

Chapter - III

Right to Freedom from Torture

Fundamental rights ensured to Sri Lankan citizens are in some instances restricted by provisions within the Constitution¹. Article 11, in Chapter III on Fundamental Rights in the Constitution of 1978, assures freedom from torture unequivocally, "No person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment". Article 12 of the Constitution confers jurisdiction solely to the highest court in the Island, the Supreme Court on contentions pertaining to fundamental rights. Yet, since a wide array of other related human rights can be curtailed on a number of grounds, as specific cases illustrate, such limitations can account for an abuse of power by personnel in government. This causes a dent on an untrammled rights regime.

Article 126 of the Constitution requires a victim of violation of rights to move court personally or through an Attorney-at-Law, but within one month of commission of the wrong.² An application for trial can be lodged only with 'leave to proceed' having been first obtained from the Supreme Court. Such leave may be granted or refused, as the case may be, by a Bench of not less than two Judges. These initial hurdles and high expenses of retaining Lawyers without whom laymen encounter difficulties in presenting their complaint have in practice discouraged victims of violations of human rights approaching the Judiciary. Another difficulty arises from the injunction that a case should be filed within a month's time of the commission of torture.³ In outer areas, beyond the metropolis where the Supreme Court is situated, this requirement is not easily fulfilled.

Torture, even though prohibited by the Constitution, has nevertheless been occurring in the Island. There have been years of emergency rule when the police and security services enjoyed emergency powers⁴. Their activity gets masked, and the tendency to

ignore normal practices regarding arrests, questioning and incarceration grow. Permitting visitors to meet those taken in for investigation is also severely curtailed arbitrarily. The environment then turns to be conducive to abuse of law. Additionally, stringent laws like the Prevention of Terrorism Act also facilitate misuse of power by the same persons who are to enforce law, order and security. They become far more authoritarian, and plenitude of power corrupts. Detention can be for long and allow time for torture.

Periods of conflict and challenges to State authority have been many in Sri Lanka since independence in 1948.⁵ There were two attempted coups by a few elements from the police and the military, two youth rebellions in 1972 and 1987-89 followed by occasional challenges to law and order; later on, civil ethnic conflicts studded with armed combats between militant rebels and the police and State security organizations became protracted. Being engaged in a ruthless conflict they tended at times to lapse into unscrupulous practices such as torture. Pre and post election violence and labour strikes, occasional skirmishes between the majority community and the minority community of Tamils all made the Island disturbed by sporadic or even continuous violence⁶. Law and order forces and armed security services engaged in belligerent confrontations yielded to the temptation to overstepping laws and the limitations imposed by their obligations to honour human rights. Torture frequently resulted in such a context.

More than through prosecution, it was through appealing on grounds of violations of human rights that relatively more successful prosecution for torture took place. Suspects could be detained for lengthy periods with the approval of the Secretary to the Ministry of Defence, with no need to obtain judicial approval. Suspects could be interrogated in secrecy. For a few unscrupulous law and order officers to be brutal, to commit torture and inflict inhuman and degrading treatment or have such treatment inflicted by subordinates while interrogating alleged offenders,⁷ this arrangement helped.

Torture took varied forms as a few random recent examples illustrate. Persons had been detained in solitary confinement for long period without legitimate cause. On mere grounds of suspicion persons have been incarcerated in solitary confinement over time leading to mental derangement, depression and speech inhibition. Constant assault, exposure to overhead strong light and repeated interrogation disrupting sleep have all been used to extract confessions. Parading a girl or woman semi-nude while questioning was degrading treatment. Inflicting pain on reproductive sexual organs, raping, or mutilation were other forms of torture and cruel humiliation. Sri Lankan police and security services' officers devised ingenious forms of torture and degrading cruel treatment. Mental torture through constant threats, causing recurrent fear, have broken down persons. Confessions extorted have been later found to be false and were made only to escape torture.

Articles 3 and 5 of the Universal Declaration of Human Rights specify that "everyone has the right to life, liberty and security of person"⁸. This right nevertheless has been constantly breached. Article 11 in the Sri Lankan Constitution of 1978 ensured an unrestrained right to freedom from torture, but this injunction was disregarded during the turbulent days of turmoil and grew into a usual practice. Lives and movements of many were unreasonably and rigorously controlled, with insensitivity or insensibility shown to rights, dignity or personal or family life. Certain places were secretly turned into "out of bounds centres" where brutality and degrading cruelty of persons took place with impunity⁹. 'Batalanda', North of Colombo and the Fourth Floor of the Police building in Fort, Colombo attained notoriety in the practice of cruelty, torture and humiliation. Another building close to where three roads meet called 'Thummulla' was another "torture chamber".

As torture and arbitrary killing occurred in secret, highly guarded centres they were not open to scrutiny, and captives were "writter

as missing persons whose numbers gradually escalated. Bestial torture accounted for impotence and disablement. Such injured persons could not be released into society without danger of investigations following. The unfortunate victims of torture therefore were done away with. Many of the “disappearances” still await investigation in vain. Victims of brutality remain timid and afraid of police or security forces if they divulge information lest they or their families are penalized in reprisal. People have to complain to the police of torture, a catch twenty two situation. No wonder only a few cases of torture come to the courts. Ignorance of how complaints can be judicially lodged in terms of Article 126 of the 1978 Constitution also preclude victims from filing cases against infliction of torture. Obtaining evidence and witnesses to testify to the commission of torture turns out to be difficult because witnesses fear police revenge. Often, even the absolutely needed medical evidence to confirm that torture was committed, and how, and to what extent, is not easy to get especially in outer Colombo areas where high police officials and medical officers move socially together and independent medical testimony is rare.

The case of Yogalingam Vijitha exemplified this phenomenon. The victim suffered severe torture but initial medical examination by a doctor “testified” that she was not sexually tortured. This medical testimony was challenged at the trial and the judges ordered another medical examination by another medical officer which indicated that severe sexual torture had taken place. The Supreme Court accepted this testimony and the Court ordered that compensation be paid to the victim partly by the culpable police and partly by the State. The Attorney General significantly added that further steps be taken against the guilty police in terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Act, No. 22, of 1994. Additionally, the observations of the judges regarding the practice of torture by local police are illuminating. The facts of the case revealed disturbing features regarding third degree methods adopted by certain police officers. The torture was characterised as barbaric, savage and

inhuman, most revolting, and offending one's sense of human decency and dignity particularly ... when every endeavour is being made to protect and promote human rights. Corruption was obvious in ineffective police conduct. Their manipulation and distortion of truth was striking¹⁰. Yogalingam Vijitha's case is only one of many similar cases that, through decades, Sri Lanka had seen in conflict, observed an Attorney-at-Law in a media account of the trial. It was added that one waits for the day when Act No. 22 of 1994 is used effectively against police torture justifying the passionate hopes with which it was enacted¹¹. The ineffective use of this Act compels people to sue against torture in terms of the human right to freedom from torture under Article No. 11 in the 1978 Constitution.

Yet, on arrest, suspects are physically manhandled immediately, to elicit information or force a confession. Police behaviour, sometimes divulged in courts, indicates that they behave like criminals themselves rather than as scientific investigators.¹² Torture by police enables false evidence to be extracted and the public is driven to fear and not to trust law and order maintaining elements. However, recent incidents in Sapugaskanda, Wattala and Ja-ela are a few instances when the public openly protested against police conduct.¹³ Public opprobrium was mounted by women against the police in regard to sexual torture and abuse of one Nandani.

Several inquiries under the Convention Against Torture and Cruel, Inhuman, Degrading Treatment or Punishment, and in terms of the Act 22 of 1974 are pending.¹⁴ Those found guilty have to be mandatorily sentenced for 7 years whether the convicted is a policeman or State officer. A special unit in the Attorney General's Department examines such inquiries about instituting cases. In one case that concerned a police officer who was charged in terms of the Act, one Angalima Roshan was tortured by two police officers in December 2000 in the Narahenpita Police Station.

Often, a case is concocted against a victim of torture by the police to prevent the tortured or his family resorting to legal action against the police. There have been allegations of pressure on victims to withdraw complaints of torture by police. In return the police promise that the case against the tortured will not be pursued. Another connected evil is that victims are driven to live in fear of harassment by police or their agents. The system of justice allowed suspects to be in police custody for long and to be produced before Magistrates when traces of torture were not easily verifiable.

Once locked up, a suspect's life and limb are at the mercy of the police. Torturing by police of a suspect in a secret place in order to break the victim and extract the desired confession was usual. Many females too have fallen easy prey to torture by police. Victims have been stripped naked, tied around the wrists and hanged from a beam and beaten by police. Females tortured by male police have fallen victims to perverse sexuality and sadism.¹⁵ Hearings run into inordinate delays. Litigation gets postponed. Sadly, neither Judges nor Lawyers seem to worry over the mental torture of victims of police torture. Mental torture is also engendered by continuing insecurity, anxiety and fear in which the suspect and family miserably survive. Law's delays then condemn an already broken and bruised victim to misery. The catalogue of crimes attributed to the police were reprehensibly frightening. In one recent case a judge discovered the police guilty of inflicting injury against an innocent being. In his noteworthy judgment he posed the question "Who would guard the guardians of law?"¹⁶

Among the number of cases of police torture one was of a twelve year old boy arrested for theft from a State Co-operative shop.¹⁷ He was savagely beaten and tortured to confess to theft. The tragedy was that the boy was born mentally retarded and was unable to understand questions or give answers. Even though this was medically certified the fact was ignored. A doctor vouched for his inability to have

committed the crime but this was ignored. In another case the police raided a house and dragged out a youth informing his parents that he had robbed. When the family visited the police station the next morning the youth complained of brutal assault to make him confess to the crime. The parents pleaded with the police to produce their son before a Magistrate and release him. The police refused but later asked for a bribe. The next morning the parents were informed that their son had committed suicide. A doctor however certified that death was due to strangulation. This finding was challenged and the Magistrate ordered an autopsy to be performed in the metropolis. It was then recognized that the body bore fatal injuries and the autopsy revealed that even the corpse had been tampered with so as to confuse the Judicial Medical Officer.¹⁸ No effective measures by superiors seem to have been taken to eradicate gross violations of human rights.

Sri Lankan police brutality and torture were recorded even as early as in the 1960s. The suspects in custody for the abortive coup committed suicide when interrogated by the police in traumatic conditions¹⁹. But the civil society was then not alive to violations of human rights. In rural areas, in times of political insurgency, as in 1971 or 1988-1989²⁰, the village remained non-co-operative towards police and security officers in order to demonstrate against intemperate and undisciplined behaviour by those meant to maintain law and order. In the abortive youth insurrection of 1971, forty four police officers were taken captive by insurgents, and villagers remained indifferent. In the rebel violence of some Tamil militants during 1975 to 1980 once more police were targeted. Police reacted brutally committing serious violations of human rights. Arbitrary arrest, detention, rape and torture occurred.

It was only after the 1971 youth insurrection that human rights became pronounced in Sri Lanka and later infringement of rights to freedom from torture was referred to courts as a right denied. Torture

had been earlier tolerated as a means to elicit the truth about offences or test the veracity of statements of witnesses and the accused; Later it was considered a crime not to be countenanced under any conditions. Nevertheless, even more recently, Lord Averbury who represented Amnesty International was expelled from Sri Lanka because he was critical of the Island's disregard of human rights or violations of them. The Civil Rights Movement (CRM) was formed only after the insurgency of 1971.

The position of human rights in Government got further diluted after 1972 and disregarded owing to increasing Executive interference in judicial administration after the new Republican Constitution was introduced²¹. Still no real attempt to recognize and respect human rights was made until 1978. Even then human rights education of the police, the army and the administration languished, or was even ignored. Later on, in 1982 and 1983 the courts decided at times that police actions had violated fundamental rights and ordered payment of compensation to the aggrieved. A judge was constrained to comment that, "a police officer using the coercive powers vested in him by law acts as an Organ of the State and the State is liable for the transgressions of fundamental rights committed ...". However, the culprit, police officers, were not punished, but were promoted. Instead, as a reaction, Judges were subjected to humiliating protests by the then Executive President. Naturally the atmosphere turned conducive for torture or degrading treatment to be practiced since the Head of the State encouraged lawless behaviour among officers maintaining law and order.

By the mid 1970s and 1980s ethnic Sinhalese-Tamil conflict and relations between Tamil and the State's security forces worsened. Amnesty International reported violations of rights by way of arbitrary arrests in Tamil peopled areas, while torture and "disappearances" in custody aggravated. Still most fundamental rights recognized by International Covenants and other human rights Instruments remained

guaranteed by the 1978 Constitution of Sri Lanka. The people have been assured "freedom, equality, justice, fundamental rights and an impartial trial". All governmental organs additionally were required to respect, secure and advance human rights, which remained unrestricted except in the manner and extent provided for in the Constitution. Nevertheless cases were filed against infliction of torture on grounds of violating fundamental rights. More often cases demonstrate that most of the torture and inhuman degrading treatment occur during conflict and states of emergency when normal laws can be suspended. In peace time an ill-trained police force, as many have observed, use torture and inhuman cruel treatment in investigating simple crimes too.

Wanasundera, J. emphasizing that freedom from torture²² and degrading treatment should be ensured to the people, observed in the case of Velmurugu V.A.G. that "Article 11 which gives freedom from torture and ill-treatment has a number of features which distinguish it from other fundamental rights. It's singularity lies in the fact that it is the only fundamental right that is enshrined in the Constitution and an amendment of this clause would need not only a two-thirds majority but also a referendum acceptance. It is also the only right in the catalogue of rights set out in the Chapter, that affords equal opportunity to everybody and which in no way can be restricted or diminished. Having regard to its imports, and its effectual consequences to society, it should rightly be singled out for special treatment. It is therefore the duty of the country to give it full play and to see that the said provisions against torture etc., enjoy the maximum application". In the same case Sharvananda, J.²³ added that "the fundamental nature of the human right of freedom from torture is emphasized by the fact that no derogation of the right is permitted under any condition, even in times of war, public danger or other emergency". The Constitution is jealous of any infringement of this right to be free from torture. Additionally, the Penal Code, in Chapter XVI, provides for penalizing offenders convicted of crimes affecting the human body. In the meantime,

special Acts were passed to deal with offences amounting to torture, inhuman treatment and degrading punishment inflicted upon a specific category of people, women and children. Briefly, strong provisions exist for the State to safeguard people from physical pain caused by others.

Generally, Sri Lanka's criminal jurisdiction is limited to deal with offences committed in the Island. But under a system of "double criminality" rule, for a crime like torture, the offender can be extradited to be dealt with by another State provided the crime had been committed there.²⁴ Ever since the Nuremberg trials, international law recognizes several offences as international crimes which include torture and inhuman and degrading treatment²⁵. Moreover, torture and inhuman or degrading treatment figure as international crimes triable even in states where they were not committed. Sri Lanka has ratified the International Convention Against Torture and Cruel, Inhuman or Degrading Treatment of 1984, and has deemed torture to be an offence in terms of Act No. 22. But since Sri Lanka has not made a declaration under it, victims cannot approach the International body, the Committee Against Torture. This omission has to be cured to reinforce Sri Lanka's prohibition of torture.

Torture is presently associated with war or conflict. It is an international crime nevertheless. Sri Lanka's record is sullied by a large incidence of torture. This crime is a common foe of humanity. Hence all nations can exercise an equal interest in apprehending offenders and prosecuting them within their States. The Torture Convention was adopted in order to recognize it as an international crime, and to furnish an international system within which a torturer, as an international criminal, can seek no haven. The Convention Against Torture is an international instrument which overrides even customary law²⁶. The use of torture is akin to universally condemned piracy yet is being practised with impunity. Nevertheless the costs and time entailed preclude resort to international fora by victims of torture. Only general amnesties or Acts of Indemnity can save torturers from trials or

penalties. To claim internationally that freedom from torture has been ensured to citizens a State must prohibit torture totally and deal with it as piracy was.

Fundamental Rights and Anti-torture Measures in Sri Lanka

The ancient oriental and classical world of Greece and Rome were familiar with torture as a practice in dealing with offences²⁷. In Rome torture of slaves and aliens and criminals, even for minor offences and was common as a public spectacle was common. Likewise, in the royal courts of India and China torture was a familiar form of punishment of offenders. In Sri Lanka evidence of the practice of torture by royalty is vividly documented in a study by Robert Knox, titled "An Historical Relation of the Land of Ceylon in the East Indies".

The earliest reported measure on prevention of torture in Sri Lanka is the Proclamation of the Kandyan Convention of 2nd March 1815²⁸ by the British imperial rulers. Three of the twelve clauses of the historic Convention directly focused on abolition of cruelty and torture in Sri Lanka. Every type of physical torture and the mutilation of limb or organ of a body was strictly prohibited. This step accorded both with the teaching of Buddhism, the main religion practiced in Sri Lanka, the Island, and also was consonant with the tenets of other religions. British thinking too contributed to foster the anti-torture stance. Slavery and the degrading subjection of human beings was proscribed by early 19th century. Under British rule in the 19th Century, the Penal Code of 1883 and the Criminal Procedure Code of 1898 contained clauses devoted to the protection of victims from cruelty²⁹. Those who committed torture or cruelty would have acted illegally and could be punished. In terms of sections 320 to 392 of the Penal Code, causing hurt to one was illegal. The procedure for arresting and detaining offenders detailed under sections 320 to 329 of the Code was also provided in Chapter IV of the Criminal Procedure Code. Interestingly, civil law in Sri Lanka also provided effective remedies to those who suffer torture. This too was intended as a deterrent against torture.

Provisions of the Roman-Dutch Law such as *actio injuriarum* which was used in Sri Lanka and the possibilities legally to award damages to victims of assault to restrain the infliction of torture³⁰. Therefore, historically, Sri Lanka at Independence in 1948, was left with a legacy of anti-torture policy and practice.

After gaining independence, Sri Lanka had to take cognizance of and observe international obligations to prevent the practice of torture, and indeed to recognize and respect human rights. The responsibility to avert or penalize transgressions of these rights could not be ignored by the government. Through a subscription to the Universal Declaration of Human Rights, the Government of Sri Lanka had to ensure the rights of the people to live safely and not to suffer as a slave, or any inhuman treatment. They were to be entitled to a fair trial in a proper court of justice. Moreover, they were to be safeguarded from attacks on their person, and enabled to enjoy other human rights too. If, in Sri Lanka, human rights were correctly observed, there ought to be no room for torture of any one. But actual practice and reality could, at times, be different³¹, especially so in times of emergency when a derogation of rights could occur as some rights can then be legitimately suspended³². Sri Lanka thus not only accepts an obligation to ensure a regime of rights but importantly recognizes the responsibility to make legal system though its observance of basic human rights meaningful in reality

Additionally, the Sri Lankan Constitution adopted in 1978, through Article 126 furnishes in the provisions a means of implementing the right to penalize authorities if they infringed the article guaranteeing freedom from torture³³. Through this vital Article, citizens have been indicated the way of gaining redress or reparation when a violation of human rights, including the right to be free from torture, occurred. Sri Lanka has undertaken the obligation to respect the right to freedom from torture seriously through her national domestic laws and also more responsibly through acknowledging the

obligation as an element of international law which needs to be followed within the country. Since the national law had been influenced by liberal values, human rights have been accepted in framing the law.

In Constitutional law too, as in domestic law, the principal human or fundamental rights are provided for in Sri Lanka for determining and defining the relations between the State and individuals. Also protective legislative measures like the Habeas Corpus Act and jurisdictional authority over constitutional provisions serve to enhance the legal protection for the people from arbitrary state actions which may be practiced without heeding human rights³⁴. Chapter III of the Sri Lankan Constitution of 1978 sets out a number of fundamental rights taken from the Universal Declaration of Human Rights and similar Human Rights Conventions³⁵. Special mention needs to be made of the right to freedom from arbitrary arrest, unlawful detentions or punishment, and, importantly, the right to freedom from torture.

However, theoretically well protected fundamental rights may be, it is significant and merits salient scrutiny that they can practice, be subject to governmental restriction in the interests of national security or maintaining public order. It is in such contexts that human rights need to be guarded from derogation and vigilance is most useful. Rights become otherwise vulnerable. Adherence to human rights in practice and ensuring the observation of rights turns to be more vital in judicial examination and of concerned protection because of the provision for utilization of wide emergency powers. Yet, freedom from torture is stated to be unassailable, and in respect of infringement of fundamental rights such acts against freedom from torture become justifiable, and application can be made for relief and redress from the Supreme Court.

Among international instruments that forbid the practice of torture and other transgressions of human rights which are to be adhered to by Sri Lanka, the Universal Declaration of 1948 plus the

International Covenants on Civil Political Rights and the Covenant on Economic, Social and Cultural Rights can be reckoned to be most significant³⁶. Additionally, Sri Lanka is to respect and observe the terms of 20 or more multi-national treaties specifically riveted on aspects of human rights. Noteworthy of these are the Convention on Genocide and particularly the one on torture. Furthermore, Sri Lanka has also to note similar instruments like the European Convention for the Protection of Human Rights and Fundamental Freedom; resolutions of the Geneva Assembly of the United Nations, and judgments of International Tribunals too³⁷. No doubt, some of these are in intent clearly anti-torture. Obviously, Sri Lanka has opted to erect a torture free environment.

Estimating these International Conventions against torture one notices that some are general and some are specific³⁸. Most specific, is the Convention against torture and cruel and inhuman or degrading treatment or punishment, the CAT Convention adopted by the UN General Assembly on 10th December 1984. There torture is described as "any act by which severe pain or suffering", physical or mental is caused. The act should be "intentionally inflicted For obtaining Information or a confession, for punishing him for an act committed or is suspected of having committed ...". Moreover, it is unlawful for intimidation or coercion to be used for any reason based on discrimination of any kind, when pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The terms of the Convention are wide in scope³⁹. To Sri Lanka it is quite appropriate particularly in periods of emergency rule when derogation of rights can occur and even occasions to tolerate violations of rights may emerge.

The CAT Convention envisages various measures of protection from torture and degrading and cruel treatment. It expects States to adopt positive steps in their jurisdiction to prohibit torture and to render torture punishable as an offence. The observance of the

implementation of the Convention is watched over by a Committee of ten experts. Also States are required to report on measures they had formulated to give effect to the Convention and its provisions. Moreover, if States so desire they can recognize the competence of the Committee to consider relevant communications from another State or individual. This provision can serve to be useful and vital in regard to Sri Lanka where violations of the right to be free of torture are often alleged.

Sri Lanka in its effort to make the country torture free ratified the CAT Convention. Moreover, in 1994 in line mainly with the provisions of the Convention it enacted Act No. 22 of 1964, and later Sri Lanka submitted her first country report. This report was considered in May 1998 and several valuable recommendations were received in accordance with the Convention so as to improve the Island State as a torture free one. Also, it is presently possible for the UN to adopt a resolution against Sri Lanka if it is not serious in ridding itself of torture or if the offence is permitted to often occur with impunity. This can be perhaps a powerful deterrent to permitting torture being easily and freely committed. The stress is on the imperative need to abide by a general interdict on torture and to recognize and allow human rights to be invariably honoured in the Island. Furthermore, from the above Convention the international community too has commented on diverse ways related to averting commission of torture including a guide to the correct conduct of law enforcement officers. For example, a code of conduct for law enforcement officers that require those exercising police power should respect and protect human dignity had been adopted by the UN General Assembly in December 1979⁴⁰. Article 4 of that spells out that no law enforcement official may inflict, instigate or tolerate torture or other cruel⁴¹, inhuman or degrading treatment of people or allow a penalty of that character being inflicted on one. Nor may law enforcement officials invoke an exercise of superior orders or quote exceptional circumstances such as a threat of war or interests of national security or existence of political instability or a state of

emergency to justify the use of torture and cruel, inhuman degrading treatment or punishment. Therefore, Sri Lanka's record on practice of torture or tolerance of infringement of human rights has to be assessed in the light of the above stipulations.

Sri Lanka's Constitution of 1978 not only proscribes the practice of torture, cruel inhuman or degrading punishment or treatment but also provides the mode by which a transgression of the rights including the right to be free of torture could be dealt with in terms of Article 126, as it has been mentioned earlier. Till the ratification in 1994 of CAT by Sri Lanka, victims of torture or violations of human rights invoked only the provisions in the 1978 Constitution either to ward off torture or to bring to book torturers. Independent Sri Lanka *ab initio* provided no constitutionally entrenched protection against torture. However, the general penal law prohibited practice of torture. Even under emergencies torture was deemed illegal as demonstrated in the Premawathie Manamperi trial involving the actions of an Army Officer at a time of insurgency and emergency rule⁴². In 1972 also, when a new Republican Constitution was introduced it failed to specify a fundamental right like "freedom from torture". There also was no effective procedure constitutionally defined in 1972 to canvas legal redress of violations of fundamental rights. Even though torture appeared anathema to Sri Lanka because of a lacuna of a prescribed mode of moving court if torture occurred and though rights were infringed, only one fundamental rights violation case was lodged in court up to 1978. There happened little legally about transgression of rights and the provision of 1972 to confer a fundamental right against torture in the 1972 Constitution was abysmally ineffective⁴³. Only in 1978 with a fresh Constitution did Article 11 of it elucidate that none shall be subjected to torture, cruel, inhuman or degrading treatment, or penalty⁴⁴. These rights were the ones specified in Article 7 of the International Covenant on Civil and Political rights in 1966 which had been given force in the Island. But still there lies a difference in the version of rights in Sri Lanka. The second sentence in the "original

form” was omitted. In today’s world it is indeed critical because there was no embargo on any one “...being subjected without his free consent to medical or scientific experimentation”⁴⁵.

Gradually, Sri Lanka, at least in law, has built an almost comprehensive regime of freedom from torture, cruel, inhuman or degrading treatment or penalty. Thus it has moved to realize its aim to rid the practice of torture from the Island. Presently the right to freedom from torture is constitutionally entrenched. Any other bill that could affect this provision needs the assent of a two thirds majority in the legislature and additionally the people’s consent at a referendum. To make this right even more secure it cannot be restricted on grounds of national security and all governmental bodies should respect, secure and advance the basic right to be free of torture. This is certainly positive theoretically, but this study will certainly examine how intentions had been handled in practice⁴⁶.

A qualifying requisite in judicial handling of cases of torture had been the insistence on medical evidence bearing out infliction of torture. Medical testimony is considered vital to determine whether inflicted injuries were of a nature that brought a case under consideration in terms of Article 11 of the Constitution. Also, medical evidence helps to decide whether a case where two versions prevail which one is correct. A want of a positive medical certification to confirm alleged physical abuse may make the court generally rule that Article 11 has not been transgressed. In pages 44 – 55 Justice A.R.B. Amerasinghe mentions so in “Our Fundamental Rights of Personal Security and Personal Liberties”⁴⁷. Consequently often the courts of law either on an application by the petitioner’s counsel or on its own, orders medical or judicial medical officers to produce relevant medical reports when dealing with cases of torture or cruelty. However, at present the Sri Lankan judiciary tends to interpret torture as described in the CAT Convention. A petitioner if he proves that his fundamental rights as assured by Article 11 have been violated, then courts are

entitled to give relief. The court will declare that the Petitioner's fundamental rights had been violated by the respondent or otherwise. Even if the violation is not correctly identified but the violation itself is established, the court declares so. The State's liability may be unchanged, still the delinquent official can be directed to make amends and be punished too. In accordance with principles of common-law wrong doers who had violated the right and their master can become liable if the wrong was committed while being employed. (**Fernando v Keekadasa**) (1989) SLR 11-25⁴⁸.

If commission of torture is established and the violator is identified, the court directs the Inspector General of Police (IGP) to ensure that speedy payment of compensation is made and also to discipline the offender and report the action taken to court. Superior officers who encourage, tolerate and acquiesce in the commission of torture are also held responsible for the offence and the courts take action against them – (**Ratnapala v. Headquarters Inspector Dharmasiri**) (1993) SLR 224⁴⁹. Even private citizens involved in violations of the right to be free of torture by officials become liable under fundamental rights jurisdiction to pay compensation (**Faiz v. Attorney General of SCM of 19.11.93**)⁵⁰. A fundamental rights application owing to causing torture is no private matter between parties either to be settled or withdrawn at the will of the involved parties. Even if parties settle differences in respect of offences against Article 11 the courts still can hold that fundamental rights have been transgressed and direct the police to act against violators – (**Herath Banda v. Sub-Inspector of Police, Wasgiyawatta Police Station**) (1993) SLR 324⁵¹.

Despite Sri Lanka abiding by the terms of the Convention against Torture and other Cruel or Inhuman or Degrading Treatment or Punishment, and Act No. 22 of 1994 being enacted in conformity with it, not a single prosecution by the Attorney General had been instituted in terms of the provisions of this Act which had made torture a severely

punishable criminal offence. This is curious in spite of Sri Lanka's professed concern to stamp out torture. According to this Act on conviction by a High Court a guilty party is liable to receive a minimum of seven years and up to a maximum of ten years rigorous imprisonment. Further, any attempt to commit and or abet to commit the offence or conspiring to commit torture is likewise a punishable offence. However, the Act of 1994 defines torture more narrowly, as already shown, than the CAT Convention. Nevertheless that in Sri Lanka no recourse was made to the Act in deciding cases of torture is an enigma indeed!

The legislation in Sri Lanka against commission of torture is criminal legislation. The required proof that an offence of torture took place needs to be beyond reasonable doubt. Practical problems encountered in conducting prosecutions against offences of torture will be identified and discussed in later chapters of this study. Furthermore, Constitutional Article 126 on pursuing action only in the Supreme Court when torture has taken place or fundamental rights have been violated will be analysed in greater detail later on⁵². The merits and demerits of vesting sole jurisdiction in the highest court will be scrutinized.

Owing to the importance Sri Lanka had attached to suppression of the practice of torture, apart from enacting legislation towards that end and also conforming to and subscribing to anti terror conventions and conventions that ensured respect towards human rights, the Government further created two other bodies which could examine complaints of torture and violations of fundamental rights. A provision for an Ombudsman was made in the 1973 Constitution, according to Article 156⁵³. The official was independent and enjoyed the freedom to investigate complaints of infringement of rights inclusive of the right to freedom from torture. At the end the Ombudsman only could recommend grant of relief or redress for the grievances suffered owing to violations of the rights of the freedom from torture. The Ombudsman

does this in terms of enabling legislation Act No. 17 of 1981 and Amendment Act No. 26 of 1994. But the Ombudsman's final recommendations are not mandatory, and have been of little value to victims of torture. Again, another mechanism for attending to, among others, complaints of torture, the Human Rights Commission was established⁵⁴ in 1976. A Chairman and Members comprise the Commission and Counsel participate in proceedings of investigation. Once more this Commission also exercises only recommendatory power. A close review of this Commission, its functions and powers, and its effectiveness in handling the right of freedom from torture, degrading or cruel treatment or punishment follow. However, it has not been a useful instrument so far either in protecting people from torture and in dealing with violations of rights. Its operation is dilatory, somewhat expensive and does not yield sure gains commensurate with expectations aroused.

In pursuing this study in the following accounts special attention will be paid to derogation of fundamental and human rights in a close scrutiny of the restrictions in the Constitution of fundamental rights embodied in Article 15, and especially the likely resultant effects on the right to freedom from torture. Restrictions are moreover imposed on the right to equality of treatment in Article 12 and on freedom from arbitrary arrest or detention and on freedom of speech, assembly and association which are delineated in Articles 13(1), 13(2) and 14⁵⁵. The examination in this account will refer to how such restrictions can become conducive to enable violations of the right to freedom from torture.

This survey will review in later discussions restrictions on use of torture which apply to armed security personnel in the Armed Forces. They are, however, endowed with special powers during emergency rule. Generally emergency rule and regulations tend to detract from normal constitutional provisions which ensure human and fundamental rights including the right to be free of torture. It is essential to study

particularly the manner in which emergency regulations contribute to create a derogation of rights⁵⁶. It is then that the atmosphere turns to grow favourable to the commission of offences irrespective of the right to freedom from torture being there. Also, the passage of Acts of indemnity is a measure to be examined so as to see whether it encourages law and order officers and security forces to practice torture without restraint and with impunity.

References

- ¹ Constitution of the Democratic Socialist Republic of Sri Lanka (Colombo, 21.7.1997) Articles 10 and 15; also Government Publications Bureau, The Constitution of Sri Lanka (Ceylon), 1972, especially Chapter VI.
- ² Ibid Article 126
- ³ ibid article 126(2)
- ⁴ Elizabeth Nissan, Sri Lanka: A Bitter Harvest [Minority Rights Group, London, 1996 – both for abuse of emergency authority and Prevention of Terrorism Act (PTA)]. See account in the publication p. 16
- ⁵ Laksiri Fernando; Human Rights, Politics And States (Social Scientists' Association, Colombo, 2002) for an account.
- ⁶ Jagath P. Senaratne; Political Violence in Sri Lanka: Riots, Insurrections, Counter Insurgencies, Foreign Interventions (The University Press, Amsterdam, 1997) for details.
- ⁷ See “Confidential Report on Investigations into Incidents Committed between 27/7/78 and 2/8/89” in Presidential Archives of J.R. Jayawardene, Accession No. 28905 and other letters from President Ronald Reagan, 13 December 1987. See also Presidential Archives Acc No. 28915 and letters from Prime Minister Margaret Thatcher, Rajiv Gandhi in Document 805/11 and 583/819. In addition see Asia Watch, Cycles of Violence: Human Rights in Sri Lanka since the Indo-Sri Lanka Agreement. (Asia Watch, Washington, 1987)
- ⁸ See Henry J. Steiner and Philip Alston; International Human Rights in Context, Second edition. (Oxford University Press, April, 2000)
- ⁹ Department of Government Printing. Report of the Commission of Inquiry into the Establishment and Maintenance of Place of Unlawful Detention and Torture Chambers at the Batalanda Housing Scheme, Sessional Report (Colombo 2000)
- ¹⁰ See for details P. Hyndman; Democracy in Peril: Sri Lanka, a Country in Crisis. Report to the LAWASIA Human Rights Standing Committee (London, June 1985)
- ¹¹ Quintus Perera, “Dealing with Victims of Torture”, Daily Mirror, November 13, 2002 (Colombo).
- ¹² J. Wickremaratne, “Fundamental Rights in Sri Lanka” (Ph.D. Thesis – University of Peradeniya 1992); European NGO Forum on Sri Lanka, “Sri Lanka Human Rights Situation”, January 1992
- ¹³ See for examples of tortured victims, INFORM, “Special Dossier on Mass Graves at Suriyakanda”, Colombo, 1992.
- ¹⁴ See further “Civilisation and Humanity in Peril”, a Statement on behalf of the Civil Rights Movement, Colombo, 13 September 1989.
- ¹⁵ Ibid.
- ¹⁶ Ibid.
- ¹⁷ See newspaper article in The Island, Colombo, pp 8 and 11 by Dr. Nalin Swaris on “Torture and the Sri Lankan Justice System”
- ¹⁸ Ibid.
- ¹⁹ International Alert; Political Killings in Southern Sri Lanka (London. 1989); also R. Cheran et al, A decade of Conflict: Sri Lanka, 1983 – 1993 (Cortmund: South Asia Bureau)
- ²⁰ Elizabeth Nissan; Sri Lanka: A Bitter Harvest, (Amnesty International, London, 1996) for accounts of police atrocities.
- ²¹ J. Wickramaratne, “Fundamental Rights in Sri Lanka” (unpublished doctoral thesis, University of Peradeniya, 1992) also the Amnesty International, Sri Lanka Disappearances, A1 Index ASA 37/08/86 and for more details of “disappearances” and

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- “extra-judicial killings” ASA 37/02.88; ASA 37/21/90 and ASA 37/10.95 (London, September 1986, June 1988, September 1990 and June 1995)
- 22 (1981)1 FRD 180 (1981)1 SLR 406
- 23 See Note 22
- 24 See Act No. 22 of 1994
- 25 See Henry J. Steiner and Philip Alston: International Human Rights in Context, *op. cit.* see especially part C, “International Human Rights Organizations”.
- 26 United Nations 1993; Human Rights: A Compilation of International Instruments (Vol. 1, Parts 1 & 2) United Nations, New York 1993; also see Jack Donnelly, Universal Human Rights in Theory and Practice (Cornell University Press, Ithaca, 1989)
- 27 For interesting general reading see ed. Duncan Forrest for Amnesty International’s A Glimpse of Hell: Reports on Torture Worldwide (Amnesty International, U.K. 1996) pp viii – 1 – 210, specially Duncan Forrest; “Torture worldwide” by Mike Jempson, pp 121 - 136
- 28 K.M. de Silva, A History of Sri Lanka (Oxford University Press, Delhi, 1981) p. 230 – 231, 250, 267.
- 29 Laksiri Fernando; Human Rights, Politics And States (Social Scientists’ Association, Colombo, 2002), p 115, 254 – 285.
- 30 *Ibid.*
- 31 Laksiri Fernando; Human Rights, Politics And States (Social Scientists’ Association, Colombo, 2002), for an account of break down in human rights and creation of a conducive atmosphere to commit torture in later years of conflict and disorder
- 32 Parliament Secretariat (amended up to 20 December 1988) The Constitution of the Democratic Socialist Republic of Sri Lanka, Chapter 111, See for provisions
- 33 *ibid.* see Article 126
- 34 See Torture Vol. 4, Number 1, 1999, quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture (Copenhagen 1994) on types of torture etc. Ed. Duncan Forrest A Glimpse of Hell – Reports on Torture Worldwide (Amnesty International, UK, 1996) pp 52, 74, 105, 145 for references to torture in Sri Lanka.
- 35 See United Nations, 1993: Human Rights: A Compilation of International Instruments Second Edition (Oxford University Press U.K., New York, United Nations, Vol. 1 : Parts 1 and 2 for organizations and conventions etc.
- 36 Ian Brownlie: Basic Documents of Human Rights (Clarendon Bros. 1971)
- 37 See for a reference to Conventions, particularly against Torture, Ed. Duncan Forrest, A glimpse of Hell, *op. cit.*, Foreword by Pierre Sane, p.v.
- 38 United Nations: Human Rights : A Compilation of International Instruments, Vol. 1, Part 1, (United Nations, New York, 1993) for details.
- 39 Henry J. Steiner and Philip Alston: International Human Rights in Context, Second Edition (Oxford University Press, 2000) see pp 1072 – 3, 1209.
- 40 In addition see Asian Human Rights Commission, Monitoring the Right for an Effective Remedy for Human Rights Violations (Asian Human Rights Commission, Hong Kong, 2001): also see Henry J. Steiner and Philip Alston, *op cit*, p 1201 – 1203.
- 41
- 42 Wifesuriya and Others appellants and the State Respon. 77 NLR 25
- 43 Government Publications Bureau: The Constitution of Sri Lanka. (Ceylon) 1972, Chapter VI.

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- ⁴⁴ Constitution of the Democratic Socialist Republic of Sri Lanka (Parliament Secretariat as amended up to 20 December 1988), Chapter III.
- ⁴⁵ See Torture Quarterly Journal of Rehabilitation of Torture Victims and Prevention of Torture (Vol. 4, No. 1, 1994 (Copenhagen 1/94), Yasmin Oztink, "The Torturers in White" Page 7 and "Doctors Involved in Torture" by Knud Smidt Nielsen, "Doctors Involved in Torture" page 10 to understand need for prohibition of medical experimentation in interrogation.
- ⁴⁶ See Reports of movement for Inter-racial Justice and Equality (MIRJE, Colombo); also Laksiri Fernando Human Rights, Politics and States (Social Scientists Association, Colombo, 2002)
47. Dr. AKB Amarasinghe 'Our Fundamental Rights of Personal Security and Personal Liberty', Sarvodaya Publication, Ratmalana, Sri Lanka, 1995 at 88 - 117
- ⁴⁸ Fernando v. Keeladasa, 1989 11 SLR 25
- ⁴⁹ (1993) 1 SLR 224•
- ⁵⁰ SC 89:9, SCM 19/11/93
- ⁵¹ 1993 1 SLR 25
- ⁵² The Constitution of the Democratic Socialist Republic of Sri Lanka (1978) See Article 126
- ⁵³ ibid Article 156 and Act No. 17 of 1981 (Government Printer, Colombo 1981) and Amendment Act No. 260 of 1994 (Government Printer, 1995).
- ⁵⁴ See Human Rights Commission Act, 1996 (Government Printing Department, Colombo, 1996)
- ⁵⁵ The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978. See Articles 11 to 14 in Chapter III.
- ⁵⁶ See Jagath P. Senaratne, Political Violence in Sri Lanka, 1977 – 1990 – Riots, Insurrections, Counter Insurgencies, Foreign Interrelation; (VU University Press, Amsterdam; 1997) for a discussion.