judges visited the scene of the murder.<sup>11</sup>

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<sup>8</sup> CHRDLanka, 'Army Sergeant Found Guilty Mirusuvil Massacre Case' (*Srilankachrd.org*) <<https://srilankachrd.org/la-mirusuvil.php>> accessed 30 March 2020.

<sup>9</sup>They were Justice Sarath Ambepitiya, Justice S.I. Immam and Justice Kumar Ekaratne.

<sup>10</sup> 'Confessions In Mirusuvil Massacre Case Valid - Supreme Court' (*Tamilnet.com*, 2004) <<https://www.tamilnet.com/art.html?catid=13&artid=11515>> accessed 31 March 2020.

<sup>11</sup>Judges Deepali Wijesundara, W.U.M.P.B. Warawewa and Sunil Rajapaksa inspected the site and the STF and the Air Force provided security to the area during the inspection. The judges also inspected the Chavakachcheri court premises where an identification of the suspect took place.

- **27 July 2011**- The Asst. Examiner D.H.L. Jayamanna stated in his evidence that according to the evidence produced by the Government Medical Examination Department there was proof that the clothes found at the massacre site were that of the victims.
- **25 June 2015**- The High Court Trial at Bar, found, former Staff Sergeant R.M. Sunil Ratnayake guilty of 17 counts including unlawful assembly with common intention to cause injury and murder of eight persons. The Court further imposed a fine of Rs.51,000 on the accused and observed that he would be liable to a seven-month-imprisonment on default of the fine. Four other accused Second Lieutenant R.W. Senaka Munasinghe, T.M. Jayaratne, S.A. Pushpa Saman Kumara and Gamini Munasinghe were not found guilty and thereby acquitted and released from the case.<sup>12</sup>
- **5 September 2018**- Supreme Court takes up an appeal filed by Sergeant Rathnayaka against the conviction and sentence by the Colombo High Court Trial at Bar.
- **25 April 2019** A five-judge-bench of the Supreme Court of Sri Lanka unanimously affirmed the conviction.<sup>13</sup>

As indicated here, the trial underwent a long and often tedious process and highlighted many flaws inherent in the judicial system, such as the transfer of the case (from Chavakachcheri Magistrates Court to Anuradhapura Magistrates Court) at the request of the Attorney General's Department and the multiple delays. Nevertheless, this case was seen as one of the rare cases that succeeded in bringing justice to victims of wartime violations.

## **SECTION II: Presidential Pardon**

The power of the Executive President to grant pardons is provided in Article 34 of the Constitution of Sri Lanka. It provides for the power to grant pardon in 4 situations<sup>14</sup> and due process to be followed in the exercise of such powers<sup>15</sup>.

<sup>12</sup> Lakmal Sooriyagoda, '8 Civilians Murdered In Jaffna: Soldier Sentenced To Death' *Daily Mirror* (2015) <<http://www.dailymirror.lk/77509/8-idps-murdered-in-jaffna-soldier-sentenced-to-death>> accessed 31 March 2020.

<sup>13</sup> The Five-judge-bench comprising Justice Buvaneka Aluvihare, former Chief Justice Nalin Perera, Justice Sisira de Abrew, Justice Priyantha Jayawardena and Justice Murdu Fernando were of the view that the Trial-at-Bar was justified in treating witness Maheswaran as a credible witness and acting on his testimony, the Supreme Court concluded that the judges of the Trial-at-Bar were correct in coming to the conclusion that the accused-Appellant was guilty on counts 11 to 19 on the Indictment. See, Lakmal Sooriyagoda, 'SC Affirms Conviction And Death Sentence Imposed On Staff Sergeant' *Daily News* (2019) <<http://www.dailynews.lk/2019/05/21/local/186122/sc-affirms-conviction-and-death-sentence-imposed-staff-sergeant>> accessed 30 March 2020.

<sup>14</sup>Article 34- *Grant of Pardon*

(1) *The President may in the case of any offender convicted of any offence in any court within the Republic of Sri Lanka –*  
 (a) *grant a pardon, either free or subject to lawful conditions;*

When the President expects to pardon any offender who has been sentenced to death, the following steps are required to be fulfilled.

- A report should be received by the President from the Judge who tried the case.
  
  
  
  
  
  
  
  
  
  
- Such report is to be forwarded to the Attorney General who is required to advise on the report and forward the same to the Minister in charge of the subject of Justice.
- The Minister in charge shall make his recommendations based on the report and forward it to the President.

The power to grant pardons has been used by successive Presidents since 1978. While the reason and context has been different in every case, public interest and controversy had been sparked in certain instances. Some examples include- Former President J. R. Jayawardena granted a pardon to 'Gonawela Sunil'<sup>16</sup>, former President Ranasinghe Premadasa granted a pardon to Manohari Daniels<sup>17</sup>, former President Mahinda Rajapaksa granted pardons to several Presidential Security Division Officers<sup>18</sup>, to S.B.Dissanayaka<sup>19</sup> and a pardon to Mary Juliet Monica<sup>20</sup> among others. In 2019, former President

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*(b) grant any respite, either indefinite for such period as the President may think fit, of the execution of any sentence passed on such offender;*

*(c) substitute a less severe form of punishment for any punishment imposed on such offender; or*

*(d) remit the whole or any part of any punishment imposed or of any penalty or forfeiture otherwise due to the Republic on account of such offence:*

<sup>15</sup> Article 34 (2) The President may in the case of any person who is or has become subject to any disqualification specified in paragraph (d), (e), (f), (g) or (h) of Article 89 or sub-paragraph (g) of Paragraph (1) of Article 91-

(a) grant a pardon, either free or subject to lawful conditions; or

(b) reduce the period of such disqualification.

(3) When any offence has been committed for which the offender may be tried within the Republic of Sri Lanka, the President may grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender or of any one of such principal offenders, if more than one.

<sup>16</sup> Perhaps the first pardon to raise concern was that offered to Sunil Perera, better known as 'Gonawela Sunil' who was serving a sentence for rape. The pardon granted by President J. R. Jayewardene was widely criticized by opposition groups at the time. See, Sulochana Ramaiah Mohan, 'Presidential Pardon Does Not Wipe Off The Record Of The Criminal: What Is Wrong Is Wrong - Kalinga Indatissa PC' *Ceylon Today* (2019) <<https://ceylontoday.lk/print-more/45206>> accessed 31 March 2020. See also, Shamindra Ferdinando, 'Anatomy Of Presidential Pardon' *The Island* (2006) <<http://www.island.lk/2006/02/18/features1.html>> accessed 31 March 2020.

<sup>17</sup> President Ranasinghe Premadasa pardoned Manohari Daniels, who was convicted of aiding and abetting the Liberation Tigers of Tamil Eelam (LTTE) to carry out a bomb attack opposite Zahira College, Maradana in 1987 that killed forty persons. Daniels was pardoned at a time when the Premadasa government was having 'peace talks' with the LTTE, as a gesture of goodwill in what was a bid to ensure the talks succeeded. See, Sulochana Ramaiah Mohan, 'Presidential Pardon Does Not Wipe Off The Record Of The Criminal: What Is Wrong Is Wrong - Kalinga Indatissa PC' *Ceylon Today* (2019) <<https://ceylontoday.lk/print-more/45206>> accessed 31 March 2020. See also, Shamindra Ferdinando, 'Anatomy Of Presidential Pardon' *The Island* (2006) <<http://www.island.lk/2006/02/18/features1.html>> accessed 31 March 2020.

<sup>18</sup> President pardons jailed PSD officers, <http://www.ft.lk/news/president-pardons-jailed-psd-officers/56-280660>, 12 April 2014

<sup>19</sup> S. B. Dissanayake, who had been jailed for contempt of the Supreme Court was sentenced to two years rigorous imprisonment by a five-Judge Supreme Court bench headed by then Chief Justice Sarath N. Silva in 2004 for defaming the court during a speech he made in 2003. However, he was released in February 2006, following Rajapaksa's pardon. See, Shamindra Ferdinando, 'Anatomy Of Presidential Pardon' *The Island* (2006) <<http://www.island.lk/2006/02/18/features1.html>> accessed 31 March 2020.

<sup>20</sup> Rajapaksa also pardoned Mary Juliet Monica Fernando, the wife of then Public Estate Management and Development Minister Milroy Fernando in March 2009. Ms Fernando had been sentenced to death for a double murder in Katuneriya in January 1992 and later had her sentence commuted to life imprisonment See, Sulochana Ramaiah Mohan, 'Presidential Pardon

Sirisena granted pardons to Gnanasara Thero<sup>21</sup> and to Jude Shramantha Anthony Jayamaha<sup>22</sup>. The last two pardons were challenged and presently before the Supreme Court.

One must consider the consequences when the Executive grants a pardon to a person who has gone through the judicial system and thereby override the decisions of the judicial arm of Government. As stated by the Centre for Policy Alternatives in 2019 when a pardon was granted to someone convicted of contempt of court<sup>23</sup>, presidential pardons exist to correct miscarriages of justice and are to be exercised with extreme caution and gravity. Any deviation from this will seriously impede the rule of law.

Pardons have been recognized as an act of grace or humanity in many civilized nations. By virtue of the, Article 72 of the Indian Constitution, the President of India is empowered to grant pardon, reprieve, respite or remit the punishment<sup>24</sup>. However, case law has upheld that pardoning power is not a privilege of the Executive but rather a performance of an official duty which ought to be exercised on public considerations.<sup>25</sup>

*“Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone.”<sup>26</sup>*

In the **United Kingdom**, the Constitutional monarch can pardon or show mercy to a conviction on ministerial advice. But the judiciary has upheld that the exercise of the royal

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Does Not Wipe Off The Record Of The Criminal: What Is Wrong Is Wrong - Kalinga Indatissa PC' *Ceylon Today* (2019) <<https://ceylontoday.lk/print-more/45206>> accessed 31 March 2020.

<sup>21</sup> The Thero was serving a six-year jail term for Contempt of Court. He also has been accused of inciting violence against the Muslim community in the country, was also convicted and given a six-month jail term over intimidating Sandya Ekneligoda, the wife of missing journalist Pradeep Ekneligoda. See, Chathuri Dissanayake, 'President Pardons Gnanasara Thero' *Daily FT* (2019) <<http://www.ft.lk/front-page/President-pardons-Gnanasara-Thero/44-678714>> accessed 31 March 2020.

<sup>22</sup> Jude Shramantha Anthony Jayamaha who was convicted for the brutal killing of the 19 year old Yvonne Jonsson at Royal Park in 2005 was granted presidential pardon by President Sirisena. See, Sunday Observer, 'President Sirisena Pardons Royal Park Murder Convict' (2019) <<https://www.sundayobserver.lk/2019/11/10/news/president-sirisena-pardons-royal-park-murder-convict>> accessed 31 March 2020.

<sup>23</sup> CPA Statement On The Presidential Pardon Of Gnanasara Thero' (*Centre for Policy Alternatives*, 2019) <<https://www.cpalanka.org/cpa-statement-on-the-presidential-pardon-of-gnanasara-thero/>> accessed 30 March 2020.

<sup>24</sup>(1) *The President shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend remit or commute the sentence of any persons convicted of any offence-*

*(a) in all cases where the punishment or sentence is by a court-martial;*

*(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;*

*(c) in all cases where the sentence is a sentence of death.*

*(2) Nothing in subclause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.*

*(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.*

<sup>25</sup> *Epuru Sudhakar & Anr vs Govt. Of A.P. & Ors on 11 October, 2006 (Supreme Court of India)*

<sup>26</sup> *Ibid* para 65

prerogative of mercy (by the Home Secretary) must be in accord with accepted public law principles<sup>27</sup>.

*“The court had jurisdiction to review the exercise of the royal prerogative of mercy by the Home Secretary in accord with accepted public law principles since the exercise of the prerogative was an important feature of the criminal justice system and a decision by the Home Secretary which was infected with legal errors ought not to be immune from legal challenge merely because it involved an element of policy or was made under the prerogative”.*<sup>28</sup>

In the **United States of America**, according to the Article II Section 2 Clause 1 of the U.S. Constitution the President can grant pardon except in the cases of impeachment.<sup>29</sup> The judiciary has held<sup>30</sup> that a pardon is not a private act of grace but is a decision to be taken with the considerations of the Public.

*“A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”*  
*(Justice Oliver Wendell Holmes)*

The above demonstrates the jurisprudence that has evolved in the area of pardons and the prospect of reviewability by courts. It is now established that such power must be used with extreme care and not lead to the undermining of the rule of law and judicial independence. Thus, the power to pardon must be used in the rarest of cases and not abused for political or other gains.

It is indeed unfortunate that the present pardon smacks of political considerations and done in stealth at a time when Sri Lanka and Sri Lankans are confronted with an unprecedented health emergency. This also sets an unfavourable precedent that must not be ignored. Thus, scrutiny of any similar actions in the future and resistance is required to ensure such action does not further erode the rule of law in Sri Lanka.

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<sup>27</sup> R v Secretary of State for the Home Department, ex parte Bentley(1993 (4) ALL ER 442)

<sup>28</sup> Ibid

<sup>29</sup> The American Constitution gives the President the power to grant reprieves or pardons for offences against the USA, except in case of impeachment. However, this power is available only in case of violation of Federal law and pardon in the case of violation of a State law has to come from the Governor of the State concerned.

<sup>30</sup> Biddle v. Perovich(1927) No. 771