Chapter – IV

Adjudication of Cases of Torture

An examination of the role played by the judiciary in this regard provides some insight into how effectively it has advanced and secured the right to be free from torture in terms of Article 11 of the Constitution. Principles governing the invocation of Article 11 guaranteeing freedom from torture has received expression in case law. A majority of cases involved disputes in regard to facts. Only in a very few cases substantial issues of law have been raised. Whether torture has taken place in a situation has been determined more in the light of all circumstances affecting each case, making it relative. Where decisions have been made on facts, it is difficult to discern any underlying principle which has influenced the outcome in individual cases resulting in decisions which are sometimes unrealistic and irreconcilable. In some cases liability has been imposed on the actual perpetrator while in other cases on the State, and sometimes on both the State and the actual wrongdoer, defying a rational basis for such decisions and lacking consistency. In some instances, identical set of facts and circumstances have given rise to divergent views and outcomes. Again, where liability has been imposed, on what basis it was fixed is uncertain and inconsistent and lacks consensus.

The sentiments, expressed by Judges themselves, show the amplitude and dimension of the constitutional right guaranteed. Justice Wanasundera stressing the importance of the dimension of Article 11 of the Constitution observed:

"Article 11 which gives protection from torture and ill treatment has a number of features which distinguish it from the other fundamental rights. Its singularity lies in the fact that it is the only fundamental right that is entrenched in the Constitution in the sense that an amendment of this clause would need not only a two-thirds majority but also a Referendum. It is also the only right in the

catalogue of rights set out in Chapter III that is of equal application to everybody. and which in no way can be restricted or diminished. Whatever one may say of the other rights, this right undoubtedly occupies a preferred position.

> Having regard to its importance, its effect and consequences to society, it could rightly be singled out for special treatment. It is therefore the duty of this court to give it full play and to see that its provisions enjoy the maximum application[1]".

Justice Sharvananda in similar vein, observed:

"The fundamental nature of the human right of freedom from torture is emphasized by the fact that no derogation is permitted. This human right of freedom from torture, is vouched not only to citizens, but all persons, whether citizens or not. The Constitution is jealous of any infringement of this human right. This case is not to be exercised less vigilantly, because the subject whose human dignity is in question may not be particularly meritorious.[2]"

Justice Atukorale giving expression to similar sentiments in the case of Amal Silva vs Kodituwakku, I.P. observed:

> "The police force, being an organ of the State, is enjoined by the Constitution to secure and advantage this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to mere illusion.[3]"

It is therefore appropriate to examine whether the judiciary has lived up to these sentiments expressed by themselves. It also would be pertinent to examine whether the courts, in the task of enforcement of freedom from torture have enforced the right to the fullest possible extent. This would be all the more necessary since the judiciary as an organ of government is constitutionally expected to advance and secure, not only the fundamental right relating to freedom from torture, but all other fundamental rights guaranteed in Chapter III of the Constitution. It would hence be necessary to examine a few representative cases involving violations of the fundamental right to freedom from torture determined by our courts and in respect of principles governing the invocation of Article 11 of the Constitution whether they have received expression in case law. A study of his kind would throw light on how effectively the judiciary has advanced the right to be free from torture without reducing it to mere illusion in the process of interpretation. A survey of a general run of cases involving torture indicates that while there have been straightforward cases some have proved to be problematic.

Mahenthiran and Thedchanamoorthy v. A.G.[4] concerns two petitioners on the infringement of their fundamental right to freedom from torture, inhuman treatment and degrading punishment guaranteed under Article 11 of the Constitution. As far as the two applications were similar in nature, they were taken up for consideration together. According to both petitioners they were subjected to basically the same kind of torture, inhuman treatment and degrading punishment at the hands of the Officer-Incharge and other police officers of the Eravur Police Station. They also alleged that torture and inhuman and degrading treatment were inflicted on them for the purpose of obtaining a confession of guilt in regard to an offence of murder. Mahenthiran's application was rejected, purely on a technical ground, of non compliance with the stipulated time within which the application had to be preferred, without considering its merits, leaving only the other matter to be determined; dimension and scope of the constitutional

remedy afforded by Article 126 of the Constitution in an infraction of a right guaranteed under Article 11 of the Constitution by executive or administrative action. Drawing sustenance from the decision of the European Court of Human Rights in ***Ireland v. UK***[5] which depended heavily on jurisprudence developed by the Greek case[6]. The Court relying heavily on the concept of administrative practices as enumerated in the Greek case proceeded to deal with elements from which administrative practice could be presumed. The Court, making special reference to the following excerpts from the judgment of the Greek case concluded that an administrative practice as contemplated by the jurisdiction does not exist in this country. In the Greek case the Court said:-

> "..... two elements are necessary for the existence of an administrative practice of torture or ill-treatment; repetition of action, and official tolerance. By `repetition of acts' is meant a substantial number of acts of torture or ill treatment which are the expression of a general situation. The pattern of such acts may be either, on the one hand, that they occurred in the same place, that they were attributable to the agents of the same police or military authority, or that the victims belonged to the same political category; or on the other hand, that they occurred in several places or at the hands of distinct authorities, or were inflicted on persons of varying political affiliations.
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> By `official tolerance' is meant that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognizant of such acts, take no action to punish them or prevent their repetition; or that higher authority, in face of allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in

judicial proceedings a fair hearing of such complaints is denied.[7]"

The Court in this case held the view that only situations of , administrative practice, as understood by the Greek case would entail liability for the State.

In regard to direct authorization of torture it would be extremely impossible, as His Lordship Wanasundera himself observed, that Government would directly and openly authorize such acts unless in times of war and emergency. Therefore it would be an extremely difficult task for a victim of torture to substantiate an act of torture to which he was subjected unless he is in a position to prove that the act of torture to which he was subjected was part and parcel of administrative practice. Even in regard to officially authorized torture, a victim may find it difficult to establish it with proof, as government may only covertly encourage perpetration of tortuous acts. The decision of the Court appears to recognize that facts do not constitute State practice, as in the Greek case. This conclusion, made in regard to the juristic basis of the liability of the State, is open to criticism on several grounds.

It is not easy to see why the court embarked on an inquiry into the question of State practice relying on principles developed in another jurisdiction when the constitutional provisions were explicit on the matter.

Seeking guidance from the jurisprudence of other common law jurisdictions in the construction and application of human rights and fundamental freedoms should be undertaken with care and caution. In this connection Lord Woolf's observation made in relation to the use of the decisions from other jurisdictions is worthy of consideration.

"Such decisions can give valuable guidance as to the proper approach to the interpretation of the Hong Kong Bill, particularly in relation to an article in the same or substantially the same

terms as that contained in the equivalent provision of the Hong Kong Bill. However, it must not be forgotten that decisions in other jurisdiction are persuasive and not binding authority and the situations in those jurisdictions may not necessarily be identical to that in Hong Kong.[8]"

When the attempt of the court was to equate the concept of executive and administrative action with that of administrative practice, relying on foreign jurisprudence was really unwarranted, and impinged on the jurisdictional reach of the court. Had the decision depended on the consideration of the concept of executive or administrative action as envisaged in terms of Article II of our Constitution, perhaps, the court would have come to a different conclusion in regard to the legal basis of liability. Reliance on principles and concepts which have no direct application to the interpretation of the concept of executive or administrative action as envisaged by the Constitution, even with the sole objective of securing this basic right to victims subjected to torture, would cause error. By adopting a highly legalistic approach permitting technicalities to stand in the way of securing justice, apparently, the judiciary has circumscribed the very amplitude and dimension they themselves had set out to establish.

The decision here was in sharp contrast to the decision in ***Ruwini Perera v University,***[9] which the Supreme Court decided just about three weeks prior to ***Thedchanamoorthy's*** case. In ***Ruwini's*** case the petitioner alleged that her fundamental right relating to equal opportunity was violated when denied admission to a University, because of the University Grants Commission's policy of selecting applicants on a ratio basis and not on merit. It was the position of the Commissioner that the petitioner is precluded from claiming any relief under Article 126 of the Constitution because the admission policy of the Commission does not come within the definition of executive and administrative action. The court relying on the United States case of ***Neal v Delaware***[10], observed that whoever, by virtue of public position

under a state government denies or takes away equal protection of the laws violates constitutional provisions as he acts in the name of the State, clothed with the State's authority and since his act is that of the State. It was also held that in the context of fundamental rights the state is the repository of all power. The expression "executive or administrative action" embraces executive actions of the state or its agencies or instruments exercising governmental functions. It refers to exercise of the state power in all its forms.

"Administrative practice" and "executive or administrative action" are two matters conceptually different. The failure of the Court to refer to ***Ruwini's*** case or to focus its attention on this aspect of the matter resulted in a denial of justice to a poor litigant in the ***Thedchanamoorthy*** case. Some reference to factual matters would be pertinent in this connection. Dealing with the case the Court observed that injuries found on the petitioner were of a minor nature consisting of a few abrasions and two wounds on the left and right forearm. It appears that medical evidence did not carry much weight with the court. Thus in the case of ***Sudath v Kodutuwakku I.P.*** Justice Kulatunga observed in the following terms.

> "The report of the medical officer of Bandaragama is in my view valueless and unworthy of acceptance. On his own showing, it is evident that he has not carried out an independent examination of the petitioner to ascertain whether he had any injuries. I therefore reject the report of the medical officer as being worthless and unacceptable and in spite of the medical report determine violation. [11]"

The observations made by Justice Dheeraratne in the case of ***Weerasinghe v Premaratne*** PS and others are also to the same effect. Justice Dheeraratne commenting on the absence of a medical report observed: "One does not require medical evidence to prove the intensity of the pain which would have been caused to the body of a person on being forcibly made to perform such a robust acrobatic

feat[12]". It has been possible for the court to come to a definite finding even in the total absence of medical evidence in certain cases. The court, commenting on the absence of medical evidence, observed that the court was able to come to a conclusion even in the absence of medical evidence or a comprehensive medical report on the nature of injuries sustained. It may be that victims of torture in certain circumstances may be prevented from seeking medical attention in time or even if he is produced before a medical officer, he may not come out with as to how he came by the injuries. Therefore undue insistence on medical evidence sometimes may prevent a poor hapless victim of torture from obtaining redress. As far as injuries of the victim are concerned, some of the injuries, particularly on the right hand forearm and left arm dorsal aspect are not compatible with what he has averred in the petition. Therefore it is clear in regard to the factual incident in the ***Thedchanamoorthy*** case that the police assault has been borne out at least to some degree by the medical evidence. The court without totally ignoring medical evidence should have given it some consideration owing to the facts that emerged in the case. Yet it is significant that the Court took judicial notice of facts that are notorious.

In interpreting the provisions of this Article, in an endeavour to give the fullest weight and effect to underlying provisions of the Constitution without reducing norms to a theoretical illusion. The Court had apparently been influenced by certain provisions of the Penal Code, the Code of Criminal Procedure, the Police Ordinance and other normative safeguards to which the counsel for the respondent had drawn attention of the Court for negativing the existence of executive or administrative practice as interpreted in the Greek case. It is true that the Penal Code, Code of Criminal Procedure and the Police Ordinance and other normative safeguards explicitly provide for the prohibition of torture and other ill-treatment. Reality has little to do with the normative prescription as is evident from their blatant violations in the country. His Lordship Justice Wanasundera has also referred to an inquiry

conducted by the Police Department as another example disproving the existence of executive and administrative practice as enunciated in the Greek case. It should be observed that undue reliance placed on inquiries conducted by police is really misplaced, as most departmental inquiries have been perfunctory and had resulted in exoneration of errant officers. When the Police Department has gone to the extent of recognizing unlawful acts of errant police officers by promoting them in utter disregard and contempt of Court Orders, it cannot be that the Police Department would hold an impartial inquiry into the conduct of their officers.

The case of ***Velmurugu v AG***[13] presents another situation, where reliance placed on foreign jurisprudence for the purpose of interpreting the phrase "by executive or administrative action" deprived a petitioner from securing his fundamental right to freedom from torture. The court relying heavily on the concept of administrative practice, enunciated in the case of ***Ireland v United Kingdom***, determined that the alleged act of torture by the army personnel does not come within the purview of administrative practice and does not attract the liability of the State. They could have determined the issue on the basis of administrative or executive action as adumbrated by courts. There was no necessity to rely on the concept of administrative practice as expounded in foreign jurisprudence when an explicit constitutional provision speaks of executive or administrative action. When the liability could have been imposed on the army personnel without having recourse to the narrower concept of administrative practice the reasoning of the court was indefensible. As far as the case is concerned, it appears that court has placed implicit trust on material furnished in an affidavit by the police officer who recorded the statement and had visited the petitioner when he was in police custody. The police officer, testified that the petitioner had not made any reference to any illegal conduct by the A.S.P. on whose orders the arrest was made. Similarly, the Major by his affidavit testified that the petitioner did not complain of any assault by army officers or any other

person at any time when he saw the petitioner at the police station. What is important to remember is that at the relevant time the second respondent, the A.S.P. was functioning as Coordinating Officer of the area along with the army. He was entrusted with the task of maintaining security. Therefore, the army has reason to support the stance taken by the A.S.P., the second respondent. Army testimony in court cannot be considered as coming from an independent source. Their affidavit will be self serving, and the court cannot expect it to corroborate the stance taken by the petitioner. They are bound by fraternal solidarity to defend a colleague. Uncritical and ready acceptance and reliance placed on police evidence in this case, when the court had shown marked hesitation and reluctance to act on the evidence of the police and the armed forces, without critical examination in several other instances is incomprehensible. In cases of assault and torture committed by police and armed forces, it is important to remember that it would be an extremely difficult task for an innocent victim to obtain evidence of probative value in regard to the incident.

That the petitioner was taken into custody by army personnel on the direction of the second respondent, A.S.P., is not in dispute. It was on his orders that the petitioner was in custody whatever be the situation in the country. It is evident from the observation of Justice Ismail that the second respondent cannot be expected to keep a fatherly eye on the petitioner after he was taken into custody, in view of the extraordinary situation prevailing. It is apparent nevertheless that the petitioner had been negligent of his duty in this regard. That itself should attract State liability. Therefore liability could be imposed on the second respondent on this ground alone.

Liability on army officers could have been imposed on the basis of reasoning adopted by Brandeis, J. in ***Iowa – Des Moines National Bank vs. Bennet***[14] (1931) 284 US 239 cited by Lordship Wanasundra:

> "The prohibition of the 14th Amendment, it is true has reference exclusively to action by the State, as distinguished from action by private individuals. But acts done by virtue of a public position under State Government and in the name and for the State are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of State Law. When a State Official, acting under colour of State authority invades in the course of his duties a private right secured by the federal Constitution that right is violated even if the State officer not only exceeded his authority, but disregarded special commands of the State Law."

The reasoning in this case can apply to circumstances in the Sri Lankan cases. The army official was acting under the aegis of state authority and infringing a right in the course of his duties. Evidently the army had been deployed to assist the police in the area to co-ordinate security arrangements. Therefore it cannot be denied that they were engaged in official duties when they took the petitioner into custody on orders of second respondent A.S.P. It was their paramount duty to keep him in safe custody. The court has characterized the acts, if they had taken place as alleged by the petitioner, as in the nature of individual and personal or private acts, they are patently illegal and criminal acts, not merely acts that are unlawful and *ultra vires*. It cannot be said that when the army personnel tortured the petitioner it was only an isolated act. It was tolerated and practiced by the State. The court had recourse to the concept of administrative practice as enunciated in the Greek case to accommodate a situation which the counsel himself has cited as an example of a girl being ravished by a police officer after being confined in custody. Facts alleged by the petitioner in this situation are not comparable in any way to the facts of the example cited. One fails to see the reference to the example. The application of the concept of administrative practice to facts of the case

is unwarranted and uncalled for. Distinction has also been drawn between the high state officer and the subordinate officials. In this case the court called for a report from the Magistrate before whom the petitioner was produced. It is incomprehensible as to why court called for an observation from the Magistrate in regard to events which the petitioner has alleged had taken place in his presence. The record maintained by the Magistrate itself was explanatory of what happened to the petitioner while he was in custody.

It is an admitted fact that when the petitioner was produced before a Magistrate although the second respondent moved for remand, the Magistrate, on the petitioner's undertaking that he would remain indoors, had not made an order of remand. From the Magistrate's Court record, the petitioner's Attorney-at-Law had sought permission from court by way of motion to have the petitioner treated by a private medical practitioner. The Magistrate then had ordered the Divisional Medical Officer (DMO) to examine the petitioner and submit a report. It is incontrovertible that the DMO in compliance with the order of the Magistrate has submitted a report detailing the injuries he found on him. Even when the petitioner appeared in court on 12.08.81, the record indicates that the petitioner asked permission to enter hospital. Consequently the Magistrate directed the DMO to report on his condition. The petitioner was admitted to General Hospital, Batticaloa on 12.08.81. Examined by the Junior Medical Officer, his report detailed the number of injuries found on the petitioner. Therefore the Magistrate's record which suggests that the petitioner had certain injuries and ailments at the time the petitioner was produced before him runs counter to his observations sent in compliance with court order. Therefore it cannot be comprehended why the judges who spelt the majority view in the judgment thought it fit to place implicit trust and reliance on the Magistrate's observation in regard to events that took place in his presence when the petitioner was produced before him. In this respect the minority judicial view, particularly of Justice

Sharvananda is favourable towards, and in line with, reasoned out judgment on facts.

The failure of the petitioner to inform the Magistrate in regard to injuries suffered from assault at the hands of the army personnel after being taken into custody should not be conclusive that the petitioner had not suffered injuries he complained of. Various factors may deter a person placed in the position of the petitioner from complaining against the very people, who produce him before the Magistrate.

In this connection, observations made by Justice Atukorale in ***Amal Sudath Silva v Kodituwakku, IP***[15] and others would be quite apposite. His Lordship, commenting on the failure of the petitioner to make a complaint about ill-treatment received at the hands of the police to the Acting Magistrate and the medical officer of the area, had this to say that no doubt the petitioner had not made the complaint either to the Bandaragama Medical Officer or to the acting Magistrate. However his failure to do so must be judged within the context, at the time he was in police custody, with no access to any form of representation. The report of the Medical Officer, Bandaragama is valueless and unworthy of acceptance because on his own showing it is evident that he had not carried out an independent examination of the petitioner to ascertain whether he had any injuries since it is highly unlikely that a detainee would show such injuries in the presence of officers who took him into custody. Therefore when all circumstances are taken into account, evidently the petitioner has suffered the injuries after being taken into custody by the army on the orders of the second respondent and while the petitioner was in their custody. The majority opinion there appears to be fundamentally flawed in many respects. It could be easily said that wrong evaluation of factual matters prevented a victim of torture, who had sustained serious injuries in custody of the law enforcement authorities, from obtaining justice.

Justice Wanasundera has also in the course of his judgment appeared to have placed much reliance on affidavits filed by the three

Commanders of armed forces and the Inspector General of Police wherein they had categorically denied having ever authorized, encouraged or condoned unlawful acts or breaches of discipline among their personnel. He has also referred to steps taken by the IGP in a number of previous incidents where unlawful acts have been committed by his men. His Lordship appears to have placed reliance on statute law, regulations and other directions, outlawing unlawful acts and breaches of discipline among law enforcing authorities to which the attention of the court had been drawn by the Commanders of the three armed forces and the IGP.

In spite of all the steps taken in regard to previous incidents, and precautionary measures by the police department and other relevant authorities, however, it cannot be said that acts of torture by the police and other law enforcing authorities have ceased. The mere fact that disciplinary measures have been taken by the police in regard to previous incidents of torture had not dissuaded officers who are prone to commit unlawful acts. This is clear from a number of incidents of torture highlighted by the media. The Army Commander had stated that he would have taken prompt steps to investigate alleged acts of torture had he received a complaint. But when all circumstances are considered, can it be believed that he or at least the Commander in charge of the area and the second respondent, a senior officer in the police, and the Magistrate before whom the petitioner was produced, as revealed by the court record had reasonable grounds to believe that no act of torture had been committed by the army. In this connection international obligations laid on authorities by Article 12 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment would be pertinent. Under this Article any law enforcing authority is required to initiate prompt and impartial investigation, whenever there is reasonable ground to believe an act of torture has been committed. Even if there is no formal complaint by the petitioner, it should not deter authorities from initiating inquiry into the matter. Therefore, the Commander's statement that had he received a

complaint, he would have held an inquiry cannot be accepted in view of specific international obligations cast on authorities.

Statute laws, regulations outlawing illegal acts on the part of law enforcing authorities have had not much effect on law enforcing authorities. In spite of express prohibitions, massive, horrendous violations of fundamental rights involving torture take place daily. Even the inquiries conducted by police have been supercilious resulting in exonerating the offenders concerned. There have also been occasions when errant officers, found to have violated fundamental rights, have been promoted to higher ranks as if their unlawful acts have received commendation, in utter disregard and contempt of court orders. Lack of creativity and innovation by court in its approach to torture is also illustrated by the case of ***Namasivayam v. Gunawardena***[16]. The petitioner complained that fundamental rights relating to freedom from torture under Article 11 and from arbitrary arrest and detention under Articles 13(1) and 13(2) were violated by police. He also complained of violation of certain provisions of the Public Security Ordinance and the Emergency Regulations. The Supreme Court while holding that the violations of Article 11 and 13(2) have not been established, determined however that the petitioner's fundamental right guaranteed under Article 13(1) had been violated by the police. The petitioner, while in a bus was taken into custody, on suspicion of being a terrorist belonging to a prohibited organization called "TELO". He was alleged to be acquainted with a case of robbery of a gun from Rozella Farm. In his application to court, he alleged that he was repeatedly assaulted by security personnel at a camp after being taken into custody by police. He complained that fundamental rights guaranteed under Article 11, 13(1) and 13(4) of the Constitution and certain provisions of the Public Security Ordinance were violated by the Police by the arrest and his subsequent detention in the camp. The court, while finding his fundamental right relating to freedom from arrest violated by the police, rejected his evidence in regard to torture. It was not corroborated by medical evidence, and assault was denied by the respondent. When

this judgment is carefully examined, it becomes evident the court has preferred to accept the petitioner's evidence in regard to violation of the petitioner's fundamental right relating to arbitrary arrest, but had not accepted his evidence in regard to torture he alleged to have suffered, on the ground it was not corroborated by medical evidence, and infliction of torture had been denied by the respondent. It is incomprehensible what had led the court to accept part of the evidence of the petitioner in regard to the unlawful and illegal arrest but to reject the evidence relating to acts of torture. In regard to two violations, the court has taken two irreconcilable and contradicting stances, in its evaluation of evidence furnished by the petitioner, accepting affidavits instead.

The court referred to the complaint of torture and observed that it has not been corroborated by medical evidence. Here it would be pertinent to mention that there have been cases where the court has held violation of Article 11 of the Constitution established even in the absence of medical evidence, and where medical evidence has not shed any light on the nature of injuries suffered by the petitioner. In the case of ***Weerasinghe v Premaratne PS***[17] and others, referring to the petitioner who had suffered torture by the police as his hands were tied together and onto his legs below his knees, keeping him in a squatting position, sending a rice pounder under the knees and above forearms, and the two ends of the rice pounder then being kept on the top of two boxes thus making the petitioner's body to be on the rice pounder only to be repeatedly beaten. It was then remarked, one does not require medical evidence to prove the intensity of the pain which could have been caused to a person on being forcibly made to perform such a robust acrobatic feat. Therefore refusal of the court to act on evidence in regard to acts of torture, only because it was uncorroborated by medical evidence, cannot be justified when contrasted with cases in which acts of torture violating the fundamental right under Article 11 have been accepted even with the lack of medical evidence. The judicial approach in regard to medical evidence looks fundamentally

flawed and presents a picture of a lack of coherence and of being contradictory from one case to another.

Lack of an innovative, bold approach to an interpretation of the constitutional provisions is noticeable by the court's failure to examine critically whether the petitioner's unlawful and illegal arrest impacted on his right to freedom from torture. The fundamental importance of the guarantee contained in Article 13(1) is to secure the right of individuals in a democracy to be free from arbitrary arrest by the authorities.

An illegal arrest can put at stake both protection of physical liberty of individuals as well as personal security. An arrest can cause immense mental torture to the arrested person amounting to an infraction of his fundamental right to freedom from torture. As enshrined in major international and regional instruments and treaties listening what is tantamount to torture or cruel treatment. It is not merely physical assault resulting in injuries to the person subjected to torture. An arrest can be degrading, inhuman and humiliating. When the court determined that the respondent's arrest was illegal and violative of Article 13(1) of the Constitution the court should have critically examined whether the illegal arrest had an adverse impact on the petitioner's right to freedom from torture, inhuman treatment and degrading punishment. An arrest made on insufficient grounds is likely to cause immense mental torture and agony. The effect of an illegal arrest is none-the-less torture. The object and purpose of the prohibitive Article is to ensure that none should be deprived of liberty arbitrarily. Therefore, the court could proceed to examine whether there had followed any violation of the petitioner's other fundamental rights stemming from the violation of his right to freedom from arrest even though he had not alleged specific violation of such rights by an expansive and liberal interpretation to constitutional provisions.

Arresting a person often factually entails thereafter a long detention period despite the 24 hour time limit prescribed by law, for most offences. When a suspect is taken into custody he fears being

held for a longer period, and even overnight in police cells, which are uncomfortable, exposed to extremes of temperature, often stinking, and containing noxious substances. This subjective experience of several hours under putrid conditions is bound to have a deleterious physical impact, although one may not suffer obvious physical trauma. In custody every aspect of life is controlled by the police who can be highly intimidatory. Oppressiveness of the detention can be inhuman and degrading in terms of Article 11 of the Constitution. Being subjected to arrest, detention and interrogation can be an agonizing experience particularly to a person with an unblemished reputation. The extent to which an individual may be traumatized by being arrested, detained and interrogated cannot be imagined. Therefore whenever a petitioner alleges a violation of his fundamental right relating to freedom from arbitrary arrest under Article 13(1) of the Constitution, the court should go beyond Article 13(1) and examine whether the violation of the fundamental right relating to freedom from arbitrary arrest has led also to a violation of Article 11 of the Constitution. Today torture extends beyond the obvious physical abuse. Modern psychiatry has broadened the concept of torture to encompass acts causing serious psychological damage to a person.

The failure on the part of the court to adopt a creative approach to the problem of torture is exemplified by the case of ***Dharmatilleke v. I.P. Abeynaike***[18], Peliyagoda. The petitioner, an Assistant Secretary in the Ministry of Agriculture, complained that she was unlawfully arrested and detained in prison by the police. She had also complained, as a result of the illegal arrest and subsequent detention by police in prison, her fundamental rights relating to freedom from arrest under Articles 13(1) and 13(2) of the Constitution were violated by the police. She further alleged, as a public servant who had been 31 years in service, illegal arrest had affected her mental and physical health and caused humiliation

Although the court found that the petitioner's fundamental right under Article 13(1) of the Constitution was violated by the respondent, it did not venture to examine whether the arrest had caused her degrading and humiliating consequences, in violation of the fundamental right under Article 11. Torture, in the present context would encompass not only cases where there are visible and discernible injuries, but also acts which cause psychological trauma. Only by an expansive and liberal interpretation of constitutional rights can Courts discover whether violations of other rights had recurred. In this respect, the constructive and creative role played by the Indian judiciary is a bench-mark in the interest of social and political advancement. India has not specifically incorporated immunity against torture, inhuman treatment, degrading treatment or punishment as a fundamental right unlike as in Sri Lanka. India has in her Constitution basic rights such as freedom from arbitrary arrest, detention or from discrimination. But by imaginative and courageous interpretation the Indian judiciary has expanded the frontiers of fundamental rights and of natural justice through an expansive interpretation of the fundamental right to life and personal liberty guaranteed under Article 21 of the Indian Constitution. This process of interpretation has encompassed every aspect of life, the right to dignified treatment in custodial institutions, right to bail, right to a speedy trial and right to freedom from torture and inhuman treatment. Justice Bagawathi's judgment in ***Maneka Gandhi's***[19] case denotes a watershed in constitutional law.

The approach of the Sri Lankan judiciary is not as virile and bold as of the Indian Supreme Court even where it could have been creatively constructive to promote fundamental rights. The case of ***Saman v Leeladasa***[20] exemplifies a situation where the Sri Lankan judiciary failed to adopt an adventurous and innovative approach in respect of the prisoner, despite the lead by the Indian Supreme Court in ***Sunil Batra v Delhi Administration***[21]. In ***Saman v Leeladasa*** , a prison guard committed an act of torture on a prisoner. He was found liable by the court for infraction of the prisoner's fundamental right to

freedom from torture. The case presented the Supreme Court with an ideal opportunity of making an order for the good of other prisoners too and for advancing equity, on lines of the Indian Supreme Court in ***Sunil Batra's case***. This case concerns brutalization of a prisoner by a warden for monetary gain. In the course of adjudication the Indian Supreme Court laid down salutary principles to help protect the rights of prisoners from violation by prison officers. It held that the writ jurisdiction lies not only to seek relief of a prisoner unlawfully detained but also to regulate conditions of custody. Two directions which were issued to prison authorities marked a major advance of the scope of the writ of habeas corpus and vitally in the nature of judicial policy making.

> "Article 9: Wherever there is reasonable ground to believe that an act of torture as defined in Article 1 has been committed, the competent authorities of the State concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint."

The following directions were issued by the Indian Supreme Court in reliance of Art. 9 of the Convention which provided :

> "1. We hold that Prem Chand, the prisoner, has been tortured illegally and the Superintendent cannot absolve himself from responsibility even though he may not be directly a party. Lack of vigilance is limited guilt. We do not fix the primary guilt because a criminal case is pending or in the offing. The State shall take action against the investigating police for the apparently conclusive dilatoriness and deviousness we have earlier indicated. Policing the police is becoming a new Ombudsmanic task of the rule of law.
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> 2. We direct the Superintendent to ensure that no corporal punishment or personal violence on Prem Chand

shall be inflicted. No irons shall be forced on the person of Prem Chand in vindictive spirit. In those rare cases of 'dangerousness' the rule of hearing and reasons set out by this Court in Batra's case and elaborated earlier shall be complied with.

3. Lawyers nominated by the District Magistrate, Sessions Judge, High Court and the Supreme Court shall be given all facilities for interviews, visits and confidential communication with prisoners subject to discipline and security considerations. This has roots in the visitatorial and supervisory judicial role. The lawyers so designated shall be bound to make periodical visits and record and report to the concerned court results which have relevance to legal grievances.

4. Within the next three months, Grievances Deposit Boxes shall be maintained by or under the orders of the District Magistrate and the Sessions Judge which will be opened as frequently as is deemed fit and suitable action taken on complaints made. Access to such boxes shall be accorded to all prisoners.

5. District Magistrates and Sessions Judges shall, personally or through surrogates visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances, shall make expeditious enquiries thereinto and take suitable remedial action. In appropriate cases reports shall be made to the High Court for the latter to initiate, if found necessary, habeas action."

"6. No solitary or punitive cell, no hard labour or dietary change as painful additive, nor other punishment or denial of privileges and amenities, no transfer to other prisons with penal consequences, shall be imposed without judicial

appraisal of the Sessions Judge and where such intimation, on account of emergency, is difficult, such information shall be given within two days of the action."

Indian prison officials were required to observe these directions in discharging their duties. In the event of a violation of these directions, the errant officer became liable for contempt for not obeying a court order.

The case of ***Saman Leeladasa v. AG*** is an indication of the judicial passivity and inaction in the island. The Sri Lankan Court, in that case, could have adopted a similar strategy in the interests of remand prisoners by following the innovative approach of the Indian Court.

Realizing the realities of conditions that occur in the custody of persons, the practical steps that the Indian Supreme Court has taken in cases are worthy of emulation by the Sri Lankan Court. In the case of ***D.K. Basu v AG***[22] the Indian Supreme Court issued the following guidelines to police officers so that they would act within the law when making an arrest and detaining a suspect.

"The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

The officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organization in the District and the police station of the area concerned, telegraphically, within a period of eight to twelve hours after the arrest.

The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend or the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

The arrestee should be by a trained doctor subjected to medical examination every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all **tehsils** and districts as well.

Copies of all the documents including the memo of arrest, referred to above, should be sent to the Taluk Magistrate for his record.

The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

Just as much as the Supreme Court is expected to respect and secure fundamental rights guaranteed by the Constitution, it would be appropriate to consider how lower courts have approached the task of upholding and securing the fundamental rights, particularly the right to freedom from torture.

In Sri Lanka today, Magistrates deal with the bulk of cases at lower court level. They are constantly involved in making decisions and orders which impact on the personal liberty of individuals. Though their incarcerating powers are limited, they perform important functions as remanding or bailing out arrested suspects, issuing interim orders preventing breaches of the peace, holding inquiries into custodial deaths or violence and issuing warrants of arrests and searches.

Of all functions performed by Magistrates, the function of remanding or bailing out of arrested suspects would be one of the most important. A police officer who arrests a citizen with or without authority of a warrant is equally obliged to notify the arrested person of the reason for restricting his personal freedom. Article 13(1) of the Constitution provides that "no person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reasons for arrest." ..... Reference to Section 23 of the Code of Criminal Procedure, Act 15 of 1979 requires that the person arresting shall inform the one to be arrested of the nature of the charge or allegation upon which he is arrested. Section 115 of the Code of Criminal Procedure requires the police to produce the suspect before the Magistrate within 24 hours of arrest, and the police to file a case.

The bulk of torture cases committed in violation of Article 11 of the Constitution which reach a Magistrate's Court arise out of an arrest made in violation of one's fundamental right to freedom from arbitrary arrest and detention. The law does not require a person to consent to or submit to the individual who arrests, unless the person knows the reason as to why his arrest is effected. If he is not informed of reasons for arrest, he is entitled to resist arrest. An arrest can be made either on the strength of a warrant issued by a judicial officer or without it. An arrest made on a warrant issued on judicial authority carries with it a degree of protection for the person arrested. The judicial officer is required to satisfy himself before he issues the warrant whether sufficient grounds for arrest exist. This procedure generally prevents allegations of arbitrary and capricious arrests against arresting officers. This procedure helps to minimize applications made against arbitrary arrests and detention, violative of Article 13(1) and (2) of the Constitution. It is only when arrests are effected without judicial authority and a warrant that allegations of arbitrary and capricious arrests and detention violative of provisions in the constitution and provisions in the Criminal Procedure Code arise. Circumstances under

which an arrest without a warrant can be made are explicitly enumerated in the Criminal Procedure Code. Arrests should be according to procedure established by law. There is a fundamental right to freedom from arbitrary arrest and detention. Justice Atukorale expressed in the case of ***Amal Silva v. Kodituwakku I.P.*** that "The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this Court to protect and defend this right to its fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to mere illusion".

One of the important tasks magistrates perform is that of bailing out or remanding of persons suspected of having committed an offence. Whenever a suspect is produced before a Magistrate for preliminary scrutiny, he is required by law to satisfy himself whether the police have acted within the parameters of law. The Magistrates are also required to ascertain whether the suspect has been subjected to torture or other ill-treatment while in custody after arrest. In most instances, the Magistrates have lamentably failed to perform this task in the manner expected. This is evident from observations made by judges in certain fundamental rights cases. The questioning by Magistrates of suspects when produced before them are not done thoroughly to ascertain whether any infraction of the law has taken place in the process of arrest and detention in custody. Most of them do not incisively look into assertions in the reports by the police.

A few random examples of Sri Lanka's lower judiciary's management would bear testimony to their ineffective handling of preliminary judicial steps which have caused the higher judiciary to

pronounce dissatisfaction. In ***Dayananda v. Weerasinghe***[23], the petitioner was arrested on 4 September 1982 and remanded till 15 September. Subsequent remand orders followed on police application, and objection to bail. Finally, petitioner was allowed bail on 26 November 1982. The higher court commenting on the procedure followed at the lower level in this case noted that the first report filed by the first respondent in terms of section 115(1) of the Criminal Procedure Code took longer time than necessary, and no summary of statements were submitted, although essential. The Magistrate, if he were to order detention, had to record his reasons in terms of section 115(2). However when the petitioner was produced before the Acting Magistrate on 5 September 1982, he did not record reasons for remanding. Additionally according to journal entries of 8, 9, 15 and 22 September and 6 October 1982, the Magistrate who ordered remand repeatedly failed to record any reason. The reports filed by the 1st respondent on 15 and 22 September and 6 October 1982 also recorded no statements of witnesses. The petitioner was released only on 6.12.1982 after deprivation of his liberty for three months. The Magistrate had even then not recorded reasons for remanding the petitioner. A person remanded had forfeited his personal liberty but was not given reasons for it though he was entitled to know it.

The higher court critically commented that "Magistrates should be more vigilant and comply with the requirements of the law when making remand orders and not act as mere rubber stamps." This was caustic enough. Additionally, the higher court required the Inspector General of Police to be informed of the negligence of his officers. The court concluded strongly that a violation of fundamental right guaranteed by Article 13(2) of the Constitution had occurred. Candidly it was stated that the violation had been owing more to erroneous exercise of judicial discretion on misleading police reports. The court went on to draw attention of police officers to the Code of Conduct for law enforcement officials as adopted by the UN General Assembly on 17 December 1979, Article 3 of which proscribed use of unnecessary

and excessive force by officials, otherwise than exceptionally. Doubtlessly this case illustrates how ineptitude, carelessness and incompetence at the lower judiciary has exacerbated the sufferings of a few whose right to be free from torture and cruel, inhuman degrading treatment had been violated

In yet another case ***Kodituwakkuge Nihal v. Police Sergeant Kotalawela and others***, reported in the Sri Lanka Law Reports (SLR), interesting light is shed on the lower judiciary's conduct of cases and revision by the higher court. The higher court judges Amerasinghe and Wijetunga concluded that respondents one to five had violated the petitioner's fundamental right under Article 11. They were ordered to pay Rs 2000/= each as compensation and Rs 500/= to petitioner as costs. But what is pertinent to assess the quality of the action of the lower judiciary is the observation of the higher court, "We are unable to find any provision of law granting sanction for a Magistrate to make such a remand order which is capable of so insidiously eroding the liberty of the subject. The remand order of the Magistrate was issued when the petitioner was <u>not present</u> before him physically. This action of the Magistrate is not consonant with Article 13(2) of the Constitution and Section 37 of the Code of Criminal Procedure Act No. 15 of 1979."

The higher court observed that "The gravity of this matter compels us to direct the Registrar of this Court to bring it to the notice of the Chairman of the Judicial Service Commission for such action as he deems appropriate".

It is a thin line of subjective appraisal that separate the evaluation of a use of force as a 'law and order' problem or as an attempt to overthrow the State.

Judicial Procedure in Crimes of Torture And allied Offences – Critical Scrutiny

Central to an application for redress in respect of an infraction of the fundamental constitutional right to freedom from torture lie facts

which indicate when a person has been subjected to torture or/and inhuman and degrading treatment. Those alleging torture, claim that the state through the agency of officials has committed a violation of the basic fundamental right guaranteed under Article 11 of the Constitution on factual grounds. Therefore, the procedure adopted by court becomes important for the determination of 'contested' issues or facts. In the evaluation of disputed facts the court normally acts on the basis of oral argument and written submissions of parties. It is rarely that disputes/questions of law arise for a proper assessment and evaluation of the strength of each party's case, grounded on facts, revolves around a thorough probing into the incident of torture or degrading inhuman treatment.

A hearing of parties takes the form of argument by respective parties and written submissions. Cases of such a nature illustrate an example of a situation when a Justice of the Supreme Court dealing with facts of the case assesses the petitioner's word against that of the respondent. This is clearly exemplified by the following observation made by his Lordship Justice Ismail in the case of ***Velmurugu v AG***[24]: "In the circumstances, it appears to me, that at the most, the contention of the petitioner and of the 2nd respondent is word against word". Perhaps, if the court deviates from the present position and insists on oral testimony, the outcome could be different. The court has the power to do so on its own motion, or at the behest of either party, at any stage of the proceedings, to direct that any document, information or oral testimony as may be relevantly required should be furnished by the contending parties for effectual dispensation of justice. In a fundamental rights application the court depends for its finding solely and exclusively on the petition, affidavit and other documentary evidence of parties. There have been, no doubt, instances when oral testimony has been invoked to determine on disputed matters in issue. Although, as a practice, the court does not call for oral testimony, it should permit oral evidence to be led, if the issues so justify. On an application the court would first examine whether there is a prima facie

case before it is entertained to discourage frivolous or vexatious applications.

Courts have evolved, over the decades, a standard procedure for handling applications made on account of violations of fundamental rights. The procedure is laid down in emphasis being placed on written submissions and oral argument in contrast to the lower courts tradition wherein emphasis is placed on oral testimony and cross-examination of witnesses. The Supreme Court in exercising exclusive fundamental jurisdiction vested in it under Article 126 of the Constitution does not function as a criminal court. The method of adducing evidence has borrowed rather significantly from the summary procedure adopted in a normal civil court.

Allegations of violations of the fundamental right to freedom from torture and inhuman treatment are invariably contested not on legal but factual grounds. Therefore the procedure adopted by court in determining the disputed issues of fact would come to be particularly significant. Under the Constitution of Sri Lanka the Supreme Court alone can resolve such disputes. When reviewing disputed questions of fact however, the court has almost uniformly acted solely on the basis of oral and written submissions presented by parties. But the court however does not, as a practice, gather evidence from witnesses and hear the testimony of relevant facts. If the court, nevertheless, decides to hear any witnesses or experts in any capacity, or any person whose evidence or statement seems likely to assist it in carrying out its task, it can do so. The practice of torture could be more efficiently be dealt with if adequate, efficient procedural governing rules to govern arrest and detention are put in due place at the national level. Providing comprehensive rules determining arrest, detention and interrogation will render resort to torture and other ill-treatment of persons subjected to detention.

Amnesty International in one of its reports made the following observation on the problem of torture.

"Torture most often occurs during a detainee's first days in custody. These vulnerable hours are usually spent incommunicado, when security forces maintain total control over the detainee, denying access to relatives, lawyers or independent doctors. Some detainees are held in secret, the whereabouts known only to captors. The authorities can even deny that certain detainees are held making it easier either to torture or kill them and account as "disappeared". Incommunicado detention, secret detention and "disappearance" increase the latitude enjoyed by secret agents over the lives and well being of people in custody.[25]"

In this connection the draft principle adopted in 1978[26] by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities would be conducive to make more effective protection from torture and other ill-treatment of persons under arrest or detention.

This draft body of principles consists of two parts. In the first part the key words such as "arrest", "detention" and "imprisonment" are defined, while part two contains thirty five principles, the first thirty one devoted to persons subjected to detention or imprisonment and the last four to persons suspected or charged with criminal offences.

Among various safeguards, the following are probably most central and important which general international law requires largely to be respected and observed by governments at the national level

1. The right to legal assistance immediately on arrest and during detention.

2. The right of an arrested person to communicate with his family.

3. Rules regulating length of interrogation.

4. Medical examination before and after interrogation.

5. Detailed recording of relevant facts concerning interrogation, including time spent on interrogation, names of interrogators, particulars and results of medical examination, etc.

6. Requirement that an arrested person be brought before a judge within 24 hours.

In this respect, the Indian Supreme Court in the case of ***D.K. Basu v. State of West Bengal***[27], having regard to the ground realities found in the custody of accused persons, issued the following wide ranging guidelines to be observed by the police in order to prevent misuse of power, arbitrary arrest and incarceration. The Indian Supreme Court enjoined that the police personnel carrying out the arrest and handling interrogation should wear accurate, visible and clear identification and name tags with their official designations. Particulars of police personnel who handle interrogation of the arrestee must be recorded in a register. The police officer carrying out the arrest should prepare a memo of arrest at the time of arrest. Such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality where the arrest is made. It also has to be countersigned by the arrestee and should contain the time and date of arrest. Moreover a person arrested or detained and held in custody in a police station or interrogation centre or other lock-up, should be entitled to have one friend or relative or other person known to him or having interest in his welfare informed, as soon as practicable, that he is detained at a particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee, where the next friend or relative of the arrestee lives outside the district or town.

Additionally, the time, place of arrest and venue of the custody of an arrestee must be notified by police through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within 8 to 12 hours after arrest.

A person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of police officials in whose custody the arrestee is.

The arrestee additionally should, where he so requests, be medically examined at the time of arrest, and major and minor injuries, if any, present on the body, recorded. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and a copy should be provided to the arrestee. During detention the arrestee should be subjected to medical examination every 48 hours by a doctor on a panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. The Director, Health Services should prepare such a panel for all villages and districts as well. Copies of all documents including the memo of arrest, referred to above should be sent to the Jurisdictional Magistrate for record. The arrestee may meet his lawyer during interrogation, though not throughout the interrogation. Furthermore, a police control room should be provided in districts and state headquarters, where information regarding the arrest and place of custody of the arrestee should be communicated by the officer making the arrest, within 12 hours of the arrest and at the police control room it should be displayed on a conspicuous notice board.

These directions are significant because, for the first time, the Supreme Court of India has given detailed guidelines which are based on a practical experience of arrest and its misuse. Every care has been taken to safeguard the rights of an arrested citizen, and collateral restraints have been put upon the arbitrary and untrammelled exercise of power to arrest and its traumatic influence on the arrested citizen and his or her family.

The Indian Supreme Court made a great advance on the issue of prison reforms and of arrest and custodial detention in the case of ***Sunil Batra v. Delhi Administration****, and in the case of ***D.K. Basu v. State of West Bengal*****, almost entered on the domain of policy making in the interests of the power addresses.

Many of the provisions relating to fundamental rights, including the right relating to freedom from torture and other ill treatment encapsulated in the Constitution were inspired by the content and wording of various international human rights conventions and jurisprudence.

Therefore, it is important that Supreme Court, as an organ of government, required under Article 4(d) of the Constitution to secure and advance constitutionally guaranteed rights, act to give full weight to the objective and purpose of those rights in consonance with the international human rights jurisprudence, whenever possible, through its interpretative task. It is only by this means that the safeguards enshrined in fundamental rights could be made practical and effective.

The failure of the Sri Lankan Supreme Court to give a practical and positive meaning, in consonance with the jurisprudence developed by other States, by adopting an innovative and vibrant approach to the issue of fundamental rights, particularly the right relating to freedom from torture and other ill treatment, is exemplified by the case of ***Saman v Leeladasa***[28]. The petitioner in this case who was a school teacher was on remand in connection with an offence he was alleged to have committed. In his application for the violation of his fundamental right relating to freedom from torture and other ill treatment, he alleged that while he was on remand, he sustained grievous injury, as a result of an assault with a baton, committed on him by a prison official. At the end of an inquiry the Supreme Court found the particular prison official liable for the violation of the fundamental right and ordered compensation against him. The conduct of the prison official in this instance was not only a violation of the

fundamental right relating to freedom from torture and other ill treatment enshrined in the Constitution, but also of the norms recognized by international law.

Article 10(1) of the International Covenant on Civil and Political Rights explicitly lays down that all persons deprived of their liberty shall be treated humanely and with respect for the inherent dignity of the human person. Provisions for the recognition of this principle have been made in many other international and regional instruments such as the American Convention on Human Rights and the African Charter on Human and People's Rights, by adopting a formula with a slight variation. The American Convention goes on to the extent of making this principle a non derogable right which forms part of Article 5 prohibiting torture and other ill treatment. Today this principle is reflected in many other measures adopted by the agencies of the United Nations such as the First UN Congress on the Prevention of Crime and the Treatment of Offenders. The Standard Minimum Rules for Treatment of Prisoners (SMR) adopted by this organ also provides for the human treatment of prisoners after formal commitment to institutional detention at the pre-trial stage as well as post-conviction stage. Although all rules contained in S.M.R.[29] do not reflect legal obligations, it can provide some useful guidance in interpreting the general rule against torture and ill treatment committed on prisoners while in official custody or detention.

The principle recognized in these instruments undoubtedly reflects a rule of general international law.

The case of ***Sunil Batra v. Delhi Administration***[30] would be significant for many reasons. This case arose from a letter petition sent by a prisoner to the Supreme Court complaining of brutal assault by the Head Warden of the prison on an illiterate prisoner unable to voice his grievance. This case which led to the development of the epistolary jurisdiction of the Supreme Court in India laid down several salutary principles affecting the rights of prisoners in India. The

judgment not only granted the relief claimed for the prisoner but the Indian Supreme Court also went to the extent of imposing rules for the regulation of conditions under which a prisoner should be detained.

Adverting to another aspect of procedure one is compelled to comment on the way cases in relation to commission of torture are tried. The burden of establishing facts on which a victim of torture relies for relief in a fundamental rights application is cast on the victim. Nature of the burden of proof that is to be established by a victim for cogently promoting his case had come in for dissection in a number of cases involving infringement of the fundamental right guaranteed under Article 11. In the case of ***Thedchanamoorthy v. A.G.***[31] Justice Wanasundera referred to the assessment of evidence in fundamental rights cases relating to torture and observed that the principles enunciated in the case of ***Ireland v. U.K.***[32], suitably modified, could be profitably adopted in fundamental rights cases in Sri Lanka in the exercise of powers under Article 126 of the Constitution. In the Irish case, the following principles were considered relevant in determining the burden of proof in regard to torture and other ill treatment related to cruel and inhuman, degrading treatment.

"To assess evidence the Court adopts a standard of proof "beyond reasonable doubt' but adds that such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" However the "conduct of the parties when evidence is being obtained has to be taken into account." Justice Wanasundera adverting to the same principles in the case of ***Velmurugu v A.G.***[33] observed that "reasonable doubt" could be used aptly not only in reference to criminal cases but also in regard to civil cases.

It is doubtful whether the European Court intended to say anything different. Although from the expression "beyond reasonable doubt" has a criminal law flavour, it is possible to use that expression in other contexts. In order to buttress this position, Justice Wanasundera

also referred to the judgment of Lord Denning in ***Bater v Bater***[34] which has drawn a lot of sustenance from the case of ***Loveden v Loveden***[35]. The following observations made by Lord Denning has largely influenced Justice Wanasundera in determining the nature of burden of proof that weighs on a victim of torture in a fundamental rights application. "The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases the case may be proved by a preponderance of probability but there may be degrees of probability within that standard. A civil court when considering a charge of fraud will actually require for itself a higher degree of probability than which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court when it is considering a charge of criminal nature, but still it does require a degree of probability which is commensurate with the occasion.[36]"

Justice Fernando referring to the standard of proof in the case of ***Saman v. Leeladasa***[37] expressed that the standard of proof in cases of violation of fundamental right relating to freedom from torture and other ill treatment is preponderance of probability. He also observed that there are undoubtedly degrees of probability within that standard. Justice Fernando too in this case referred to the observation of Lord Denning in ***Bater v. Bater***[38] in assessing the degree of proof as Justice Wanasundera did in the case of ***Velmurugu v. A.G.***[39] in the assessment of the burden of proof in cases of torture, he also drew inspiration from the judgment of Morris L.J. in ***Hornal v. Neuberger Product Ltd.***[40].

His Lordship appears to have also relied on the observations made by Justice Wimalaratne in ***Kapugeekiyana v. Hettiarachchi.***[41] "The civil and not the criminal standard of persuasion applies, with the observation that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue." A careful examination of the authorities relied on by their Lordships clearly shows that in spite of their Lordships able attempt to steer away from "proof beyond reasonable doubt" and to depend instead on principles relating to balance of probability, insistence on a high degree of proof came almost tantamount to proof "beyond reasonable doubt" and has in fact made the proof of the violation of a fundamental right relating to freedom from torture and other ill treatment an onerous, nay impossible, task for a victim.

In this connection, comments made by the European Commission on Human Rights in the ***Greek case***[42] in regard to the difficulties faced by litigants alleging torture to which Justice Sharvananda adverted to in ***Velmurugu's***[43] case, would be more pertinent. "There are certain inherent difficulties in the proof of allegations of torture or ill treatment. First, a victim or a witness, able to corroborate his story, might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly, acts of torture or ill treatment by agents of the police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly where allegations of torture or ill treatment are made, the authorities, whether the police or armed services or the ministers concerned, inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill treatment may, with lapse of time, become unrecognizable, even by

medical experts, particularly if the form of torture itself leaves few external marks." It is well for a Court to bear the above comment in mind whenever it is called upon to determine in a given situation whether torture has taken place.

Lord Stowell in ***Loveden v Loveden*** observed on burden of proof thus:

"The only general rule that can be laid down upon the subject is that circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. The degree of probability which a reasonable and just man would require to come to a conclusion – and likewise the degree of doubt which would prevent him coming to it – depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case what the charge was and what the consequences might be; and if he were left in real and substantial doubt on the particular matter, he would hold the charge not to be established he would not be satisfied about it. But what is real and substantial doubt? It is only another way of saying a reasonable doubt, and a reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to the conclusion. So the phrase "reasonable doubt" takes the matter no further. It does not say that the degree of probability must be high as 99 percent or low as 51 percent. The degree must depend on the mind of the reasonable and just man who is considering the particular subject matter. In some cases 51 percent would be enough but not in others. When this is realized, the phrase "reasonable doubt" can be used just as aptly in a civil case or in a divorce case as in a criminal case"[44]. Moreover, can human experiences be statistically computed? Whether torture or degrading treatment was meted, and to what extent, is difficult to calculate. Its deliberateness and abusiveness is what should be more decisive in arriving at a conclusion makes it more difficult. According to Stowell's approach, in a fundamental rights

application, the degree of probability should attain a high level on the scale of probabilities to establish an allegation of torture.

Proof of Torture in Special Circumstances

Apart from a fundamental right application for relief, a criminal action in respect of an act of torture committed has been available under the Criminal Law of the country since 1883. Under Sections 310 – 320 of the Penal code, a person could be held liable for the offence of causing hurt or any other allied offence. The Penal Code, makes no distinction between a private person and a state officer who commits an act of torture.

The Penal code also provides for more stringent punishment in aggravated form of committing an act of hurt than in cases where simple hurt is caused. For instance, where hurt is caused to any person in an attempt to extract information or a confession which may lead to the detection of an offence, or compel the restoration of property, or satisfaction of a claim under Section 321 of the Penal Code, higher punishment could be imposed on an offender. Three of the illustrations given under Section 321 refer to an act by a state officer.

The method of adducing proof differs greatly from that of a criminal case and the court relies mainly on the affidavits and other documentary evidence. It is only in exceptional circumstances that oral evidence will be called for. Thus the court has neither the opportunity of observing the demeanor of witnesses, nor has it the benefit of cross-examination. Therefore the relief granted by the Supreme Court in cases of fundamental rights applications would invariably consist of compensation. It may also, as noted above, take the form of an order or, if appropriate, take disciplinary action, against the errant officers. Even where the state officer who committed the offence, has not been clearly identified, the Supreme Court is entitled to order compensation to the victim. On the basis of information and other material which, as

disclosed in a fundamental rights application, the Attorney-General is empowered to set in motion criminal procedures against the offender, against whom there is sufficient evidence to maintain a criminal charge. For this purpose he can direct the police to make further investigations and eventually a decision would be taken to prosecute the offender on the basis of the material submitted by the police. The Attorney General generally prosecutes only in cases where the identity of the offender and the commission of the offence could be established by proof beyond reasonable doubt. If sufficient evidence is available, the Attorney General would indict, under the Convention against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994[45], which has strengthened considerably the existing legal framework against torture, through stringent and deterrent punishment to the offenders on conviction. It vests the High Court with jurisdiction to try cases of torture committed not only in Sri Lanka, but even outside Sri Lanka.

The jurisdiction of the High Court could be invoked by the Attorney General only if he is satisfied that there is sufficient evidence to establish the charge. Only a few cases have been filed against the offender under this Act as, unlike in fundamental rights application, a higher degree of proof is required. The Act also provides for extradition of offenders if no steps are taken to prosecute the offender in the country where he is found.

The ***Embilipitiya Students Disappearance*** Case[46] which concerns mass scale torture, brutality and forcible removal of some thirty students, which occurred when the country was in crisis, was one of the most important cases involving human rights violations that the country has ever witnessed. In this case, the Principal of Maha Vidyalaya, Embilipitiya, and seven army officers, were indicted with charges of abduction and wrongful confinement of some thirty school boys between the ages of 16 and 19 years, in late 1989 and early 1990 at Embilipitiya, when there was general unrest and turmoil in the

country. Although prompt complaints were made by the parents of the boys who were abducted, and later found to have been tortured and killed, their complaints to the police and other authorities were recorded with the sole objective of shielding and protecting the offenders to the detriment of the victims who suffered at the hands of the armed forces. The complaint recorded did not really represent what the parents had told the police and it was the position of every parent that they were forced to sign statements which did not represent what they actually told the police. These statements which were technically admissible under the rules of evidence for the purpose of contradicting and discrediting a witness, by proving that he made a different statement at a different time in regard to the offence, was utilized by the defence in the course of the judicial proceedings to secure an acquittal of the offenders. But as it was evident to court that statements recorded by the police was mis-represented as what the parents told the police, the court preferred to act on the basis of the oral evidence given by witnesses in open court without placing any reliance on these statements.

In situations, when torture, inhuman treatment and other brutality occur in mass scale, and complaints of these violations are recorded in a partial manner with the objective of shielding and protecting the offenders, and such statements are permitted to be used in evidence for the purpose of discrediting the witness, a poor victim cannot expect any redress from a court of law. The peculiar vulnerability to which the witnesses were exposed makes it desirable to exclude the statements made to the police so that no unfair advantage accrues to an accused person who has violated a basic fundamental right such as the right to freedom from torture.

It is of paramount importance, just as much as an accused person should not be convicted by reception of inadmissible evidence, that his acquittal should also not be furthered by self serving statements

recorded by law enforcing authorities with the sole objective of shielding their own colleagues.

References

1 Velmurugu v AG per Justice Wanasundera (1981) FRD 180 (1981)1 SLR 406
2 Velmurugu v AG per Justice Sharvananda, See Note 1
3 Amal Sudath v Kodituwakku 1987 2 SLR 120
4 Mahenthiran Thadchanamoorthi v AG, 1 FRD 129 (1980)
5 Ireland v U.K. January 18, 1978 European Human Rights Commission
6 Greek Case 12 YBE CHR Vol. 194
7 See Note 6
8 (1993) AC 951, 966
9 Ruwini Perera v University Grants Commission Judgment of SC 4/8/1980
10 Neal v Delaware 103 US 370
11 Amal Sudath see Note 3
12 Weerasinghe v Premaratne SC 477/96 SCM 31/10.97
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14 Iowa v Des Moines National Bank v Bennet (1930) 284 US 239
15 See Note 3
16 Namasivayam v Gunawardena (1989)1 SLR 394 (SC)
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20 Saman v Leeladasa (1989) 1 SCR 1
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23 Dayananda v Weerasinghe (1983) 2 7RD 292 (1983) 2 SLR 84 (SC)
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27 D.K. Basu v State of West Bengal (1977) ISSC 416

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29 Standard Minimum Rules for treatment of prisoners adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders. 30 August 1955and approved by U.N. Economic and Social Council Resolution 663 C (XXIV) of 31 July 1957.

30 Sunil Batra v Delhi Administration. See Note 7

31 Thadchanamoorthy v AG 7RD (1) 129

32 Ireland v UK. January 18 1978. European Human Rights Commission. See also Thadchanamoorthy v AG note 15

33 Velmurugu. See Note 1

34 Bater v Bater (1951) Probate 35. see also Velmurugu v AG Note 1 where reference has been made to this case.

35 Loveden v Loveden 1810-2 Hagg. Conl. See also Velmurugu v AG. Note 1

36 Bater v Bater. See Note 18

37 Saman v Leeladasa – note 9

[38] Note 18

[39] See Note 1

[40] Hornal v Newberger Product Ltd (1957) 1 QB 247 266

[41] Kapugeekiyana v Hettiarachchi (1984) 2 SLR 153 (SC)

[42] *Greed case* 12 YBE CHR Vol. 194. See also Thadchanamoorthy v AG, Note 15.

[43] See Note 1

[44] Loveden v Loveden – see Note 35 Supra

[45] Convention against torture and the cruel, inhuman or degrading treatment or punishment Act No. 22 of 1994 giving effect to the International Convention.

[46] Embilipitiya Students Disappearance case of 1996 held at Ratnapura High Court where a Principal of a school and some army officers were charged with having kidnapped some school children.