

Legal Reform to Combat Sexual and Gender-Based Violence

PART I

Reforming Existing Laws and Policies

CENTRE FOR POLICY ALTERNATIVES

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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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Introduction

In his presidential election manifesto, Gotabaya Rajapaksa noted that ‘Sexual and Gender Based violence has increased in our country’¹. However, during his first year in office, little has been done to introduce law reforms to combat this problem. This is a trend that has been persistent in Sri Lanka, across successive governments.

The role of the State does not end at updating the statute books. The successful prosecution of those who commit these offences in a manner that truly delivers justice requires commitment from numerous key actors within the State apparatus, from the police and medical professionals, to prosecutors and judges.

While it will be shown that several of the laws in place to prosecute Sexual and Gender Based Violence (SGBV) in the country are inadequate, few prosecutions take place even with the use of the limited available laws. For instance, in 2019 there were 1,779 rapes reported in Sri Lanka and only 235 complaints (and/or indictments) filed in relation to those offences.² The State is duty-bound to not merely improve the quality of legislation; but it must also take steps to ensure that the entire apparatus of the criminal justice system functions smoothly to ensure success.

Additionally, the role of the State must go beyond taking every effort to ensure that acts of SGBV are prosecuted; it must also put in place systems and programmes aimed at the active prevention of SGBV. Women must have the freedom to enjoy their day to day lives without the fear of SGBV, and this can only be enabled by addressing the very causes of these offences. Only when this is accomplished can a just society in which the freedoms of all citizens are ensured, exist.

In this series of papers, the Centre for Policy Alternatives (CPA) looks at legal and policy reform to address Sexual and Gender-Based Violence (SGBV). It must be stated at the outset that legal reform alone is insufficient to bring about comprehensive changes in reducing SGBV in Sri Lanka. The laws and policies currently in place are not the sole reason which results in

¹ ‘Vistas of Prosperity and Splendour’, Manifesto of Gotabaya Rajapaksa, 2019, page 27, available at <https://gota.lk/sri-lanka-podujana-peramuna-manifesto-english.pdf>

² Sri Lanka Police, ‘Grave Crime Abstract for the Year 2019 for whole Island from 01.01.2019 to 31.12.2019’, available at https://www.police.lk/images/crime_statistics/2019/Grave-crime-abstract-for-the-Year-2019.pdf

high rates of SGBV and low rates of prosecution of such offences. Legal reform must go hand in hand with policy reforms aimed at addressing SGBV at its root. This series of papers will also examine and make recommendations for such reforms which go beyond introducing new legal provisions.

This first paper in the series looks at existing laws and policies relating to SGBV in Sri Lanka. It is organised in four sections. The first section looks at some of the existing problematic laws on SGBV, and elaborates the conundrum of SGBV-related laws in Sri Lanka through the lens of three areas that require urgent reform: rape, domestic violence and abortion. The second section examines the Sri Lankan criminal justice system broadly and identifies a number of reasons as to why it remains especially non-responsive to victims of SGBV. The third section observes Sri Lankan society more generally and identifies a number of socio-political factors which hinder progress on SGBV-related legal and policy reform. The report concludes with a fourth section that presents a number of recommendations to lawmakers, policymakers and stakeholders in the areas of the law, the criminal justice system and society in order to more comprehensively reform law and policy relating to SGBV.

It must be noted that this report is not an exhaustive study on areas requiring reform in order to combat SGBV, but aims to complement work already done by activists and academics over the years³.

³ See the recommendations contained in the Report of the Leader of the Opposition's Commission on the Prevention of Violence and the Girl Child, December 2014, available at <http://gbvforum.lk/r-library/document/Report%20of%20the%20Leader.pdf>

1. Problematic Laws on SGBV

This section examines three areas in which existing laws on SGBV are problematic and require reform: rape, domestic violence and abortion. These areas by no means cover all the areas in SGBV related laws require law reform but they do provide a sense of the scale of the problems regarding SGBV-related laws and legal reform in Sri Lanka.

Over the years there have been numerous calls for reforming both procedural and substantive laws aimed at combatting SGBV. In the continued absence of these reforms, the law remains inadequate for this purpose. The last substantive amendments to sexual offences in the Penal Code were introduced in 1998 and 1995 (with a few further minor amendments in 2006). It has been 15 years since the passage of the Prevention of Domestic Violence Act No. 34 of 2005, and despite calls for reform, none have yet been enacted.

Rape

The law on rape in Sri Lanka is found in the Penal Code,⁴ and the sections on rape have been subject to multiple amendments. As it stands at present, rape can be committed by a man who has sexual intercourse with a woman under any of the circumstances laid down in subsections (a) to (d) in section 363. On the face of the section, the definition of rape is narrow in scope. It has been widely criticised for the following reasons:⁵

- a) As per the section, it is only a man who can commit the offence of rape, and only a woman who can be a victim of the same.⁶ The law does not recognise that women can also be perpetrators and men the victims of rape. A considerable number of men are documented to be victims of rape annually.⁷
- b) Rape is limited to penile penetration of the vagina. Non-consensual acts of oral or anal penetration between men and women do not fall within the ambit of the section. The provision also does not cover non-consensual sexual acts between same sex persons and may have ambiguous application to transgender persons. All such acts would only

⁴ Sections 363 and 364, Penal Code

⁵ See Piyumani Ranasinghe, "Sri Lanka's legal definition of rape is too narrow", *The International Cauldron*, November 2016, available at <http://intca.org/2016/11/fixing-lka-definition-rape/>

⁶ A A Edirisinghe and NKK Mudalige, 'Male Victimization in Rape- Case of Sri Lanka', *Proceedings of APIIT Business, Law & Technology Conference, Asia Pacific Institute of Information Technology*, 2017, available at <https://www.conference.apiit.lk/pdf2/Law/LBAT201714.pdf>

⁷ Ibid.

amount to grave sexual abuse (section 365B of the Penal Code, as introduced in 1995) which covers almost all other instances of sexual abuse or sexual violence not amounting to penile penetration of the vagina. The exclusion of many people from the protection of the provision on rape may also amount to a violation of Article 12 of the Constitution.

- c) By way of the 1995 Amendment, an explanation was introduced to section 363 which provided that *'evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.'* However, the position often still taken by Courts is that it is dangerous to act on the uncorroborated evidence of a victim of a sexual offence, unless her evidence is convincing enough to act on even without corroboration.⁸ This creates a difficult burden on the victim as most often acts of rape take place in private, with no independent witnesses.⁹

Amending the provision on rape alone however is insufficient to ensure that the ends of justice are met. Most cases of rape in Sri Lanka are met with impunity; in 2013 it was reported in a study that 96.5% of men who committed rape faced no legal consequences, i.e. they were not arrested or jailed for their acts¹⁰.

Even when cases do reach the Courts, chronic delays in the criminal justice system, failures in the recording of medico-legal evidence and the lack of emotional and psychological assistance to victims of SGBV are problems that need to be addressed in order to properly ensure that the justice is met. Some of the key failings of the criminal justice system are discussed in more detail in the following chapters of this report

Marital Rape

Under Sri Lankan law, a man commits rape if he has sexual intercourse with a woman without her consent; however, this does not apply if the woman is his wife unless they are judicially

⁸ *Sunil and another v Attorney General*, [1986] 1 Sri LR 230, available at <https://www.lawnet.gov.lk/wp-content/uploads/2016/11/019-SLLR-SLLR-1986-V-1-SUNIL-AND-ANOTHER-v-THE-ATTORNEY-GENERAL.pdf>, cited in *Upali Senarathne v Attorney General*, CA 25/09 CAM 06.03.2014, *Gunewardena v Attorney General*, CA 378/2017 CAM 03.09.2019, *Manatunga v Attorney General* CA 184/2014 CAM 01.11.2019

⁹ *Ibid*, Report of the Leader of the Opposition's Commission on the Prevention of Violence and the Girl Child, page 28,

¹⁰ E Fulu, X Warner, S Miedema, R Jewkes, T Roselli and J Lang, 'Why Do Some Men Use Violence Against Women and How Can We Prevent It? Quantitative Findings from the United Nations Multi-country Study on Men and Violence in Asia and the Pacific' 2013, Bangkok: UNDP, UNFPA, UN Women and UNV page 45, available at http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/womens_empowerment/RBAP-Gender-2013-P4P-VAW-Report.pdf

separated.¹¹ Thus, marital rape is not a crime under the Sri Lankan law, which is a major gap in the protection of women from SGBV.

The idea that non-consensual sexual intercourse between a man and his wife does not amount to rape has its origins in outdated cultural rationale. This includes ideas such as a woman being merely an extension of her husband under law and therefore marital rape amounts to him illogically accusing himself of a crime; that a woman is the property of the husband and thus marital rape cannot constitute property damage; that the contract of marriage includes consent to the obligation of sex; and that allowing a woman to accuse her husband of rape would damage the marriage relationship beyond the chance of reconciliation.¹²

Several attempts have been made in the past to introduce amendments to the Penal Code to criminalise marital rape and make it a punishable offence.¹³ However, these have not resulted in any amendments to the present legislative framework.

Statutory Rape

As per section 363E of the Penal Code, sexual intercourse with a woman under 16 years of age is rape whether committed with or without the consent of the woman. The provision is based on the understanding that a girl below the age of 16 has no legal capacity to consent to sexual intercourse. This is because children are held to be impressionable, lacking in maturity or easily manipulated, and because there are serious consequences of sex, such as pregnancy, which one must fully understand or be physically prepared for in the event that they are sexually active¹⁴. Thus, the law plays a role in prohibiting sexual intercourse with young girls, in order to protect them from these consequences until they are at an age where when they are capable of facing them.

¹¹ Section 363(a), Penal Code

¹² Jaye Sitton, 'Old wine in new bottles: the marital rape allowance', 72 *N.C. L. Rev.* 261, 1993, pp 264-268. Available at <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3524&context=nclr>

¹³ Ministry of Justice, *2017 Performance Report*, p 16, available at https://www.moj.gov.lk/web/images/pdf/progress_report/14.11.2017/English.pdf and Ministry of Justice, *2018 Performance Report*, p 20, available at https://www.moj.gov.lk/web/images/pdf/progress_report/2018/English.pdf

¹⁴ Philip Graham, 'Against the Stream: lowering the age of sexual consent', *BJPsych Bulletin* (2018) 42, 162-164, available at https://www.cambridge.org/core/services/aop-cambridge-core/content/view/DE52EEC76C801FDE50593F82BFD0B843/S2056469417000262a.pdf/against_the_stream_lowering_the_age_of_sexual_consent.pdf

Minimum Mandatory Sentences for Statutory Rape

The punishment for the offence of rape is found under Section 364 of the Penal Code. In normal circumstances, the punishment for rape is a sentence of imprisonment between 7 and 20 years, meaning that a Court cannot give a rapist a sentence of less than 7 years. 7 years is thus the minimum mandatory sentence for rape. However, the same section also provides for certain aggravated circumstances which are to be punished with an aggravated sentence of imprisonment between 10 and 20 years. This includes section 354(2)(e) or when rape is committed on a woman under 18 years of age. This would include instances of statutory rape, even when the victim has 'consented' to the act.

In recognition of the fact that this could sometimes lead to injustice, the law makes an exception, known commonly as a 'close in age exemption' or the 'Romeo and Juliet clause'. As per the proviso to Section 364(2) when a boy below 18 years of age commits the offence of statutory rape, and such sexual intercourse is consensual, then the Court has the discretion to issue a sentence below the mandatory minimum sentence of 10 years.

This exposes a contradiction in the law, as it refers to a girl below 16 giving her consent, which the law also recognises that she is not competent to do. However, this does not mean that an offence was not committed under law; it only allows for wider discretion in sentencing. A major shortcoming in this clause is that it does not set any age range within which the victim must be in order for the exemption to be applicable. Thus, if a boy below the age of 18 commits statutory rape on a girl of any age, not just a girl similar in age to him with her 'consent', then he may still fall within this exemption.

The inclusion of minimum mandatory sentences is a topic of much controversy and debate. In the case of most offences, the law sets out the maximum punishment that a judge can give an offender for an offence, thus giving the judge discretion as to the sentence to hand out within that limit. However, when the law prescribes a minimum punishment, this restricts judicial discretion to give lesser sentences. It is understood that a sentence must be decided based on the facts and circumstances surrounding a case, and this discretion aims to ensure that the ends of justice are properly met. The impossibility of this in cases of statutory rape thus impairs the potential of justice being achieved.

Due to practicality and economic circumstances, girls in some parts of society may cohabit with their partners from a young age, sometimes before the age of 16.¹⁵ In such cases, if a girl below the age of 16 has sexual intercourse with a boy above the age of 18, even with her consent, it would amount to statutory rape not falling within the exemption provided for by law. While the imposition of a minimum age of consent for a girl has been legislated with the intention of being in the best interest of these young girls, it appears that that in effect that law may not always serve this purpose, in terms of prevailing social conditions.

Long delays in litigation result in situations where the victim is often an adult by the time her case reaches trial stage, and sometimes these women are married with families of their own, and no longer have any interest in prosecuting the offence. There may also be instances in which the victim is married to the offender and economically dependent on him by the time of sentencing, further creating a challenge for judges in sentencing the offender.

In 2008, a High Court judge of the North Central Province, in the course of proceedings in a case involving statutory rape made a Reference to the Supreme Court under Article 125(1) of the Constitution.¹⁶ The High Court inquired whether section 364(2) of the Penal Code (Amendment) Act No 22 of 1995 had removed judicial discretion when sentencing an accused convicted of an offence under that section. The determination of the Supreme Court was that the discretion of Court with regard to imposing punishment cannot be curtailed by stipulating a minimum term for rape in instances where consent has been obtained, as consent is a relevant consideration based on which Courts should exercise discretion.¹⁷ This determination of the Supreme Court has since been interpreted widely by High Courts to mean that judges have the discretion to impose a lesser sentence even in other instances of rape without consent, where a minimum mandatory sentence has been stipulated.¹⁸

¹⁵ Imesha Madhubhani, "Statutory rape laws in Sri Lanka: the underpinning issues, *Sunday Observer*, December 15, 2019, available at <https://www.sundayobserver.lk/2017/09/10/issues/statutory-rape-laws-sri-lanka-underpinning-issues>

¹⁶ S.C Reference 03/08, 2008 [B.L.R] 160.

¹⁷ Ibid, Report of the Leader of the Opposition's Commission on the Prevention of Violence and the Girl Child, page 29,

¹⁸ Law Commission of Sri Lanka, *Explanatory note on the sentencing policy with regard to statutory rape and matters connected thereto*, 2014, available at http://lawcom.gov.lk/web/images/stories/reports/explanatory_note_on_the_sentencing_policy.pdf

The Law Commission of Sri Lanka has on several occasions in the past examined this section and put forward recommendations to amend it.¹⁹ None of these recommendations have been passed into law.

Domestic Violence

The Prevention of Domestic Violence Act No 34 of 2005 (PVDA) came into being after many years of years of lobbying by women's rights organisations.²⁰ Prior to its passage, there were disagreements on the conceptualisation of the issue of partner violence and appropriate responses to it.²¹ Many sectors of society opposed the enactment of the PVDA, insisting that domestic violence is a private matter within the family and that a law of this nature would lead to a breaking up of the sanctity of the family unit.²²

While its passage was a victory for women, the PVDA has several flaws that require attention:²³

Definition of Domestic Violence

The PVDA does not create a criminal offence of domestic violence but rather provides for a scheme by which victims of prescribed types of domestic violence can get protection orders against forms of domestic violence described in the Act.

One of the biggest flaws of the PVDA is that it does not contain a comprehensive definition of "*domestic violence*". According to section 23 (the interpretation section), domestic violence is defined as '*(a) an act which constitutes an offence specified in Schedule 1; (b) or any emotional abuse, committed or caused by a relevant person within the environment of the home or outside and arising out of the personal relationship between the aggrieved person and the relevant person*'.

¹⁹ Ibid.

²⁰ Manuela Colombini, Susannah H Mayhew, Ragnhild Lund, Navpreet Singh, Katarina Swahnberg, Jennifer Infanti, Berit Schei and Kumudu Wijewardene, "Factors shaping political priorities for violence against women-mitigation policies in Sri Lanka", 2018, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5970471/>>

²¹ Chulani Kodikara, Battered Wives or Dependent Mothers? Negotiating Familial Ideology in Law. Violence Against Women. 2018 Jun; 24(8):901-921, available at <https://journals.sagepub.com/doi/10.1177/1077801217724452>

²² Chulani Kodikara, 'Only until rice is cooked? The Domestic Violence Act, familial ideology and cultural narratives in Sri Lanka', *ICES Working paper Series, Working Paper n. 01. 2012*, available at <http://ices.lk/wp-content/uploads/2018/07/Only-Until-the-Rice-is-Cooked.pdf>

²³ For a comprehensive list of the shortcomings see Ibid.

Schedule 1 of the Act, which sets out the offences which can constitute domestic abuse includes all the offences contained in Chapter XVI of the Penal Code (offences affecting the human body), Extortion and Criminal Intimidation, or attempting to commit any of these offences.

Emotional abuse is defined as *'a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person'*.

Three main concerns arise from this definition:

- i. First, the importation of an entire chapter of the Penal Code as physical acts which can amount to domestic violence is clumsy, and does not always make sense. Chapter XVI of the Penal Code consists of a large number of sections, ranging from sections 293 to 365. This includes sections such as voluntarily causing hurt of grievous hurt to deter a public servant from his duty (sections 323 and 324) and using criminal force to deter a public servant from his duty (section 344), which do not fit within a scheme of domestic violence. More concerning, however, is that the physical acts of domestic abuse are limited to the specified and existing Penal Code provisions, which means that acts such as marital rape are excluded from the definition of domestic violence altogether.²⁴
- ii. Second, the definition of emotional abuse under this section not just includes cruel, inhuman, degrading or humiliating conduct, but requires that there is a pattern of such treatment which is of 'serious nature'²⁵. There is no indication of what consists of a pattern, and what threshold cruel, inhuman, degrading or humiliating conduct is expected to meet in order to be considered 'of a serious nature'. Without a clear definition this can be subject to a narrow definition by Courts, thus limiting the protection that victims are offered.
- iii. Third, while the definition covers physical and emotional abuse it does not explicitly include economic abuse. Gender inequality in the home can result in economic violence,

²⁴ Rose Wijeyesekera, 'A comparative analysis of some aspects of the Prevention of Domestic Violence Act of Sri Lanka: A critique', *Sri Lanka Journal of International Law*, 2011, available at <http://archive.cmb.ac.lk:8080/research/bitstream/70130/257/1/Sri%20Lanka%20Journal%20of%20Intrnational%20Law.doc>

²⁵ Sunethra M. E. Goonetilleke, 'Domestic Violence: Is the Sri Lankan Woman Still Trapped in the Private Sphere?', *OUSL Journal* (2015) Vol. 8, (pp. 101-123), p 115, available at <https://ouslj.sljol.info/articles/abstract/10.4038/ouslj.v8i0.7321/>

whereby one partner restrains the other's ability to access economic resources as a form of intimidation and coercion. This can result in the victim being deprived of the economic means to leave an abusive relationship.²⁶ Economic abuse is a prevalent form of domestic violence, particularly where women are not able to work and have an independent source of income.²⁷ While this is a form of emotional abuse, not explicitly including it in the definition of domestic violence creates the possibility of it being excluded from its definition through a narrow judicial interpretation of the term.

No criminal offence of Domestic Violence introduced

The focus of the PVDA is on protecting the victim through protection orders. It is not concerned with addressing the offender except in the limited circumstances of a protection order being violated. It is important to have a scheme under which victims can seek protection rather than initiate criminal proceedings, as victims may be reluctant to come forward due to concerns of their abuser being prosecuted, especially when they are economically dependent on such abuser.

The PVDA does not create a new offence of domestic violence which means that that existing Penal Code provisions must be relied upon for punishing offenders even in the event that it is necessary to prosecute the abuser.

Having to resort to the individual offences in the Penal Code to prosecute acts of domestic violence has a number of disadvantages:

- i. First, the ingredients of the offence that need to be proved would be different in an offence of domestic violence and more responsive to the circumstances of victims of domestic violence than existing Penal Code provisions.
- ii. Second, emotional abuse is not linked to an existing criminal provision and thus an offender cannot be punished for inflicting emotional domestic violence on a victim, regardless of how severe the abuse is.

²⁶ World Bank, 'Global and Regional Trends in Women's Legal Protection Against Domestic Violence and Sexual Harassment', 2018, available at <http://pubdocs.worldbank.org/en/679221517425064052/EndingViolenceAgainstWomenandGirls-GBVLaws-Feb2018.pdf>

²⁷ Ibid.

- iii. Third, it would be necessary to adhere to sentencing policy under the Penal Code regime. Owing to the unique circumstances in cases of domestic violence, a separate offence could have imposed aggravated sentences in instances of domestic abuse. Such provision would have symbolised the State's non-tolerance of such acts and would have caused a deterrent effect.

The introduction of such law however must be done in consideration of the socio-economic circumstances of the victims and the realities that they face. In the current context, is prudent to maintain some check when introducing a criminal offence as it may result in being counterproductive by deterring women from coming forward when they need protection. The criminal provision on domestic violence can be included as a provision to the Penal Code rather than into the PVDA so as to maintain two different schemes. Section 21 of the PVDA also provides that nothing in the Act deprives an aggrieved person from taking separate civil or criminal action.

Limitations in accessing Courts

According to Section 2(2) of the PVDA, only the aggrieved person or a Police officer on their behalf is allowed to petition the Court for a protection order in case of an adult victim. This restriction may cause considerable hardship in situations where the adult victim is unable to come to Court. This may be difficult for several reasons including the victim suffering from injuries, trauma or a lack financial means relating to domestic violence; or if the victim is hiding from the abuser. In such circumstances, third parties should be able to petition the Court as a proxy of the victim.

Further, Section 2(3) of the Act requires that an application must made be in duplicate; in the prescribed form as provided in the Schedule to the Act; and made to the Magistrate's Court. These stringent requirements may impose hardship on a victim as the need to follow a specific format might not result in the system being easily accessible to everyone. In an emergency, a victim should be able to access the Court quickly. When onerous technical barriers exist to accessing Court, as here, victims will first have to seek legal assistance, even when their life may be in immediate danger.

Problems in enforcement of the Act

Finally, while there are several problems in the PVDA in itself, some of the larger problems lie in the enforcement of the Act; women suffering domestic violence are encouraged to endure the abuse as a normal part of marriage for sake of the family²⁸, thus resulting in the Act having minimal effect. Further, it is reported that most cases of domestic violence are dealt with through mediation by the Police, rather than through the PVDA²⁹.

It is reported that delays in processing cases too hinders the success of the PVDA³⁰. A victim is able to seek an interim protection order when the case is filed, which the Court has discretion to grant, and a date for inquiry must be fixed no more than 14 days from the date of the Application. However, in reality the inquiry does not take place within this stipulated time period, thus limiting the success of the Act in addressing the urgency of the situation³¹. The Court can proceed with the inquiry without the presence of the Respondent on the condition that it is satisfied that the notice has been served on the Respondent³², however, there is no provision to ensure that the service of such notice is expedited, thus further creating a delay when it is not served on time³³.

Despite Cabinet approval being granted in 2018 to make amendments to the PVDA,³⁴ no tangible progress has yet been made. The PVDA shows how the mere enactment of laws, policies and action plans are insufficient to address the issue of domestic violence.

²⁸ Chulani Kodikara, 'Domestic violence in Sri Lanka: the power of alternative discourse', *Open Democracy*, March 6, 2015, available at <https://www.opendemocracy.net/en/5050/domestic-violence-in-sri-lanka-power-of-alternative-discourse/>

²⁹ Policy Framework and National Plan for Action to address Sexual and Gender Based Violence (SGBV) in Sri Lanka 2016 -2020, Ministry of Women and Child Affairs, June 2016. Page 96, available at <http://gbvforum.lk/r-library/document/SGBV%20National%20Action%20Plan.pdf>

³⁰ Ibid

³¹ Ibid, Report of the Leader of the Opposition's Commission on the Prevention of Violence and the Girl Child, page 55.

³² Section 7 of the PVDA

³³ Ibid, Report of the Leader of the Opposition's Commission on the Prevention of Violence and the Girl Child, page 55.

³⁴ Press briefing of Cabinet Decision taken on 2018-03-06, available at http://www.cabinetoffice.gov.lk/cab/index.php?option=com_content&view=article&id=16&Itemid=49&lang=en&D=8676

Abortion

The provisions on abortion are found in sections 303 to 307 of the Penal Code. Section 303 makes it an offence to cause a woman to miscarry, and the explanation to the section sets out that a woman who causes herself to miscarry also falls within its ambit. The punishment for this offence varies based on the stage of pregnancy the woman is in: it is ordinarily imprisonment (and/or a fine) for up to three years, but if the woman is 'quick with child' then the term of imprisonment may extend to up to seven years. The section also provides the only exception as to when abortion is allowed under Sri Lankan law: when it is done in good faith to save the life of the woman. As per Section 305, if the woman dies in the process of causing miscarriage, the punishment can extend to up to 20 years of imprisonment.

These laws on abortion date back to 1883, and have never been amended in the nearly century and a half that the Penal Code has been in force for. The result is that Sri Lanka is among the countries with the strictest abortion laws in the world.³⁵ Even in the South Asian region, only Afghanistan and Bangladesh have similarly restrictive abortion laws.³⁶

Despite these criminalising provisions, it is estimated that approximately 650 abortions take place daily across the island.³⁷ The criminalisation of abortion means that women who seek abortions are driven underground, and forced to have these procedures carried out in clandestine manners. As abortions are not regulated and are driven underground, they vary from abortion provider to provider and are invariably unsafe. Indeed, abortion related deaths amount to some 12.5% of the maternal deaths in the country.³⁸ This figure could be reduced drastically if procedures were carried out in a safe and regulated manner.

It is reported that a majority of women who seek abortions in Sri Lanka are married women who already have children.³⁹ Clandestine abortions are thus an unfortunate backstop at family planning. Comprehensive sex education, clear understandings of contraceptive methods and their widespread availability are all additionally necessary in order to reduce

³⁵ See <https://reproductiverights.org/worldabortionlaws> for a comparison of the abortion laws in the world.

³⁶ Bangladesh's abortion laws are found in its 1860 Penal Code and are virtually identical to the abortion laws in Sri Lanka.

³⁷ K.A.A.N Thilakarathna, 'Liberalizing abortions laws in Sri Lanka; Prospects and challenges', *Sri Lanka Journal of Forensic Medicine, Science & Law*, December 2018, Vol.9, No.2, p 6.

³⁸ Ibid.

³⁹ Dinesha Samararatne, 'the abortion debate: mismatched and misplaced', *Groundviews*, September 2017. Available at <https://groundviews.org/2017/09/13/the-abortion-debate-mismatched-and-misplaced/>

the number of abortions that take place in the country. These are simple policy decisions that can have far reaching positive consequences, however, attempts to implement them in Sri Lanka are often met with resistance.

There have been multiple efforts to amend the laws relating to abortion, though none of these attempts have been successful. In 1995 the Ministry of Justice presented a Bill in Parliament which attempted to relax the criminalisation of abortion, allowing it in cases of pregnancy caused by rape and incest, and in the case of congenital abnormalities in the foetus incompatible with life.⁴⁰ Another attempt was made by the Law Commission of Sri Lanka in 2013, though this, too, did not see any success.⁴¹

The amendments recommended by the Law Commission would have decriminalised abortion on the limited grounds of rape and identified conditions of foetal impairment. The proposed amendments did not include cases of incest because the Commission determined that incest may sometimes be consensual, and the pregnancy could be terminated if it fell within one of the two proposed permitted categories. Considering that a majority of abortions are sought by married women as a means of family planning, it is unlikely that decriminalisation in these limited situations will meet the needs of society.⁴² Decriminalisation also needs to be coupled with proper knowledge of, and access to contraceptives for the amendments to have a real effect.

Despite failures in reform, there is recognition for the need for these amendments. The National Action Plan for the Protection and Promotion of Human Rights 2011-2016⁴³ included a goal to '*Decriminalise medical termination of pregnancies in the case of incest, rape and major congenital abnormalities.*' Yet the goal was not realised by the end of the Plan's target period. A similar goal was included in the plan for 2017 – 2021 as well⁴⁴, but as there has been a change of Government since the enactment of the plan, it is unknown if the present Government is committed to the same.

⁴⁰ Law Commission of Sri Lanka, '*Medical Termination of Pregnancy – Proposals of the Law Commission of Sri Lanka*', February 2013, page 2. Available at http://lawcom.gov.lk/web/images/stories/reports/medical_termination_of_pregnancy_proposals_of_the_law_commission_of_sri_lanka.pdf

⁴¹ Ibid

⁴² Ibid, Dinesha Samararatne, 'the abortion debate: mismatched and misplaced'

⁴³ Available at <https://www.refworld.org/pdfid/5a842f057.pdf>

⁴⁴ Available at <https://www.stopchildcruelty.com/media/doc/1554788053.pdf>

The 2015 National Guidelines on Post-Abortion care by the Ministry of Health, Nutrition and Indigenous Medicine for the use of medical professionals sets out that medical professionals are not duty bound to report cases of illegal abortions to the authorities.⁴⁵ The Guidelines also provide for incorporating education on family planning into post-abortion care, with the aim of ensuring that no woman goes through the procedure twice.

Considering the fact that most of the women who seek illegal abortions in Sri Lanka are married, it is important that even at the time of marriage, and thereafter following the birth of every child, both women and men are informed of the various birth control options available, including where they can obtain or purchase contraceptives from. There is already an initiative by the Ministry of Health through which newly married couples are given a package containing certain information.⁴⁶ Through interviews with couples married in the Colombo District, it transpired that a leaflet given to them by the Marriage Registrar contained information pertaining to contraceptive methods. It is important to ensure that all married couples are given such information upon marriage. This must be carried out alongside mandatory and comprehensive sex education in schools.

⁴⁵ National Guidelines on Post Abortion Care, Second Edition, Ministry of Health, Nutrition and Indigenous Medicine Sri Lanka, 2015, page 73, available at <http://fhb.health.gov.lk/images/FHB%20resources/Family%20Planning/Family%20Planning%20Unit/Publications/National%20Guidelines%20on%20Post%20%20%20Abortion%20Care.pdf>

⁴⁶ Ministry of Health Nutrition and Indigenous Medicine, 'Guidelines for the delivery of the Service package for Newly Married Couples', General Circular Letter No. 02-68/2018, available at <https://drive.google.com/file/d/1Q2IpsbiTxcitxV4F7wEmPoGGZWWJI6f1/view>

2. A Criminal Justice System Unresponsive to SGBV

This section looks broadly at the criminal justice system in Sri Lanka and identifies a number of ways in which it is unresponsive to victims of SGBV. In being so, it makes the pursuit of justice within the criminal justice system impractical and unpalatable for many victims of SGBV, which in turn further entrenches the prevalence and institutional indifference to SGBV in Sri Lanka.

Chronic Delays in the Conclusion of Cases

Sri Lanka's justice system is riddled with delays at all levels. While this causes great injustice and inconvenience to all citizens, it has a particularly adverse effect on victims of SGBV who are likely to be dealing with myriad life consequences physically, mentally and economically.

Table 1 analyses sixteen published judgements of the Court of Appeal related to rape (selected at random), decided between 2012 and 2019. What is evident from this analysis is that it usually takes more than ten years on average from the time of the incident until the time of the conclusion of Court proceedings. This is an unacceptably long time for any victim of crime to wait for the justice system to respond, but for victims of SGBV, long delays would prolong their suffering in unconscionable ways. The expedition of SGBV-related cases must therefore be an immediate priority.

Case Number and Case Type	Date of incident(s)	Date of the Judgement of the Court of Appeal	Time taken	Name of victim mentioned?
CA 13/2017 Statutory Rape	February 1 – March 26, 2004	December 14, 2017	More than 10 years	Yes
CA 25/09 Rape	May 27, 1999	March 6, 2014	More than 10 years	Yes
CA 105/2010 Statutory Rape	Not mentioned. High Court case filed in 2007.	December 12, 2017	At least 10 years	Yes
CA 44/2014 Statutory Rape	Not mentioned. Indictment in High Court in 2012	March 6, 2019	At least 7 years	Yes
CA 187/2013 Statutory Rape	September 28, 2003	June 14, 2017	Nearly 15 years	Yes
CA 21/12 Statutory Rape	September 24, 1999	July 16, 2015	More than 15 years	Yes
CA 285/2017 Rape	November 7, 2005	January 28, 2019	Nearly 15 years	Yes

CA 210/2013 Rape	May 28, 2001	November 30, 2016	More than 15 years	Yes
CA 270/2015 Rape	Not mentioned. High Court case filed in 2006	September 15, 2017	More than 10 years	Yes
CA 06/2013 Rape	January 1 – July 31, 2001	July 15, 2014 (Victim was 13 years when offence occurred and 20 years and a mother when giving evidence at the High Court)	More than 10 years	Yes
CA 196-200/2011	Not mentioned, High Court case filed in 2006	February 7, 2014	At least 8 years	Yes
CA 249/2010	Not mentioned, High Court case filed in 2005	March 4, 2013 (retrial ordered)	At least 8 years before retrial	Yes
CA HCC 116/15 Rape	Not mentioned, High Court case filed in 2011	August 30, 2019	At least 8 years	No
CA 176/2013	January 1 – February 29, 2000	November 7, 2014	Nearly 15 years	Yes
CA 378/2017	2011 (date not specified)	September 3, 2019	At least 8 years	No
CA 148/2016 Gang rape	July 21, 2009	February 8, 2019	Nearly 10 years	Yes

Table 1

Two particular reforms appear as feasible options to expedite SGBV-related cases:

- i. ***Special High Courts dedicated to SGBV*** – Special High Courts dedicated to particular types of cases have already been trialled and implemented in Sri Lanka – for instance, for cases on corruption – thus there is already precedent for establishing special High Courts on SGBV.
- ii. ***A specialised SGBV unit within the Attorney-General’s Department*** – There is already a specialised Child Protection Unit set up in the Attorney-General’s Department tasked with the expeditious conclusion of cases relating to Child Abuse. The Unit gives force to a project launched in 2012⁴⁷. It is staffed by specialist lawyers from the Department and requires actors at all relevant criminal justice institutions to work better together to conclude cases expeditiously.

⁴⁷ ‘National project launched for expeditious processing of child abuse cases’, *DailyFT*, 5th September 2012, available at <http://www.ft.lk/news/national-project-launched-for-expeditious-processing-of-child-abuse-cases/56-107720>

An inadequate victim and witness protection scheme

In order for the criminal justice system to be successful, witnesses must be able to come forward and report what happened to them, and witnesses must be able to testify and share what they know. Both victims and witnesses must be able to do so without fear of reprisals in order for the system to function optimally. Victims and witnesses will naturally be unwilling to jeopardise their safety and the safety of those close to them if they feel that speaking out will create such danger.

The Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015 was enacted as a measure to address this⁴⁸. The Act sets up the National Authority for the Protection of Victims of Crime and Witnesses and contains a number of provisions to protect victims of crime and witnesses, and to provide redress to them. Since its enactment, however, the Act has already been subject to criticism for not being fully and effectively implemented⁴⁹.

Some of the main concerns regarding the implementation of the Act are that the general public is unaware of the existence of the Authority and the protection they are entitled to under it; the slow progress of investigating complaints made to the Authority; the lack of trained staff; and the lack of institutional independence given to the Authority.⁵⁰ As per the 2018 Performance Report of the Ministry of Justice and Prison Reforms, between 2016 and 2018 the protection division under the Authority had received only seven requests to provide protection (one each in 2016 and 2017, and five in 2018).⁵¹ The division had in fact actually provided protection to only six people in three years.⁵²

According to the Director-General of the Authority, the lack of awareness is one of the main factors which has hindered the success of the Authority, as many victims, especially victims of SGBV, opt not to report crimes out of fear, shame or despondence with the criminal justice

⁴⁸ Available at <https://www.lawnet.gov.lk/act-no-4-of-2015/>

⁴⁹ See Esther Hoole, Victim and Witness Protection and Transitional Justice: The Imperative Need for Urgent Reform, *Groundviews*, January 14, 2016, available at <https://groundviews.org/2016/01/14/victim-and-witness-protection-and-transitional-justice-the-imperative-need-for-urgent-reform/>

⁵⁰ Maneshka Borham, 'Witness Protection Authority: Still faltering after three years', *Sunday Observer*, February 24, 2019, available at <http://www.sundayobserver.lk/2019/02/24/news-features/witness-protection-authority-still-faltering-after-three-years>

⁵¹ Ministry of Justice and Prison Reforms, *Performance Report*, 2018, p 105, available at https://www.moj.gov.lk/web/images/pdf/progress_report/2018/English.pdf

⁵² Ibid, Maneshka Borham, 'Witness Protection Authority: Still faltering after three years'.

system.⁵³ However, it has also been noted that giving the Authority publicity is insufficient until its capacity is built to service the need.⁵⁴

It is essential that the procedures in place allow for instant investigation into requests for protection, as a lag or delay in this regard could render the point of requesting protection futile. People must see the system work successfully to have faith that the authority will provide them with the sufficient protection in the event they report cases of SGBV.

Inadequate and inconsistent Court participation rules for SGBV victims

The Evidence (Special Provisions) Act No. 32 of 1999 introduced a provision by which, in cases of child abuse, a video recording of the preliminary interview with a child relating to the matters in issue in those proceedings could be produced in evidence, provided that the defence would be given an opportunity to cross examine the child.⁵⁵ Similar provisions do not apply in relation to adult victims of abuse or SGBV.

With regards to in-person participation in Court proceedings, the general uncodified practice in the High Court is that the public will not be allowed to remain in the Court room when the victim of any sexual offence is being examined, regardless of their age.⁵⁶ On request, such examination of the victim may also take place in the Judge's chambers, based on the preference or need of the victim. However, in the interests of justice and giving the accused a fair trial, the accused and their lawyers would have to be present during the course of leading such evidence.

⁵³“Never Hesitate to Report a Crime” says Udayakumara Amarasinghe Director General of NAPVCD’ *Department of Criminology and Criminal Justice, University of Sri Jayewardenepura*, 17th January 2020, available at <http://fhss.sjp.ac.lk/criminology/2020/01/17/never-hesitate-to-report-a-crime-says-udayakumara-amarasinghe-director-general-of-napvcd/>

⁵⁴ Anurangi Singh, ‘Witness Protection Authority Key to integrity of criminal justice system’, *Sunday Observer*, September 30, 2018, available at <https://www.sundayobserver.lk/2018/09/30/news-features/witness-protection-authority-%E2%80%98key-integrity-criminal-justice-system%E2%80%99>

⁵⁵ Section 4 of the Act by which section 163A is introduced into the Evidence Ordinance. Act available at <https://www.lawnet.gov.lk/evidence-special-provisions-3/>

⁵⁶ Swasha Fernando and Sajith Bandara, ‘Protection of Victims of Crime and Witnesses: A Contemporaneous Application of Laws’, *The Junior Bar Law Journal* (2019), Volume X, available at <http://www.juniorbarbasl.lk/assets/files/Article%20by%20Swasha%20Fernando%20and%20Sajith%20Bandara%20-%20PROTECTION%20OF%20VICTIMS%20OF%20CRIME%20AND%20WITNESSES%20-%20A%20CONTEMPORANEOUS%20APPLICATION%20OF%20LAWS.pdf>

While this practice is laudable, putting such procedure into law would eliminate any ambiguity and eliminate the practice being enforced inconsistently across the Courts. It would also signify the commitment of the State towards the interests of the victims of crime.

Inconsistent sentencing guidelines

There is a lack of consistency in the sentences that are given to offenders who commit SGBV. Sentencing guidelines will ensure that there is consistency in punishment, and also make sure that judges and prosecutors are not swayed by irrelevant factors, or disregard important factors. The sentence given to the offender should not be dependent on the personal views held by the individual judge. In the United Kingdom, the Sentencing Council has drafted comprehensive guidelines to be considered by judges when sentencing sexual offences⁵⁷. This includes a step by step formula to be followed in each type of offence, from categorising the offence based on the extent of harm caused, to considering various mitigating factors. While judges still retain some discretion, this discretion has to be exercised within a limited range based on these factors. A similar guide would be appropriate for Sri Lanka.

Names of SGBV victims being reported

It is important that victims of SGBV are able to move on from the trauma they faced in order for them to get on with their lives, or to resume some sense of normalcy. Their identity must not be tied to being a victim, especially in a country where much stigma is attached to victims. This is especially important in the digital age where people can easily search the name of someone on the internet to find details about them. Any person, including potential employers, visa offices or even suitors, may 'Google search' a victim, and if their identities have been published, they will be associated with this detail.

Under section 356C of the Penal Code, it is an offence for any person to print or publish the name of a victim of rape, sexual harassment, grave sexual abuse, incest and several other sexual offences, except on the instructions of the police; with the authorisation of the victim; or by their next of kin/guardian where they are dead or disabled.⁵⁸ It is also illegal to publish matters relating to Court proceedings in such cases without the permission of Court. Any

⁵⁷ Sexual Offences – Definitive Guideline, Sentencing Council, UK, 2003, available at <https://www.sentencingcouncil.org.uk/wp-content/uploads/Sexual-offences-definitive-guideline-Web.pdf>

⁵⁸ Section 356C, Penal Code.

person who does so can be imprisoned for up to two years. The PVDA contains similar provision.⁵⁹

Section 356C, however, does not apply such a bar to printings or publications of judgments of the Supreme Court or Court of Appeal. Among the 16 Court of Appeal cases dealing with rape analysed in this paper (see Table 1 above), 14 mentioned the names of the victim, even when the victim had been a minor at the time of commission of the offence. Judgments of the Court of Appeal and Supreme Court are all published online, and in most cases when the victim's name was searched on search engines, the relevant judgments detailing their rapes showed up. In most cases the victim's full name was used, making them easily identifiable. The Penal Code provision was introduced in 1995, a time during which the ease of searching for records relating to a name online would have been unimaginable. The law urgently requires reform to adapt the evolving needs.

There is no reason why the victim's name must be mentioned in the judgment, and no justification for the inclusion of the same. While the right to Privacy has not yet been recognized as a Fundamental Right in Sri Lanka⁶⁰, it is important that the privacy of victims is protected in order to allow them to fully recover from their trauma.

Inadequate 'One-Stop Centres' for victims of SGBV

Many victims of abuse and violence do not know where to go and how they can get help. They may also be ashamed, and fear speaking about their experiences. If dedicated places exist to provide victims of SGBV with support and resources, they are more likely to find the confidence to report their issues and to seek appropriate assistance in addressing them. 'One-stop centres' for victims of SGBV operate in numerous jurisdictions worldwide to provide victims of SGBV multimodal assistance in lodging complaints with the police; seeking medical treatment and counselling; and obtaining legal assistance on how to proceed.⁶¹ All this can be

⁵⁹ Section 20

⁶⁰ 'Right to Privacy in Sri Lanka', Discussion Paper, Centre for Policy Alternatives', September 2020, available at <https://www.cpalanka.org/wp-content/uploads/2020/09/Discussion-Paper-Right-to-Privacy-updated-draft-4-1.pdf>

⁶¹ Numerous countries including Malaysia, South Korea and India have set up such centres. For more information see: Ayesha Ashraf, Sebastián Galleguillos Agurto, Frederick Geyer Et al, 'Improving Law Enforcement's Victim-Centric Responses to Sexual Assault', *Global Best Practice Catalog*, CUNY Academic Works, 2019, available at https://academicworks.cuny.edu/jj_pubs/321/

provided in a safe and secure environment, where the victim can be protected from their abuser.

When a suspected victim of SGBV seeks treatment at a hospital, they can be referred to these centres, where they can be consulted by a counsellor, thus giving them a safe space to report what has taken place. By providing all the facilities that the victim may need in one place, it saves the victim the hassle of having to go from place to place to consult or access all these resources, and also helps to ensure their privacy. This is especially the case given the varied services a victim of SGBV would need (spanning the areas of health, accommodation, legal services and financial aid) and the difficulty of procuring such services on their own in Sri Lanka. An uncomplicated process will naturally be less intimidating to victims of crime.

There are two projects that have been attempted in Sri Lanka to this effect. The first are ***Gender-Based Violence Desks*** which have been introduced in certain hospitals and clinics. The services these Desks provide include supportive listening and referrals to other necessary in-hospital clinics or services.⁶² There are reportedly 27 such desks in the country at present, but since not many hospitals offer counselling services to which victims can be referred, these desks are dependent on the assistance of NGOs to provide such services.⁶³

Not much information is available on the success of these desks, though they are said to have been accessed by at least 3,000 women in 2009.⁶⁴ A lack of support and negative attitudes of staff at these hospitals are reported to be some factors which hinder the success of these Gender-Based Violence Desks.⁶⁵

The second initiative by the State is the setting up of '***Mithuru Piyasa***' ***Service Points***, which are also set up at hospitals. Here the victim has an initial conversation with a doctor or nurse, who will then refer them to in-hospital services or make out-of-hospital referrals.⁶⁶ The option for out-of-hospital referrals makes them a wider mechanism than the Gender-Based

⁶² Sepali Guruge, Vathsala Jayasuriya-Illesinghe and Nalika Gunawardena, 'A review of the Sri Lankan health sector response to intimate partner violence: looking back, moving forward', *WHO South-East Asia Journal of Public Health*, January-June 2015, 4(1), pp. 8-9, available at <https://apps.who.int/iris/bitstream/handle/10665/329667/seajphv4n1p6.pdf?sequence=1&isAllowed=y>

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

Violence Desks. The out-of-hospital services they are referred to can even include local NGOs that may provide short term housing, counselling or even legal and financial aid.⁶⁷

There were reportedly 35 Mithuru Piyasa centres operating in 2015, but it is reported by the Ministry of Health that as of 2017 50% of public sector health facilities had the facilities for 'Befriending GBV Survivors'.⁶⁸ This included 71% of Public Tertiary Care Hospitals and 41% of Public Secondary Care Hospitals but no Public Primary Care Facilities or Public Clinics. It is important that guidelines are put in place for medical staff at Primary Care Facilities and Public Clinics to direct potential victims to these centres as these may be the first point of contact for some victims of SGBV.

It is important that these systems are not just put in place, but that their intended services are fully implemented. No studies have been done on the effectiveness of this mechanism, however, it is reported that counselling facilities remains minimal.⁶⁹ It is also important to ensure that there is collaboration between these centres and the organisations and institutions to which they make out-of-hospital referrals, so as to prevent undue inconvenience to the victim. The persistent anti-NGO attitude of Sri Lankan governments, across successive administrations, may hinder organisations from interfacing with the government to provide such vital services, and may also be discouraging victims of SGBV from seeking services from such organisations.

These existing services do not provide legal assistance to victims of SGBV. Victims of SGBV often do not often know their rights, and the Sri Lankan legal system can be extremely difficult to navigate without the assistance of a lawyer. Like all criminal cases, cases of SGBV are prosecuted by the Attorney-General's Department which represents the interests of the State in bringing offenders to justice⁷⁰. The prosecutor does not have a relationship with the victim, and in most cases will never interact with the victim except when examining them in Court.

⁶⁷ Ibid.

⁶⁸ 'Service Availability and Readiness Assessment Sri Lanka – 2017', Ministry of Health, Nutrition and Indigenous Medicine Department of Census and Statistics, Ministry of National Policies and Economic Affairs in collaboration with World Health Organization Global Fund to Fight AIDS, Tuberculosis and Malaria Khulisa Management Services, 2018, page 87, available at http://www.health.gov.lk/moh_final/english/public/elfinder/files/publications/2019/SARASriLanka2017REPORT.pdf

⁶⁹ Manuela Colombini, Susannah H Mayhew, Ragnhild Lund *et al*, 'Factors shaping political priorities for violence against women-mitigation policies in Sri Lanka', *BMC International Health and Human Rights* (2018) 18:22, page 8, available at <https://link.springer.com/article/10.1186/s12914-018-0161-7>

⁷⁰ 'Rethinking the Attorney General's Department in Sri Lanka: Ideas for Reform', Centre for Policy Alternatives, November 2020, page 9, available at <https://www.cpalanka.org/wp-content/uploads/2020/11/AGs-Dept-Final.pdf>

The victim in turn is unable to consult the prosecutor regarding their rights in the course of the process, and will have to pay a private lawyer for such consultation if needed. Having free access to a lawyer means that the victim can be more proactive in ensuring that their rights are upheld.

Difficulties in making complaints

Currently, it is difficult for victims of SGBV to make complaints in an easy and discreet manner. A victim must approach a Police Station and make the complaint themselves. When a victim is under the guardianship or control of the offender, this can be even more challenging. As a result, many victims of SGBV may be deterred from making complaints. More remote and secure ways to make complaints may accordingly allow for greater reporting of SGBV complaints.

President Rajapaksa's election manifesto made a commitment to allow women to report violence and harassment to the nearest Police Station through their mobile phones.⁷¹ Such a provision would allow women who face SGBV at the hands of close family members who have control over them to more easily access authorities, with less chance of being intercepted by their abuser.

It is however important that, when implementing this mechanism, the need for ensuring the privacy and security of the victim is recognized, so that the information provided cannot and will not be used to put the victim at an increased risk.

⁷¹ Ibid, 'Vistas of Prosperity and Splendour', Manifesto of Gotabaya Rajapaksa.

3. Factors Impeding SGBV-Related Legal and Policy Reform

This section surveys a number of reasons as to why law and policy reform in the area of SGBV is delayed. These reasons stem from Sri Lankan society more generally and impose pervasive barriers for progress.

Lack of political will to address SGBV-related issues

The lack of political will for addressing SGBV-related issues can be substantiated by the fact that whilst sexual offences in the Penal Code have not been substantially amended since 1998, the Constitution of Sri Lanka has been substantially amended four times since then⁷². What this shows is that there is no priority given to amending SGBV-related laws.

The State has periodically given indications to the effect that they intend to reform laws, yet it has never followed through. The Ministry of Justice notes in its 2017 performance report that Bills to extend the instances in which a woman could legally have an abortion, and to amend the laws on marital rape and gross indecency, have been proposed.⁷³ The 2018 report, too, lists out the same proposed Bills.⁷⁴ Yet these policies and Bills never materialised.

Additionally, the Law Commission of Sri Lanka has also proposed a number of laws and policies. This includes proposed amendments to the law on statutory rape in 2009;⁷⁵ proposals for law reform relating to abortion in 2013;⁷⁶ an explanatory note on sentencing guidelines for statutory rape in 2014;⁷⁷ and comments on a 'Proposed Bill on Criminal Aspects of Violation of Privacy'⁷⁸ which proposed an offence related to violating privacy and the

⁷² The Seventeenth Amendment in 2001, the Eighteenth Amendment in 2010, the Nineteenth Amendment in 2015 and the Twentieth Amendment in 2020.

⁷³ Ministry of Justice, *2017 Performance Report*, p 16, available at https://www.moj.gov.lk/web/images/pdf/progress_report/14.11.2017/English.pdf

⁷⁴ Ministry of Justice, *2018 Performance Report*, p 20, available at https://www.moj.gov.lk/web/images/pdf/progress_report/2018/English.pdf

⁷⁵ Law Commission of Sri Lanka, *Punishment for Rape of a Girl under 16 years of age - Amendment to Section 364 (2) of the Penal Code*, 2009, available at

http://lawcom.gov.lk/web/images/stories/reports/punishment_for_rape_of_a_girl_under_16_years_of_age.pdf

⁷⁶ Law Commission of Sri Lanka, *Proposed Amendment to section 306 of the Penal Code to Decriminalize the Termination of Pregnancy for Rape, Incest & Congenital Abnormalities*, 2013, available at

http://lawcom.gov.lk/web/images/stories/reports/medical_termination_of_pregnancy_proposals_of_the_law_commission_of_sri_lanka.pdf

⁷⁷ Law Commission of Sri Lanka, *Explanatory note on the sentencing policy with regard to statutory rape and matters connected thereto*, 2014, available at

https://lawcom.gov.lk/web/images/stories/reports/explanatory_note_on_the_sentencing_policy.pdf

⁷⁸ Law Commission of Sri Lanka, *Proposed Offences Under Circumstances Violating Privacy*, 2015, available at http://lawcom.gov.lk/web/images/stories/reports/2015/Explanatory_Comments_to_the_Proposed_Bill.pdf

circulation of intimate images in 2015.⁷⁹ To date, however, none of these proposals have been passed into law, or even been presented to Parliament as a Bill.

In 2014, the then Leader of the Opposition, Ranil Wickremesinghe, convened a commission comprised of several leading women's rights academics and activists to prepare a report on the prevention of violence against women and girls. This commission presented a comprehensive report with clear recommendations for reform.⁸⁰ Wickremesinghe was thereafter elected Prime Minister in 2015 and remained so until 2019. However, none of the reforms that he himself had commissioned were enacted into law during this period. This is but one example of how political leaders on all ends of the political spectrum have failed to prioritise SGBV-related law reform.

Poor female representation in Parliament

International literature suggests that female legislators are more likely to raise issues relating to gender and problems faced by women in Parliament.⁸¹ This is not hard to imagine, as women are far more likely to understand and relate to the problems faced by fellow women, and comprehend the gravity of these problems.

There is severe lack of female representation in the Sri Lankan legislature. 52% of Sri Lanka's population and approximately 56% of its voters are women, yet only 5.3% of Members of Parliament are women.⁸²

At the 2015 General Election, 13 women obtained Parliamentary seats (including two National List seats) and one was disqualified. In 2020, only 12 women obtained seats in Parliament (including 4 National List seats).⁸³ This indicates that there has been no progress in female representation in the last five years.

⁷⁹ Available at

http://lawcom.gov.lk/web/images/stories/reports/2015/Proposed_Bill_Sections_1_2_3_4_and_5_Social_Media.pdf

⁸⁰ Ibid, Report of the Leader of the Opposition's Commission on the Prevention of Violence and the Girl Child, available at <http://gbvforum.lk/r-library/document/Report%20of%20the%20Leader.pdf>

⁸¹ Elizabeth Asiedu, Claire Branstette, Neepa Gaekwad-Babulal and Nanivazo Malokele, 'The Effect of Women's Representation in Parliament and the Passing of Gender Sensitive Policies', *JEL K38, 01, 055*, available at <https://www.aeaweb.org/conference/2018/preliminary/paper/an5yEb5h>

⁸² Methmalie Dissanayake, 'Women's political participation in SL', *Ceylon Today*, November 4, 2019, available at <https://archive.ceylontoday.lk/print-more/44246>

⁸³ Sarah Hannan, 'Female Members of Parliament | Gender equality: Not in the House', *The Sunday Morning*, August 16, 2020, available at <http://www.themorning.lk/female-members-of-parliament-gender-equality-not-in-the-house/>

A number of reasons can be posited for the lack of female representation in politics:⁸⁴

- A lack of willingness by political parties to give nominations to women.⁸⁵ This was evident in the most recent General Election in 2020 as well, where the numbers of women nominated by the main political parties was severely low.⁸⁶ Unless women have political ties in their families, or are well known through other platforms, parties do not see women as capable of gaining votes, and thus choose not to nominate them.⁸⁷
- Culturally, politics is seen as a sphere for men, with women's roles seen as being wives, mothers and as housekeepers. This stereotype being perpetuated from childhood results in less women being willing and interested in participating in politics.⁸⁸
- A lack of support from families for women entering politics, and a lack of resources available for women to do so.⁸⁹
- Voters not willing to vote for female candidates. In the 2020 General Election, for instance, both the leading political parties, the Sri Lanka Podujana Peramuna and the Samagi Jana Balawegaya had nominated one woman each for the Colombo District,⁹⁰ neither of whom were able to gain enough preferential votes to win a seat in Parliament.⁹¹ Yet 18 men between the two parties managed to secure seats in the district.

⁸⁴ An extensive study of the reasons for the lack of female representation in politics can be found at: Chulani Kodikara, 'The Struggle for Equal Political Representation of Women in Sri Lanka - A Stocktaking Report for the Ministry of Child Development and Women's Empowerment and the United Nations Development Programme', October 2009, available at <https://www.undp.org/content/dam/srilanka/docs/governance/WPE%20FINAL%20PDF.pdf>

⁸⁵ Chulani Kodikara, 'Women and Politics in Sri Lanka: The challenges to meaningful participation', *Groundviews*, February 9, 2008, available at <http://groundviews.org/2008/09/02/women-and-politics-in-sri-lanka-the-challenges-to-meaningful-participation/>

⁸⁶ Tharumalee Silva, 'Women nominees: Poor showing from major parties in run-up to Sri Lanka's polls', *Economynext*, July 24, 2020, available at <https://economynext.com/women-nominees-poor-showing-from-major-parties-in-run-up-to-sri-lankas-polls-72327/>

⁸⁷ Daisy Perry, 'Women's Representation and Participation in Formal Politics', *Groundviews*, October 6, 2018, available at <https://groundviews.org/2018/06/10/womens-representation-and-participation-in-formal-politics/>

⁸⁸ Ibid, Chulani Kodikara, 'The Struggle for Equal Political Representation of Women in Sri Lanka - A Stocktaking Report for the Ministry of Child Development and Women's Empowerment and the United Nations Development Programme'.

⁸⁹ Ibid

⁹⁰ Nomination lists available at <https://cmev.files.wordpress.com/2020/06/colombo-district.pdf>

⁹¹ 'General Election 2020: Preferential votes of Colombo District', *Ceylon Today*, August 7, 2020, available at <https://ceylontoday.lk/news/general-election-2020-preferential-votes-of-colombo-district-1>

The lack of priority given to women's issues within the Executive

In his message on International Women's Day, President Rajapaksa said '*As a Nation we salute our women. This is attested by social indicators such as literacy rate, social inclusion and life expectancy, where Sri Lankan women are on par with the developed countries.*'⁹² While it is true that on some social indicators such as the literacy rate and life expectancy the status of Sri Lankan women is high, indicators such as these and other historical milestones, such as Sri Lanka having the world's first female Prime Minister, are often used to distract from very pressing issues and inequalities women in Sri Lanka face today.

Even some of these high indicators for women in Sri Lanka do not paint the full story. For instance, while the literacy rate among Sri Lankan women may be high,⁹³ female labour force participation was reportedly only 34.5% in 2020.⁹⁴ The Global Gender Gap Report for 2020 compiled by the World Economic Forum, which considers factors such as economic participation and opportunity, educational attainment, health and survival and political empowerment, ranks Sri Lanka 102nd out of 153 Countries,⁹⁵ an indication of how far the country has to go in advancing the status of women.

Following the 2020 General Election, the Ministries of the Sri Lankan government were restructured. The Ministry of Women's Affairs – which was first established as a separate Ministry in 1997⁹⁶ and which has subsequently been the Ministry for Women's and Children's Affairs several times – did not find a place in the newly restructured list of Ministries.

The only Ministry tasked explicitly with advancing the interests of women is the Ministry of Education, under which a State Ministry of Women and Child Development, Pre-Schools & Primary Education, School Infrastructure & Education Services has been set up. The State Minister who was allocated this subject, Piyal Nishantha De Silva, is a male, a first time

⁹² Full statement available at <https://www.president.gov.lk/presidents-message-on-international-womens-day/>

⁹³ In 2018, the literacy rate among females between 15 – 24 years was reported to be 99% while it was 98.5% among males of the same age group. However, in the age group 65 years and older the literacy rate among men (85.1%) is reported to be much higher than that of women (74.4%) in that age group, indicating an improvement in the literacy of women. Statistics from UNESCO Institute for Statistics, available at <http://uis.unesco.org/en/country/lk>

⁹⁴ Statistics Sri Lanka, *Labour Force Survey, Annual Report 2019*, p IV, available at <http://www.statistics.gov.lk/LabourForce/StaticInformation/AnnualReports/2019>

⁹⁵ World Economic Forum, *Global Gender Gap Report 2020*, Page 319, available at http://www3.weforum.org/docs/WEF_GGGR_2020.pdf

⁹⁶ A brief history of the Ministry can be found at <http://www.childwomenmin.gov.lk/about/overview>

Minister, and has only been a Member of Parliament since 2017.⁹⁷ In addition to this, of the 28 Cabinet Ministers, there is only one woman – Minister of Health Pavithra Wanniarachchi – and of the 28 State Ministers, there are only two women – State Minister of Prison Reforms and Prisoners’ Rehabilitation Dr Sudarshani Fernandopulle and State Minister of Skills Development, Vocational Education, Research and Innovation Seetha Arambepola.⁹⁸

This series of decisions indicate that the advancement of women is not a priority for the government. It is the role of the State to create an environment in which women are safe and their dignity is respected. This involves recognising that the safety and dignity of women is at serious risk in the country. Giving priority to women’s issues at the highest levels of executive government, in both government institutions and executive appointments, is one way to ensure that these matters receive due attention and that more urgent action can be taken.

Negative social attitudes and stigma towards women

Social attitudes relating to women, gender and sexuality play a major role in the slow progress of law reform relating to SGBV. Often, a specific role is attributed to the woman in Sri Lankan society where she is expected to play the role of the mother, wife or homemaker⁹⁹, and is generally expected to be submissive¹⁰⁰.

Even benevolent framings of women reinforce these ideas. As an example, the Presidential manifesto of Gotabaya Rajapaksa states that ‘citizens, families, communities and societies are shaped through the guidance and nurturing of women’¹⁰¹. A woman who meets these criteria is often seen as good and virtuous, whilst any alternate modes of being are stigmatised. As a result, many hold the belief that a woman is subservient in the home, and a woman who ‘disobeys’ her husband deserves any intimate partner violence she is subject to¹⁰².

⁹⁷ Parliament of Sri Lanka, ‘Hon. Piyal Nishantha De Silva, M.P.’, available at

<https://parliament.lk/en/component/members/viewMember/3226?Itemid=206>

⁹⁸ ‘Newly sworn Cabinet: New MPs receive more executive authority in new government’, *Daily Mirror*, August 13, 2020, available at http://www.dailymirror.lk/print/front_page/newly-sworn-Cabinet--New-MPs-receive-more-executive-authority-in-new-government/238-193734

⁹⁹ Ibid, Chulani Kodikara, ‘The Struggle for Equal Political Representation of Women in Sri Lanka - A Stocktaking Report for the Ministry of Child Development and Women’s Empowerment and the United Nations Development Programme’.

¹⁰⁰ ‘Country Profile on Gender-Based Violence in Sri Lanka’, World Health Organization, 2018. Available at <https://apps.who.int/iris/handle/10665/273193>

¹⁰¹ Ibid, ‘Vistas of Prosperity and Splendour’, Manifesto of Gotabaya Rajapaksa,

¹⁰² Ibid, ‘Country Profile on Gender-Based Violence in Sri Lanka’, World Health Organization.

This is coupled with prevalent and dangerous misconceptions on how and why SGBV occurs; for instance, that a woman who is sexually assaulted was ‘asking for it’ based on how she was behaving or was dressed.¹⁰³ Often, behaviours that are described as ‘asking for it’ are ones that are contrary to the roles that women are expected to play.

It is believed by many that men will be tempted into touching or even sexually assaulting a woman if she dresses revealingly, and thus the burden is cast on the woman to protect herself from sexual abuse by dressing modestly.¹⁰⁴ Similar behavioural norms exist for behaviours such as traveling alone or traveling at night.

When the blame for SGBV is placed on the victim for failing to meet expected gender roles, the actual fault for the crime is shifted away from both the perpetrator and the systems in place which do not meaningfully address SGBV. As long as these patriarchal mindsets persist unchallenged in society, SGBV will continue to be a prevalent and unaddressed issue.

Religious leaders have also contributed to these stereotypes and stigmas, and have on several occasions blocked progress on SGBV related issues. For instance, religious leaders protested the publication of a textbook on sex education for children¹⁰⁵. The State itself is often seen giving priority to these views, over the interests of other stakeholders.

¹⁰³ An extensive study on the social norms that impact gender and sexual violence in Sri Lanka can be found at -ANAM Parvez Butt and Sharanya Sekaram, *Smashing Spatial Patriarchy - Shifting social norms driving sexual and gender-based violence on public transport in Sri Lanka*, Oxfam, 2019, available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620845/smashing-spatial-patriarchy-gender-based-violence-public-transport-sri-lanka-230719-en.pdf?sequence=1&isAllowed=y&fbclid=IwAR09orrieaVNOoYjr2RXh4rurLdwvm0uyIVAfkmLBpb1s1X04u_Qd36kcZQ

¹⁰⁴ Elisabeth Darj, Kumudu Wijewardena, Gunilla Lindmark & Pia Axemo, “Even though a man takes the major role, he has no right to abuse’: future male leaders’ views on gender-based violence in Sri Lanka’, *Global Health Action*, 2017, 10:1, available at <https://doi.org/10.1080/16549716.2017.1348692>

¹⁰⁵ ‘Special meeting to decide on controversial textbook ‘Hathe Ape Potha’’, *NewsFirst*, 10th January 2020, available at <https://www.newsfirst.lk/2020/01/10/special-meeting-to-decide-on-controversial-textbook-hathe-ape-potha/>

4. Recommendations

The recommendations in this section fall into three categories: recommendations aimed at reforming existing laws related to SGBV; recommendations aimed at reforming the criminal justice system in order to make it more victim centric; and recommendations aimed at reducing the prevalence of SGBV. These recommendations are aimed at the Sri Lankan government – in particular, the Executive, the Ministry of Justice, the Attorney-General’s Department and Sri Lanka Police – as well as lawmakers, policymakers and all governmental and non-governmental stakeholders working in the domains related to SGBV.

Recommendations to reform existing laws related to SGBV

Reform the offence of rape in the Penal Code by:

- Widening the scope of who the offence can be committed by from men to persons of any gender.
- Widening the scope the offence to cover acts of oral and anal penetration committed by persons of any gender to persons of any gender.
- Including marital rape in the offence of rape.
- Strictly imposing minimum mandatory sentences in the case of statutory rape when the victim has not consented to the act.
- Adding a minimum age of the victim in cases in which ‘close in age expectations’ apply in the case of statutory rape, i.e. the reduced punishment for offenders below the age of 18 should only apply if the underage victim who has given consent is over a certain age, ideally between 14 and 15 years, to be decided by legislators based on a study of the relevant social factors.

Amend the Prevention of Domestic Violence Act No 34 of 2005 to:

- Provide a stand-alone definition of physical violence which is not interlinked with provisions of the Penal Code.
- Include a comprehensive definition of “domestic violence” which includes economic abuse.

- Define what constitutes a “pattern of abuse” and what qualifies as “conduct of a serious nature” in the definition of “emotional abuse”.
- Allow third parties to petition the Court as a proxy of an aggrieved person to obtain a protection order on their behalf.
- Reduce the in-form requirements in section 2(3) to enable an aggrieved person to obtain a protection order by filling in a simple form and filing it at a Hospital, Police Station or Magistrate’s Court.
- Ensure that complaints of Domestic Violence are given priority and dealt with swiftly by Courts.
- Include a procedure for expedited service of notice on the Respondent to prevent delays in the system.
- Include a Penal Code provision on Domestic Violence.

Amend the provisions on abortion in the Penal Code to:

- Decriminalise causing a woman to miscarry a pregnancy, when the consent of the woman has been obtained.
- Decriminalise a woman causing herself to miscarry a pregnancy.

Recommendations to make the criminal justice system more victim-centric

Because of the unique nature of the trauma that the victims of SGBV face, it is important that the system is designed with a focus on the victim. No victim who has already suffered at the hands of the abusers should be made to suffer further due to the shortcomings of the criminal justice system. The following measures are suggested to minimise the trauma and suffering of victims as they navigate the criminal justice system in order to seek justice.

(a) Establish a dedicated SGBV unit in the Attorney-General’s Department

Set up a unit in the Attorney-General’s Department focused on the expeditious conclusion of SGBV cases, with a clear strategy for prosecutions. Allocate lawyers to this unit selected on the basis of prior experience in working on SGBV-related cases or on displaying a passion and willingness to help victims of SGBV. Provide these lawyers with additional training to

understand the physical and mental traumas that victims face, as well as how they can best be supported within the criminal justice system.

(b) Establish Special High Courts for hearing SGBV-related cases

Establish separate High Courts dedicated only to SGBV-related cases. These Courts should, as far as possible and practical, hold day-to-day trials in such cases, so as to conclude the leading of evidence in these cases expeditiously.

(c) Evaluate and Improve the Capacity and Publicity of the National Authority for the Protection of Victims of Crime and Witnesses

Conduct a thorough and independent study on the reasons that have hindered the Authority. Realign the Authority according to the findings of the study, and sufficiently fund it in order to: carry out its mandated functions; to recruit sufficient and suitably experienced staff; and to publicise itself on a wide scale so that all victims of crime including of SGBV are aware of it and can come forward.

(d) Allow private trials for all victims of SGBV

Codify existing practice in the High Courts or barring the public from the Court room when a victim of any sexual offence is being examined and allow such examination to take place in the Judge's chamber where preferred. Expand this to cover all victims of SGBV-related crimes.

(e) Allow in-camera Court proceedings for victims of SGBV

Permit the Prosecution to produce video recordings of interviews with the victim in the case of vulnerable victims similar to the procedure allowed in child abuse cases.

(f) Prohibit publishing victims' names in Court judgments on SGBV-related cases

Prohibit victims' names from being included in Supreme Court and Court of Appeal judgment. Where it is absolutely necessary to include victims' names, retract them in any version of the judgment that is made publicly available.

(g) Enact clear sentencing guidelines for SGBV-related offences.

Amend Sentencing Guidelines to ensure consistency in sentences for all SGBV-related crimes, which allow judicial discretion to be exercised within a range of context-appropriate factors that include taking account of the harm caused and appropriate mitigating factors.

(h) Streamline and improve ‘One-Stop Centre’ services for victims of SGBV

Take stock of existing Gender-Based Violence Desks and ‘Mithuru Piyasa’ Service Points and amalgamate them as appropriate. Ensure that the amalgamated ‘One-Stop Centres’ operate at all Public Tertiary Care Hospitals, Public Secondary Care Hospitals, Public Primary Care Facilities and Public Clinics in all districts. Ensure that they provide, at a minimum, referrals to psychological counselling, legal assistance, assistance making Police complaints (if desired) and a minimum level of financial assistance and accommodation. Interface with NGOs and community organisations for further services to be provided.

(i) Introduce a facility to allow reporting SGBV to the nearest Police Station through mobile phone

Design the facility with stringent privacy safeguards; give sufficient publicity to the facility, and maintain it properly. The service should not require the use of a smart phone, but should be accessible via any phone. The service should also be operated in a manner that does not put the privacy or the security of the victim at risk.

Recommendations to reduce the incidence of SGBV

Reforms to the criminal justice system, while important, are not sufficient by themselves to curb the rates of SGBV that take place in Sri Lanka. It is important that policy reforms are also put in place directed at addressing the root of the problem. It is only then that people will be able to live without fear of becoming victims of SGBV.

While the elimination of SGBV from society cannot be achieved by simple legal and policy interventions alone, the following are some recommendations suggested in order to address such root causes of the problem.

(a) Establish a Ministry of Women’s Affairs

Establish a separate Ministry tasked with the advancement of women, not just for the development of the status of women as per social indicators, but to also focus on systemic reforms aimed at protecting the dignity and safety of women. Allocate adequate resources to the Ministry through annual appropriations to carry out this broad mandate. Make the Minister of Women’s Affairs a Cabinet Minister.

(b) Conduct comprehensive research on SGBV in Sri Lanka

Carry out comprehensive island wide studies to really ascertain the prevalence of SGBV in Sri Lanka, as figures are vague due to the amount of underreporting. Carry out further studies into the causes of SGBV in Sri Lanka, and the attitudes that have resulted in its rates of prevalence. When such information is available, the State will be better able to implement tailor-made solutions designed to suit the particular context of the country.

(c) Update school curricula and introduce comprehensive sex education

Update all school curricula for all grades to eliminate gender stereotypes, particularly in subjects relating to health, social studies and biology. Introduce comprehensive sex education at multiple age-appropriate intervals throughout a child's education at school.

Consult experts in the fields of health, psychology, sociology and gender studies when designing a curriculum for comprehensive sex education, in order to ensure it is designed to teach adolescents to recognise and resolve to not commit SGBV. The curriculum should aim to demystify sex so that both healthy and unhealthy sexual behaviours can be recognised and discussed openly. Materials on sex education should be easily accessible in all three languages.

Provide proper training to teachers teaching comprehensive sex education, so that the curricula can be imparted properly and without teachers' own biases on gender and sexuality being imposed on children.

(d) Implement proper rehabilitation programmes for perpetrators

Put into place rehabilitation programmes to ensure that no person who has been found to have committed an act of SGBV repeats such act. Make these programmes part of the sentencing of SGBV-related offences. They should involve mandatory counselling, education, and, where deemed necessary, monitoring perpetrators.