Chapter - II

Kinds of Torture

There are different kinds of torture employed by the perpetrators in different parts of the world. They range from the traditional or conventional methods and objects to modern and sophisticated. Whatever be the kind or method employed, the consequences of such torture on human beings are inevitable. These consequences also include both mental or psychological and physical. These consequences may in turn make the individual so tortured to become hardened and willing to do anything against the perpetrators, there are also the cases where the weak succumb to the acts of torture or start speaking the truth at the sight of seeing another individual being tortured. It is the second kind of individuals that provide the confidence and courage to the perpetrators in employing the degrading treatment or punishment on the individuals detained by the State.

In Sri Lanka too there are various kinds of torture that are being employed by the police and security personnel on the suspects in custody. Literally torture has become an essential part of interrogation in Sri Lanka based on the situations of armed conflict, basically to elicit information from the suspects so detained about the activities of the banned warring groups. However, over a period of time, torture has also been employed against individuals involved in petty crimes or even for political as well as their own private objectives. This situation indicates the reliance the police and security personnel have on torture as well as its application to areas never intended earlier, that being the application of various kinds of torture for to achieve private ends. It is in this context that torture is employed by the police, army and other security personnel to act not on their own volition but at the behest of superiors in rank as well as their administrative and political masters.

It is not an attempt in this chapter to capture the different kinds of torture that are in vogue in different parts of the world as well as in

Sri Lanka. Yet an attempt is made in this chapter to evolve jurisprudential reasons to argue against particular kinds of torture. As such, an attempt is made to discuss four broad kinds of torture in this chapter. They are violence against women, death penalty, corporal punishment and euthanasia. Even among the four, the last one on euthanasia is not in use at all by the police and security personnel world over. Yet, the development of contemporary jurisprudence in this field in the west necessitated the inclusion of euthanasia as one among the four selected kinds of torture for discussion in this chapter. These kinds of torture, their impact and implications require a brief description each and the same is attempted in the following paragraphs.

A. Violence against Women

At its most basic level, violence is an "act carried out with the intention or perceived intention of physically hurting another person".[1] Violence to which women are subjected extends to gender-specific forms of violence such as rape, sexual abuse, sexual harassment, forced abortions, forced prostitution etc., which fits the conventional definition of torture and other ill-treatment recognized by major international and regional human rights treaties and instruments.

Women experience psychological violence associated with the arrest of immediate members of their families and/or by making them witness acts of violence committed on the arrested members in their very presence. Women are also targeted for torture not for what they have done personally, but for what a member of their family has done or is suspected to have done. Women have also been the target for violence in times of conflict, and violence in the form of sexual torture has been regarded as an inevitable aspect and consequence of war. The former Yugoslavia and Rwanda present the most notorious examples of the ways in which mass and systematic rape of women was used as a weapon of war in conflict situations.

Most of the basic international and regional human rights treaties and instruments provide for human rights protection to men and women in gender neutral terms, and they are not concerned with women's rights per se. These instruments which contain a vast array of basic human rights specify that the rights, guaranteed by them are not denied on the basis of sex, and that all the individuals are entitled to equal protection of the law, regardless of their sex. Although state sponsored torture and other ill treatment have compelled the international community to develop a complex legal regime against torture and other ill treatment, the issue of violence against women has not been addressed in a thematic manner in any of those instruments. Violence such as rape was not regarded as a war crime even in the Nuremburg Charter, the bedrock of modern law of International Criminal Justice. It would be incorrect to represent the existing body of human rights law, as a satisfactory regime from the perspective of women, as there are still substantive and procedural limitations in the actual implementation of the laws relating to women and the laws do not adequately take into account the realities of violence against women.

The Universal Declaration of Human Rights while guaranteeing by Article 3, the right to life, liberty and security of all persons, imposes by Article 5 of the Declaration, an explicit prohibition on torture, cruel, inhuman. degrading treatment or punishment. This prohibition now pervades an extensive network of international and regional instruments and treaties. But regrettably, among the many forms of violence perpetrated on women by their male partners, particularly violence inflicted in the context of the immediate family which constitutes the most pervasive and egregious form, has not been accorded the same treatment by the international community as the officially inflicted violence or torture. International definitions of torture and other ill treatment have developed in terms of overt official violence placing most of the violence suffered by women outside the realm of international and regional instruments and treaties. This difference in

the treatment of officially inflicted violence and violence committed in the privacy of home is mainly attributable to the dichotomy existing between the public and private spheres in law. This has been narrowly interpreted to cover only officially inflicted torture or violence, leaving much of the violence out of the ambit of applicability of international and regional instruments.

Domestic violence which can encompass all forms of physical, sexual, emotional, verbal and economic abuse is committed within the confines of the home. It includes beating, scolding, punching, kicking, thrashing of objects, verbal abuse, threats to one's partner or an immediate member of the family. Of the efforts to describe this phenomenon, the definition by the Institute of Women Law and Development would seem to be the most comprehensive. It defines domestic violence in the following terms: "All acts of gender based physical, psychological and sexual violence against women by a person or persons in the same household or in the context of an interpersonal relationship, ranging from simple assault to aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, verbal abuse, forcible or unlawful entry and attempts to commit such acts."[2]

"Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare and economies by drawing billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence".[3]

Of the many theories advanced to explain domestic violence experienced by women at the hands of their partner's gender inequality occupies a central place. The UN report on violence against women in the family states: "There is no simple explanation for violence against women in the home. Certainly, any explanation must go beyond the individual characteristics of the man, the woman and the family and look to the structure of relationship and the role of society in underpinning that structure[4]....Violence against wives is a function of the belief fostered in all cultures, that men are superior and that women they live with are their possession or chattels that they can treat as they wish and as they consider appropriate."

Violence is used by men as a way of securing and maintaining male domination and is also widespread even among developed nations. According to a government commissioned study in France[5] every 10 days one woman in 10 is beaten at home and every five days a woman is beaten to death by her partner. Wife battering in France is just as prevalent among the well-heeled as among the underprivileged. According to Marie Dominique de Suremain, the head of the National Federation for Women's Solidarity, there are at least 1.5 million women in France who are abused physically, sexually and psychologically by husbands or partners, which implies that there are 1.5 million men behind violence committed on women. In Spain, where violence against women is a major issue, 45 women have died so far in 2003 at the hands of their partners. In the Netherlands 13 percent of women report violence suffered at home while in Switzerland 6 percent of women report violence.[6] Violence committed on women needs the attention of the human rights discourse as much of the violence suffered by women in the context of family fit the definition of torture and other ill treatment recognized by the major international and regional human rights instruments. Even the provisions of the International Convention Against Torture[7] has not catered to this type of violence. The techniques employed in the perpetration or commission of torture by officials and domestic torture or violence is

very much similar as are the objectives. The 'public-private' divide seems to be the obstacle.

Redress by fundamental right procedure for women subject to violence in Sri Lanka

There have been cases in Sri Lanka, where women who have suffered violence amounting to torture and other ill treatment at the hands of the state have sought redress by way of the fundamental rights procedure under Article 126 of the Constitution. A survey of these cases, demonstrates that not all the deliberately inflicted violence suffered by women has amounted to torture, cruel, inhuman treatment and degrading punishment as contemplated by Article 11 of the Constitution, and only violence which has reached a certain level of severity and intensity has attracted redress under this procedure. Violence or torture per se would not entitle a victim to seek redress under this procedure.

This is exemplified by ***Chandra Kalyani Perera v. Captain Siriwardane***[8] in which the petitioner alleged, that she was manacled, beaten with a hose, and hung up, in order to extort a confession. She also alleged that the 1st respondent a Captain in the army invited her to have sexual intercourse. She also claimed that the mother of a man whose murder was being investigated assaulted her with a slipper. Although the court found in this case that her arrest and continued detention was unlawful and illegal, there was insufficient evidence to establish the violation of fundamental right relating to freedom from torture and other ill treatment under Article 11 of the Constitution. His Lordship observed that there is no doubt that the 1st petitioner was subjected to severe interrogation and confrontation in the course of which she would have been treated roughly and even insulted: but acceptable evidence does not go beyond and establish that degree of grave inhuman treatment which would constitute an infringement of Article 11 of the Constitution. The conclusion arrived at by court in regard to the assault committed with a slipper on the petitioner while

she was in police custody is open to criticism on many grounds. The court concluded that the assault committed on the petitioner with a slipper by the enraged woman did not constitute violation of Article 11 of the Constitution. Even if the assault with a slipper does not attain the level of severity to constitute torture in terms of Article 11 it certainly could constitute a degrading and humiliating treatment, particularly in the Sri Lankan context. It is incomprehensible as to why the court did not proceed to consider whether the question of assault with the slipper could be brought under other limbs of the formula. Moreover assault in this case had taken place in the presence of the police officer who had a duty to prevent any assault on the petitioner. In the absence of evidence that he took steps to prevent assault ,both the police officer and the woman who was a private actor could be held responsible in consonance with the reasoning adopted in the case of ***Sumith Jayantha Dias v. Reggie Ranatunga***[9] and ***Fais v. AG***[10] wherein the court held the private actor accountable for the assault.

Similarly, ***W.M.K. de Silva v. Chairman Ceylon Fertilizer Corporation***[11] illustrates another instance where the court refused to hold a malicious act of an employer towards the petitioner in treating her in an inhuman manner amounted to a violation of the fundamental right relating to freedom from torture and other ill treatment in terms of Article 11 of the Constitution. In this case, the petitioner complained that her employer treated her in a humiliating manner by not allocating any work at the work place and by providing a broken chair to sit on and a broken table to sit at, and treated her in a degrading and humiliating manner. His Lordship Justice Amarasinghe expressing his views on the treatment meted out to the petitioner at the work place observed that although the treatment suffered by the petitioner amounted to unfair labour practice it did not amount to a violation of her fundamental right under Article 11 of the Constitution. On the other hand, ***Samanthilaka v. Perera***[12] exemplified an instance where the court determined that the violent acts committed on a 16 year old girl constituted a violation of Article 11 of the Constitution. In this case the

petitioner was slapped and threatened by the police who tried to seduce her. The court having determined that the severe intense physical and mental pain she suffered at the hands of the police constituted cruel, inhuman treatment and degrading punishment, proceeded to award Rs 25,000/- by way of compensation to the victim.

The case of ***Kumarasena v. S.I. Sriyantha***[13] exemplifies another instance where the court found that acts committed on the victim amounted to cruel and inhuman and degrading treatment. In this case a young girl complained that while she was being held by the police, some officers committed the following acts on her: Touching, squeezing breasts, punching buttocks, addressing in a humiliating manner as "love bird", inquiring whether she was wearing any underwear, making remarks which are suggestive of sexuality. The court determined these acts amount to violation of her fundamental right relating to freedom from torture.

Again in ***Sriya Lakshimi Ekanayake v the State,***[14] a young girl who was taken into custody in connection with alleged subversive activities was assaulted and ordered by the police to takeoff her clothes. On refusal by her to do so, two police officers had stripped her naked had invited other officers to view her body. Thereafter she had been beaten with a club. In this case also the court determined that the treatment she suffered at the hands of the police amounted to gross violation of her fundamental right relating to freedom from torture. In this case his Lordship Justice Fernando observing that the criticism of government educational policy was within the legitimate exercise of the right to free speech. There was no evidence that the petitioner was involved in any subversive activities. Taking into account the hardship and psychological trauma she underwent at the hands of the police, the Court proceeded to award Rs 50,000/- by way of compensation and also ordered the release of the petitioner from custody.

In ***Nalika Kalupahana v Nihal Mahinda***,[15] the Hungama Police is illustrative of gross barbaric treatment meted out to a young girl of 14

years who was suspected of having committed a theft of some articles. This girl who subsequently committed suicide was subjected to gross physical abuse and torture in order to extract a confession from her. The application to court for redress was filed on her behalf by an attorney at law working in a human rights organization. Although a lot of pressure was brought to bear on the parents of the girl to withdraw the application, the court did not permit the petitioner to withdraw the application and the court ordered Rs 150,000/- as compensation payable by the state and a further sum of Rs 50,000/- to be paid personally by the officer concerned.

His lordship commenting on the attempts made by the parents to withdraw the application as a result of the pressure brought to bear on them observed:

"I would add since an attorney at law had filed that petition on behalf of the minor petitioner (not assisted by guardian – and appointed by the court) I doubt whether a third party even if he was the father of the minor – had the right to give instructions for its withdrawal".[1] Much of the violence committed on women in Sri Lanka remains outside the realm of fundamental rights procedure. Consequent to insisting on requirement of an executive or administrative action as a sine qua non for the invocation of the fundamental right procedure. This has been extended by a process of judicial interpretation to encompass pain or suffering inflicted by another at the instigation or with the authority, consent, acquiescence or participation of a public officer or other person in official capacity.

The requirement of official involvement for redress by way of fundamental rights procedure has kept the majority of the women to suffer violence at the hands of the private actors, or in the domestic sphere. Even the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act required the official

element to be proved and has kept many of the women's experiences of violence outside the ambit of the Act. This Act defines torture, with its grammatical variations and cognate expressions to mean any act which causes severe pain, whether physical or mental, to any other person, it has failed to mention many tortuous and violent acts such as rape, grave sexual abuse, sexual harassment, unnatural offences, forced abortions in specific terms, leaving the determination of the question whether a particular act has amounted to torture in a given situation, to wide and varied judicial interpretation. The concepts such as grave sexual abuse, sexual harassment, and marital rape too remained outside the criminological thinking and legal system of this country until recently, depriving many a woman who has suffered such experiences at the hands of a private actor to proceed under the Criminal Law. Therefore, one of the central challenges the constitutionalists are faced with is how to expand the fundamental rights procedure to hold states accountable for gender based violence that are carried out in the private realm, as from the perspective of women who have suffered violence at the hands of private actors redressed by way of fundamental procedure would be more advantageous.

The Sri Lankan Constitution also contains provisions which are applicable not only to the state but also to all institutes and individuals alike. Articles 12(1) and 12(2) of the Constitution guarantee the principles of equality before the law and to be equal to gain protection by the law in the following terms. All persons are equal before the law and are entitled to the equal protection of the law. No citizen shall be discriminated against on the ground of race, religion, language, caste, sex, political opinion, place of birth or any of such grounds. Similarly, Article 12(3) of the Constitution provides that "no person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion"

His Lordship Justice Mark Fernando in ***Ramuppillai v. Festus Perera, Minister of Public Administration***[18] referred to the principle of non discrimination enshrined in the Constitution by Article 12(3) and has taken the view, that the state and its institutions and individuals are equally bound by the constitutional procedures.

Gender based violence has been equated by the Committee set up under the Convention on the Elimination of All forms of Discrimination against Women to a form of discrimination. It observes: "If gender based violence that amounts to discrimination applies to the state and to private individuals alike, an argument can be advanced that a woman who has suffered violence in the form of torture and other ill treatment at the hands of a private actor would be entitled to such redress by way of fundamental procedure through an oblique way, avoiding the necessity to prove official involvement as a prerequisite for redress". This approach would be in consonance with the determination made in the case of ***Ramuppillai v Festus Perera***[19] The state can also be held responsible by way of fundamental rights procedure for violence committed on women by private actors or in the domestic sphere on the basis of violation of fundamental principles of non discrimination and equal protection of law irrespective of sex to which one may belong. The failure on the part of the state to act with due diligence to protect the rights of women against violation by private actors in these circumstances leave the state vulnerable to accusations that violence was committed with its approval, authority, knowledge, connivance and acquiescence, or inaction as the state is bound to take all measures to prevent the phenomenon of violence against women.

In this connection the International Charter of Women, which was adopted by the Government of Sri Lanka in March 1993 would be relevant. Article 16 of the Women's Charter reads:

"The state shall take all measures to prevent the phenomenon of violence against women, children and young persons in society, in the work place, in the family as well as in custody, particularly such

manifestations of it as rape, incest, sexual harassment, physical and mental abuse, inhuman and degrading treatment."[20]

An illegal act which violates human rights and which is not directly attributable to the state would make the state liable to international responsibility for its failure to take effective action to prevent human rights violations. Observations made by the Court in the ***Valesquez case***[21] would be pertinent in this regard.

"An alleged act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. The state has the legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation. Where the acts of private parties are not seriously investigated, those parties are aided in a sense by the government thereby making the state responsible on the international plane."[22]

Campaigns have been set afoot both by states, as well as individual activists, against abuses of women, like rape, sexual harassment and sexual slavery and also even wife beating. Since, however, the focus of this concise account is primarily on violence against women as a degenerate form of torture, a wider discussion inevitably has to be avoided.[23] The Inter-American Commission on Human Rights considers torture to be comprehended as the practice or instigation by means of which physical or mental pain or suffering is deliberately inflicted upon a female reckoning the age, sex or condition of the person so as to intimidate, or extort a confession or information from the human being so as to punish her for committing an act or

suspecting that it was committed. This definition falls short of elaborating upon the special nature of female sexual slavery and torture as one learns of in Sri Lanka, particularly practiced by soldiers during the crisis of conflict in the island.

Rape of women in custody by police or armed forces is most chilling owing to the cold-blooded manner in which it is executed. Along with rape, degradation and molestation of women occurred largely because of the opportunity offered by the civil conflict. Women were incarcerated privately, even away from their habitats and raped while captive, unprotected and vulnerable, helpless as they were, without their husbands or children.[24]

In Sri Lanka women commonly remain chaste until marriage. Consequently, rape is a severe trauma for women and their families as they entertain well founded fears of rejection and ostracism and of lives without marriage or children. Sexual humiliation and unrestricted sexual savagery in Sri Lanka often remain concealed more especially in extreme conservative communities. Throughout Sri Lanka torture and violence against women, more so of a sexual character remains more a hidden problem. Public attitudes have to change in order to bring into the open view torture, violence and sexual cruelty against women so that the canker is recognized, condemned and remedied as far as possible.

B. Death Penalty

Capital punishment can be imposed in several forms such as by shooting, administering lethal gas in chambers etc. In earlier times, guillotining or garroting were used to execute people. Primitive society had resorted to beheading or stoning which are employed in some countries even now. More modern is electrocuting or injecting poison, a refinement of a horrible deed which however does not make the deed itself less horrible.[25]

Torture is an inseparable characteristic that accompanies the death penalty. Victims of torture are reported to suffer as much as victims awaiting infliction of death in a cell, lonely and mentally wrecked. Capital punishment is killing that is legalized, and ironically even by states which have subscribed to Conventions and observance of rights that forbid the practice of torture. The death penalty is a common punishment for murder. Unfortunately sometimes it is also imposed on those who express political dissent.

In Sri Lanka politically motivated torture and murders has been reported and proven in the north and east of the island following militant activities. Historically in Sri Lanka, however, capital punishment was suspended in April 1956.[26] Yet capital punishment was restored after the assassination of Prime Minister S.W.R.D. Bandaranaike. Between 1961 and July 1976 when the last execution to implement a judicial sentence was carried out, eighty had died on the gallows in Sri Lanka. Although a provision remains in the Penal Code and death sentences are imposed by Court, still none has been hanged. But the fact that the death penalty has not been executed should not give room for complacency to public spirited people.

In Sri Lanka, the kings in ancient times wielded the power of life and death over his subjects. The only constraint limiting this power was that the ruler had to follow the laws of the land and heed the advice of the Buddhist clergy and the elders.[27] The consultation with these people was abandoned later. A system like the modern jury system came into vogue in the eleventh century. Nevertheless, later on, the king alone could inflict capital punishment and Robert Knox,[28] an European Captive for some years, has left an elaborate record of crime and punishment and the imposition of the death penalty in the 17th century Kandyan kingdom, which was the last of the Sinhalese kingdoms before Sri Lanka fell captive to British colonial rule. Under the British capital punishment was systematically continued in the colony of Ceylon (Sri Lanka).

In Europe in early periods a criminal was required to confess before he was punished, and torture proved a powerful method of obtaining a confession. In Sri Lanka, under local rule, confession was reckoned to be sound in meting out justice, yet the Sri Lankans preferred to ascertain culpability or innocence from recourse to divine testimony. To the Sinhalese, mutilation, torture and physical pain were punishments inflicted on offenders. Yet there are diverse views on the use of torture in early Sri Lanka; some believed before sentencing to death confession of the crime was essential and hence torture was resorted to gain admission of guilt. Under occidental rulers like the Portuguese, Dutch and more under the British[29] new forms of capital punishment like crucifixion, although abandoned in Europe, was introduced into the Island. Although the Portuguese, later on in 1870, abolished the death penalty yet in Sri Lanka they were notorious for making the death penalty excruciating. The Dutch, who succeeded the Portuguese in dominating maritime Sri Lanka, continued using torture ending with death where the death penalty had been imposed, sometimes for small offences. As the British established their conquest and consolidated their rule, barbaric forms of punishments were abolished from 1802 but not the use of the death penalty, which, many have concluded as most barbaric of tortures was retained as a penalty. The first Governor Sri Frederic North introduced hanging as the mode of inflicting capital punishment but a victim himself could opt to be decapitated.[30]

It is pertinent and important to note how the execution of a death sentence can definitely approximate to be a horrible torture. On one occasion the British had to reprieve a man after four attempts to hang him had ended unsuccessfully. Surely, this is torture of the utmost cruel character, and it has not been the first of such despicable cruelties inflicted As on this occasion, on more than one instance witnesses of the execution of the death sentence (allowed then) had found the torture that attends hanging or execution to be revolting, and repulsive to human feeling.[31]

A newspaper report graphically described "It was really heartrending to see them severally take leave of their families; four of them were apparently resigned to meet the miserable fate awaiting them but the fifth .... was evidently suffering from excessive mental punishment."[32] Leonard Woolf as Assistant Government Agent, Kandy, had to witness hangings of sentenced criminals as part of his duty. In one case the man did not die as expected and his body "went on twitching violently". The hangman pulled down the man by his legs to ensure strangulation. Another multiple hanging was more dreadful. Out of the four men to be hanged the calculation of the drop for one man was faulty. "His head was practically torn from his body and a great jet of blood spurted up three or four feet,..."[33] These examples of execution prove how gruesome the mental torture can be before carrying out the death sentence. It is because of the mental torture that follows a death sentence that from the time of Sinhalese kings and later on from the nineteen twenties those legislative attempts, unfortunately unsuccessfully, were made to abolish the death penalty in 1928 and 1936. Then capital punishment was suspended in 1958 but in May, owing to communal disturbances capital punishment was reintroduced.[34] But no one was hanged.

Apart from the disapproval of capital punishment because it meant so much mental torture, there are those who do not approve of it on moral grounds. Capital punishment has not been so effective as an only deterrent to commission of murder or similar crimes.[35] Nor has the murder rate increased to indicate anything worthwhile as a conclusion after countries had abolished capital punishment. Moreover, it is morally wrong for the state in the name of justice deliberately to take one's life since the sanctity of life should be upheld by the state instead.

Whatever its worth may mean, a large percentage maintain and swear that they are innocent when they have to go to the gallows, and after they are hooded and the rope is around their neck. Many accuse

the Police of having framed them, implicating them. Considering the quality, and character of the local police, some truth can lie here. It is hence at times an unjust torture when hanged. And why should even one suffer an undeserved fate, as, mistakenly, innocent people have been executed? As congestion in death rows is common, when appeals are lodged, the ordeal of those who, expecting to be killed, lived in the dark and gloomy cells at Welikada and Bogambara prisons, is tantamount to excruciating mental torture. Some occupants in death row had lingered miserably and in dread for up to even three years. Men who were hanged had staggered or been dragged less than ten paces to death which indicates the misery or torture they had experienced.[36]

It is indeed interesting that statistics with the Police demonstrate that during the suspension of capital punishment by Executive fiat for a time of six years, there was a drop in the total number of homicides annually despite an increase in population. In 1971, there took place 1194 homicides but in 1980 the number fell to 893 even though the population had increased from 12,711,143 to 14,738,000.[37] It is would seem obvious that death penalty is ineffective to induce human beings to desist from murders. A singular case of mishandling of the death penalty in Sri Lanka is best illustrated by the Maru Sira execution in August 1975. Although it was held that he was executed by hanging an inquiry revealed later that he had been drugged into unconsciousness and crudely killed in a foul way. If one is to avert this sort of torture the best way would be to abolish capital punishment.

A Commission comprising eminent legal personalities to report on Capital Punishment heard evidence, read much, travelled and recorded representations in the Island and concluded, as published in 1959, that "capital punishment for murder should not be reintroduced in Ceylon". The Commissioners who examined the question were convinced that even in neighbouring Travancore-Cochin where the death penalty had been abolished "statistics are inconclusive on the

question of deterrence" because the death penalty had been done away with. Although they never addressed the issue of torture itself inherent in the death penalty, to the advocates of those who were distressed at the element of torture integral in capital punishment their decision appeared prudent. Undoubtedly it is torture of a grievously painful character.

The practice of capital punishment brings upon a government the odium that it "was acting in a spirit of revenge that was unworthy of any government". The execution of a person is an irreversible act even if error in meting it had been detected later, and this characteristic alone lends the worst feature of torture to capital punishment.[38] The South Asian Human Rights body stood firmly against introduction of the death penalty in Sri Lanka. Death penalty was contrary to fundamental human rights norms and it carried no justification under international law.[39] In Sri Lanka's legislature many from the opposition questioned the value of reimposing the death penalty as it would in no way contribute to diminish or dissuade instances of murder as other social and economic ills trigger mortal crimes.[40] Following a high incidence of crime of a fatal nature after the suspension of the death penalty since 1977 controversy has erupted and rages whether the moratorium on death sentence needs to be lifted. Police statistics have revealed that death penalty is no real deterrent to commission of crime.[41] So why should this suspended torture and agony which worsens as prisoners to be executed are physically moved closer day by day towards the gallows as the day of judicially sanctified killing reintroduced? An interesting point of view to condemn usage of the death penalty was expressed by the South African judiciary. Internationally the trend is anti-death penalty, and in 1995 in a South African judgment all eleven judges of the Constitutional Court wrote judgments striking down the death penalty. One judge very wisely concluded that while punishment should be commensurate with the offence it does not have to be equivalent or identical. One torture should not qualify the torturer to another torture. The Civil Rights Movement of Sri Lanka aptly

announced that "Judicial hangings are one of the few horrors that our country has been spared for over a quarter of a century."[42] One can agree with the Secretary of the Civil Rights Movement that, "executing murderers means that society, in a chillingly systematic and calculated manner, wills people to teach that killing people is wrong".[43] This is bitter irony. In somewhat similar was Kumari Jayawardena who condemned the death penalty unequivocally. "It's an outdated and barbaric means of punishment..." "It does not act as a deterrent to crime, but only brutalizes society further." Moreover it is "cruel and unusual" and "illegal under international law today",[44] she added. Is Sri Lanka to ignore international opinion so as to inflict torture and seek only international aid?

If growth of crime is to be curbed, it has been convincingly argued, a re-imposition of execution of those condemned to death will not help. On the other hand there have been occasions when the wrong persons have gone to the gallows. It is a serious mistake for any government to commit. If a man has been sentenced to imprisonment, that could be rectified in some manner and compensated in some measure, stated one legally qualified legislator. But "capital punishment could only lead to further brutalization of society", because it is the practice of torture one can conclude.[45] Amnesty International has explicitly stated that, "it appears the death penalty and torture or other cruel, inhuman treatment or punishment of all persons are identical without reservation".[46] To argue for the death penalty's revival on the reasoning that people will deliberately consider the consequences of their actions before committing murder is not quite true. Only after offenders get caught do they contemplate on likely consequences. This explains why the death penalty was abolished in many countries. Miscarriages of justice where innocent folk have been condemned to death compels a re-think. The torture of the death penalty will kill some but will not stifle crime.

Governor George Ryan in Illinois, U.S.A., spared the lives of 163 men and four women before his office ended 48 hours later. He confessed that he had realized capital punishment was morally wrong. Governor Ryan commented that often the individual without influence got convicted and executed. Former Commissioner of Prisons admitted that it was so in Sri Lanka. The influential got away scot-free, and it was they who committed murder often. Winston Churchill, the famous British Premier, stated that the quality of a people could be judged by the quality of treatment given to convicts. If Sri Lanka were to mete out the barbaric, primitive death penalty, she will be judged to be barbaric. Strong condemnation is echoed by Secretary General, United Nations when he exclaimed once that "The forfeiture of life is too absolute, too irreversible for one human being to inflict on another, even when backed by legal process. Let the states that still use the death penalty stay their hands lest in days to come they look back with remorse knowing it is too late to redeem their grievous mistake". Torture masquerades in the guise of death penalty. According to Amnesty International, 1,831 executions took place in 1998, but 1,419 were in China. Only 412 were executed in the rest of the world.[47] Capital punishment by almost half the countries in the world have been regarded unconstitutional since cruel and unusual punishment was prohibited. Unjust imprisonment, it is accepted, is a great wrong but when it is discovered, the prisoner can be freed and compensated but the killing of an innocent being is irremediable. It becomes a torture that can never be undone. Justice Brennan was forthright in ***Gregg v Georgia***[48] "The fatal institutional infirmity in the punishment of death is that it treats members of the human race as non-humans, as objects to be toyed with and discarded". Again the Federal Constitutional Court of Germany emphasized, "Respect for human dignity especially requires the prohibition of cruel, inhuman and degrading punishments". The state "cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

The Hungarian Constitutional Court forthrightly stated that "everyone has the inherent right to life and to human dignity, and no one shall be arbitrarily deprived of these rights." Immediately followed the assertion that "No one shall be subjected to torture or to cruel or inhuman or degrading punishment."[49] Capital punishment unambiguously has been equated to torture and forbidden. Likewise in a case in a South African Court the conclusion was that, "The carrying out of the death sentence destroys life, which is protected without reservation ..., it annihilates human dignity which is protected ..., elements of arbitrariness are present in its enforcement and it is irremediable."[50] So there should be no room for the death penalty as much as there is no legal room for torture in Sri Lanka.

Moreover, executions have been compared to torture also because victims suffer under dehumanizing prolonged delays plus degrading conditions under which they are held in cells as they are moved closer and closer to the gallows till the tragic day. The mental agony of being in death row is excruciating. Sociological inquiries reveal that "...confinement under sentence of death is exquisite psychological torture..."[51] The pardon does not mitigate the pain of torture in the death penalty. In India Mr. Justice Shetty explained that "It has been universally recognized that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture." He added that "This mental torment may become acute when the judicial verdict is finally set against the accused."[52] Between "funeral fire and mental worry, it is the latter which is more devastating... funeral fire burns only the dead body while the mental worry burns the living one."[53] There can be no doubt of the torture caused by a sentence of death itself.

A summary of a judgmental statement by Wright C.J. in the Supreme Court of California strengthens substantially that torture surrounds the death penalty. He emphasized that "in assessing the cruelty of capital punishment ... we are not concerned only with the

mere extinguishment of life ... but with the total impact of capital punishment, from the pronouncement of the judgment through the execution itself, both on the individual and on the society which sanctions its use."[54] He added "... the execution which ultimately follows pronouncement of the death sentence has become ... the 'lingering death' which the Kemmler Court (an earlier discussed opinion) conceded would be cruel in the constitutional sense."[55] "The cruelty of capital punishment lies in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administration procedures .. are carried out,"[56] he added. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to contribute psychological torture."[57]

Though euphemistically called judicial execution, the death may be sudden or, mostly, long drawn out. It involves unnecessary cruelty both in execution and in a legal process, prolonged delays or long waiting for judicial execution entail those condemned to suffer for years in a state of limbo torn between the knowledge that they are to die and the hope that they may gain a reprieve. Death row is a torture in which none need lift a finger to torture otherwise. As they are doomed to die, the conditions are often appalling. Judicial execution is state-sanctioned murder. It is a form of terror and the ultimate job of the torturer. It is a final form of retributive punishment. Death penalty "is a reminder of the ultimate authority that those in power wield over the population. That gives it the hallmark of torture."[58] There can be no doubt at all that the death penalty creates is the most intolerable form of torture, terribly mental and harrowing psychologically. It also degrades a person and the punishment smacks of man's inhumanity to man.

Amnesty International (AI) is noted for its continuing efforts to have the death penalty abolished worldwide. In 1971, the International Council, AI's decision making body, planned to canvas the United

Nations and the Council of Europe to make all possible efforts to achieve the abolition of the death penalty throughout the world. Again in 1977 AI organized a world wide campaign against the death penalty and the AI's opposition to the death penalty widened to include freeing any sentenced to death because it was a cruel punishment. It feels that "the death penalty is disgusting, particularly if it (court) condemns an innocent" to that fatal punishment. "But it remains an injustice even when it falls on someone who is guilty of crime".[59]

Recognizing that the death penalty can be torturous, Protocol No. 13 to the European Convention on Human Rights (ECHR) provides for the abolition of the death penalty in all circumstances. Scientific studies consistently failed to find convincing evidence that the death penalty deters crime more effectively. On the other hand, as long as the death penalty is maintained the risk of executing the innocent can never be eliminated.

The right to life is the most fundamental of all human rights, as the basic precondition of the enjoyment of other rights. It is an inherent right of a human being which the law should protect. The death penalty is an exception to the right to life and also is inhuman and degrading.[60] Some jurisdictions, notably in India, "have taken an expansive view of "the right to life" itself, extending it to the means of living a healthy and fulfilling life," which embraces 'civil and political' and 'economic and social' rights.[61] In England the common law has always recognized the fundamental importance of human life. Blackstone considered it an absolute right. "Life is the immediate gift of God, a right inherent in every individual ... of such high value ... The law not only regards life and the member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support.[62]

Fortunately, in Sri Lanka, the Convention on the Rights of the Child (CRC) specifies that capital punishment shall not be imposed for offences committed by persons below eighteen years of age.

International human rights law also prohibits applying the death sentence for crimes committed by those below eighteen years. Although some countries include Viz., Iran, Nigeria, Yemen and strangely the U.S.A. still impose the death penalty. But, of late, some of such countries have abandoned the use of capital punishment on children. Amnesty International nonetheless opposes the death penalty in all cases as a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading punishment. "Detaining an accused, who is a minor, in the Death Row which can break even a hardened criminal, while he awaits his fate, negates the very essence of the protection afforded by the state on the youth"[63]. This firmly attests the tortuous nature of death penalty.

C. Corporal Punishment

Forms of corporal punishment too, other than death penalty need consideration, in the context of a fair discussion of the need to reinforce freedom from torture, inhuman treatment and degrading punishment as a right. Corporal punishment is legitimately meted out in accordance with the provisions in the national laws of the country, although fundamental rights, which incorporates the right to freedom from torture, inhuman and degrading, cruel punishments allows it no space.

The European Court of Human Rights in the case of ***Tyrer v. U.K.***[64] has observed that "the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence. that is in the present case violence permitted by the law, ordered by the judicial authorities of the state and carried out by the police authorities of the state." Thus, although the applicant did not suffer any severe or long lasting physical effects, his punishment whereby he was treated as an object in the power of authorities constituted an assault on precisely one of the main purposes of Article 3 of the Constitution, to protect a person's dignity and physical integrity.

Corporal punishment which obviously degenerates into torture when severe, is degrading as an assault on human dignity when inflicted especially in open court.

Corporal punishment usually assumes two principal forms. Beating by the application of strokes of a whip, cane or birch, or punitive mutilation such as amputation of limbs, especially in Islamic countries. Beating is administered invariably on one's buttocks which is a sheer humiliation. The forms of punishment involving mutilation of limbs, stoning victims and public demonstrations of violent penalty considered to be among the most heinous forms of punishment are carried out in states where Sharia or Islamic laws prevail. Saudi Arabia has prescribed amputation of limbs for offences such as theft of articles above a certain value, adultery and sexual misbehaviour.[65] Malaysia has provided for corporal punishment in the form of up to 24 strokes of the rattan for offences such as rape, kidnapping, drug connected offences and firearm related offences, as a whole or partial punishment, under medical supervision. Even youthful offenders could be subjected to a maximum sentence of 10 strokes.

Malaysian Law provides that the punishment of whipping shall not be inflicted unless a medical officer is present, and certifies that the offender is in a fit state of health to undergo such punishment. If during the execution of a sentence of whipping, a medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence the whipping shall be finally stopped.[66] Similar provisions have also been made for the imposition of corporal punishment for certain types of offences, under medical supervision, in Singaporean laws. According to a Director of Prisons, "The officer uses the whole of his body weight, and not just the strength of his arm. He holds the cane rigidly at arm's length and pivots on his feet to deliver the stroke. The skin at the point of contact is usually split open and after three strokes, the buttocks will be covered with blood."[67]

Similar provisions for imposing corporal punishment are found in South African Laws. Section 36 of the Prisons Act No. 8 of 1959 provides that corporal punishment shall not be inflicted before the medical officer has examined the prisoner and has certified that he is in a fit state of health to undergo such punishment (and that) the punishment shall be inflicted in the presence of a medical officer.[68] The provision of a medical officer to oversee punishment does not in any way make the penalty less than sheer torture, cruel and inhuman degrading treatment.

Apart from crimes involving violence, offences in respect of which corporal punishment can be imposed in Sri Lanka vary from theft of agricultural produce to offences such as acts of gross indecency and "unnatural offences". Corporal punishment by whipping has been stipulated in the Penal Code[69] and by special statutory enactments such as the Dangerous Knives Ordinance,[70] and the Corporal Punishment Ordinance.[71] The Prisons Ordinance[72] provides for whipping for certain breaches of prison discipline. This has long been prohibited as a method of enforcing discipline among prisoners held by the armed forces, whether at home or in occupied territory at times of military operations. Corporal punishment consisting of up to six strokes with a light cane or rattan is also a penalty that can be inflicted on children and young persons under section 29 of the Children and Young Persons Ordinance. This too has now, with greater knowledge of psychology and child behaviour, can be well compared to torture.

Certain features which made the infliction of corporal punishment by whipping particularly cruel and degrading as much as torture, and abhorrent, under the old criminal procedure were done away with, under the Administration of Justice Act in 1973. Section 315(2) of the old Criminal Procedure Code provided that in all cases, where adults were sentenced to whipping, with the exception of offences under Section 368 of the Penal Code which relate to theft of agricultural produce or livestock, the punishment shall be inflicted with

a "cat" or other implement as the Minister shall direct. The section also provided that the whipping of children and young persons shall be with a light cane or rattan on bare buttocks. The Children and Young Persons Ordinance provides that the latter sentence shall be implemented in the presence of the Court. There is here an affliction of human dignity and therefore degrading treatment since even the young are sensitive and can feel humiliation. Both these provisions were dropped by the Administration of Justice Law which replaced the old Criminal Procedure Code. The Administration of Justice Law provided that whenever a person over sixteen years of age is sentenced to whipping the sentence shall not exceed 24 strokes with a rattan.

When the present Criminal Procedure Code[73] was passed, although there were attempts to revive the abhorrent features found in regard to the infliction of corporal punishment, they have not been successful. Under existing law, therefore, corporal punishment up to 24, strokes with the rattan on adults and up to 6 strokes on children and young persons could be imposed for a number of offences under Sri Lankan law. Whenever corporal punishment by whipping is imposed, sections 294, 295, 296, 297 and 198 prescribe how it should be carried out. Similarly rules 59, 60, 253, 254, 255, 256 and 257 made under the Prison Ordinance set out the obligations of the prisons authorities in carrying out sentences of whipping.[74]

There have been instances when the Sri Lankan Courts had imposed corporal punishment on convicts. In 1980, the High Court Judge of Kandy after having convicted four men on a charge of rape and abduction of an 18 year old girl sentenced the accused to terms of imprisonment and six rattan strokes.[75] The High Court Judge of Kurunegala too sentenced six men in 1983 to a jail term and six lashes on each of the accused after convicting them of rape and abduction of a 19 year old girl.[76] The High Court Judge of Matara too sentenced a man convicted of rape of a woman aged 16 years. Three other accused who were convicted in the same case were sentenced to two

years imprisonment and six lashes in open court.[77] Although there was an attempt by the Civil Rights Movement to stop the execution of the sentence of whipping by appealing to the President of the country exercise his powers under Article 34 of the Constitution, it is reported that the President declined to intervene in the matter.[78] In 1985 the High Court Judge of Kurunegala again sentenced four men who were convicted of rape of a 17 year old girl to four years imprisonment and also to four lashes each.[79] Sentences of whipping have generally been imposed by Sri Lankan Courts on adults for offences of rape.

There have also been a few reports of Sri Lankans who had gone to the Middle East countries and other Islamic countries for employment where Islamic fundamentalism prevails. They have been subjected to corporal punishment and other cruel forms of penal treatment if convicted of committing offences. In January 1980, it is reported that a Sri Lankan girl and her Pakistani lover were sentenced to 50 lashes and deportation.[80] Early in June 1981, a Sri Lankan maid working in Abu Dhabi who was reported by her employers for fornication had been sentenced to receive 100 lashes by a religious court. Her Indian lover was sentenced to death by stoning.[81] Yet another Sri Lankan woman in the United Arab Emirates was sentenced to 50 lashes, 3 months imprisonment and deportation by a Sharia Court which also sentenced her Pakistani lover to death by stoning.[82]

Besides imposing corporal punishment as a judicial sanction, some of these countries have resorted to use, as a disciplinary step, corporal punishment and other forms of physical abuse and barbaric modes of punishment, violating the integrity of persons. General international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and major regional human rights codes do not address themselves explicitly to the issue of corporal punishment as a form of judicial sanction.

However, Rule 31 of the U.N. Standard Minimum Rules for the treatment of prisoners (SMR) provides that corporal punishment by placing in a dark cell and cruel, inhuman degrading punishments shall be completely prohibited as punishments for disciplinary offences.[83] Although SMR cannot be considered to be a legal document, and all its rules cannot be applied in all places and at all times, the peremptory and absolute language in which this rule is couched makes it evident that its primary objective is to achieve a conducive human prison environment. There cannot be any controversy that SMR regards corporal punishment as something cruel, inhuman and degrading[84] and rightly so. Similarly, the Human Rights Committee, the only organ established under the International Covenant on Civil and Political Rights to monitor compliance with the Covenant in its general comments on Article 7 which prohibits torture, cruel, inhuman and degrading punishment and treatment has taken the view that prohibition contemplated under Article 7 should extend to corporal punishment, including excessive chastisement even as an educational or disciplinary measure.[85] The Beijing rules provide that juveniles shall not be subject to corporal punishment.

The General Assembly of the UN at various stages of its history has shown its concern over the question of corporal punishment, by passing resolutions.[86] The imposition of corporal punishment on protected persons in time of an international armed conflict has also been prohibited by International Humanitarian Law such as the Geneva Convention. The Geneva Convention relative to the treatment of prisoners of war, under Article 87, prohibits corporal punishment of prisoners of war in the following terms: Collective punishments for individual acts, corporal punishment, imprisonment in premises without daylight and in general, any form of torture or cruelty remains forbidden. As this Article is listed under the heading "penal and disciplinary sanctions" it can be said that it is equally applicable to judicial proceedings and other proceedings relating to the maintenance of discipline among the prisoners.[87] Also Article 32 of the Fourth

Geneva Convention relative to the protection of civilian persons in time of war prohibits any measure of such a character which can cause physical suffering or extermination of protected persons.[88] The protection extends not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents. Corporal punishment falls into the category of heinous crimes which have been enumerated in the Article. The Additional Protocol 1 to the Geneva Convention which applies to a wider category of armed conflicts, by its Article 75, places a prohibition on corporal punishment in respect of all persons in the hands of a party to the conflict as defined by Article 1 of the Protocol.[89] Although in regard to non-international armed conflict, Article 3, common to all Geneva Conventions does not make explicit mention of corporal punishment in the phrase "outrages upon personal dignity in particular, humiliating and degrading treatment" used in it, yet it can be safely inferred that the prohibition on corporal punishment is encompassed by the Article itself.

Judicial corporal punishment has been adjudged to be a form of degrading treatment and punishment in the case of ***Tyrer v. U.K.***,[90] constituting a breach of Article 3 of the European Human Rights Convention. In this case, a schoolboy Anthony Tyrer who was convicted by a Juvenile Court in the Isle of Man of unlawful assault on another schoolboy was sentenced to three strokes of the birch. The sentence was carried out by a police officer in the presence of a doctor. The point at issue before the European Court was whether the infliction of corporal punishment amounted to degrading punishment within the connotation of the prohibition under Article 3 of the European Human Rights Convention. The Court had no hesitation in determining that the punishment constituted a violation of Article 3 of the Convention which prohibits torture, inhuman treatment and degrading punishment. The Court in this case considered the question whether a person may be

humiliated by the mere fact of a criminal conviction. The Court, while acknowledging that one of the effects of judicial punishment could amount to humiliation since a person is subjected to unwilling demands of the penal system, reasoned that Article 3 of the Convention requires more than just the humiliation caused by the conviction and there must be an additional suffering as a result of the imposition of the specific punishment. The Court further observed, in order for the punishment to amount to degrading treatment and so to fall within the prohibition of Article 3, the humiliation of debasement must attain a particular level and must in any event be other than, and more serious than, the usual element of humiliation.

The Supreme Court in Sri Lanka has not received many cases to decide which had come up by way of alleged infringement of fundamental rights applications owing to corporal punishment as judicial sanction. Decisions consequently on the subject are sparse. However, one of the striking examples of these cases is provided by that of ***Bandara v Wickremasinghe.***[91] In this case, the petitioner who was a minor and a student at a school, complained that he was assaulted during school hours by the Principal and Deputy Principal, Vice Principal and a teacher. It was alleged that his father had detected some persons having brought liquor and ganja (cannabis) to the school during a sports meet, which had displeased the school authorities, and that resulted in the alleged assault on the student. The Court in this case rejected the contention of the respondent that the alleged assault was a purely individual private act not involving the use of the coercive power of the state and held that the impugned acts of the respondents are connected with the performance of an official function and constitutes executive or administrative action. The Court also held that the discipline of a student is a matter within the purview of school teachers. Whenever they purport to maintain discipline, they act under the responsibility of office. If, in doing so, they exceed their power, they may be liable for infringement of fundamental rights by executive and administrative action. The respondents' acts it was contended were

violative of fundamental rights. The punishment imposed in this case cannot be considered as judicial sanction and at most it would amount to a disciplinary measure.

From the foregoing it can be argued that corporal punishment is not only expressly prohibited by international humanitarian law such as the Geneva Conventions, but also by the General International Human rights Law.

Although in the ***Tyrer's*** case the European Court on the assessment of the facts concluded that the sentence of corporal punishment inflicted on the applicant constituted a degrading treatment, there is nothing to prevent corporal punishment becoming torture depending on the facts and the severity of the punishment meted out. In its least injurious form as in the ***Tyrer's*** case, it could amount to degrading punishment but in its more injurious forms such as corporal punishment imposed by way of amputation of limbs, it could constitute torture. Again, if corporal punishment is inflicted in a violent manner causing grave suffering and serious injury to body or health, it would undoubtedly amount to a grave breach of the Third and Fourth Geneva Conventions.[92]

The decision of the Supreme Court of Zimbabwe in the case of ***Stephen Ncube and others v. The State***[93] comes to be important. The Supreme Court of Zimbabwe striking down as unconstitutional a sentence of whipping imposed on an adult offender held that the corporal punishment was by its very nature both inhuman and degrading. The Court had no hesitation in holding that corporal punishment was *per se* inhuman and degrading. The Court came to this conclusion drawing extensively on comparative constitutional authorities and the case law of the European Court of Human Rights and judicial organs of the world.

What Justice Gubbay observed in Stephen's case would be apposite to reflect upon here. "Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman and degrading decades ago may be revolting to the sensitivities which emerge as civilization advance."[94]

In Kenya corporal punishment, especially in schools, has been accepted without demur. Violence has been a regular experience. Permanent disfigurement, disabling, and even death have been tolerated as a matter of course. Of course Kenyan law restricts the use of school based corporal punishment but Education (School Discipline) Regulations authorise the punishment. According to the Human Rights Watch illegal and severe forms of corporal punishment remain widespread in Kenyan schools. The common method of corporal punishment meted out by teachers involved striking students with an uneven wooden stick. Some teachers flogged students with whips made of rubber. Slapping, kicking and pinching were also practiced. The Education Ministry has done little to enforce the provisions of the Education (School Discipline) Regulations which limit the manner of inflicting corporal punishment. Sri Lanka's record is not so bad but recent events evoke fear of inhuman corporal punishment spreading in schools.

As the New York Times, April 5, 1994 in page 176 reported, "Many in U.S. Back Singaporeans Plan to Flog Youth." This is a sequel to an American youth, 18 years old who was imprisoned for four months, and meted out a fine and six lashes because of an act of vandalism. In Singapore, Amnesty International reported 1,218 floggings in 1987-1988. Singaporeans accounted for 984 and foreigners for 234. Singapore society and judiciary accept flogging on

bare buttocks with a rattan cane by the martial arts experts. It is difficult to accept this practice as it can well be torture.

In many societies like that of Singapore the law which permits flogging violates international laws and permits unusually cruel and degrading punishment. Corporal punishment administered in Singapore and some other countries is not only legal but surprisingly a traumatic experience physically and mentally, that is tolerated. Corporal punishment plays a major part in children's family life. No international law or the European Convention of Human Rights cope sufficiently to ensure that children are protected from over authoritarian parents in homes. The Committee on the Rights of the Child in the U.K. strongly criticized the practice of corporal punishment among families domestically. Parents have to be warned that inhuman or degrading treatment of children in disciplining them is legally prohibited. But this is unlikely in many societies now.[95]

Singaporean law recognizes obviously as valid that the judicious application of corporal punishment is in the best interest of the child. In Bangladesh corporal punishment has persisted and it is accepted by society. Consequently, instances of violence by law enforcement officials against abandoned or vagrant children have been the cause of grave and serious concern. The Convention on the Rights of the Child has made an attempt to mitigate the occurrence of corporal punishment which is a form of torture and also reduces one to suffer degrading cruel and inhuman punishment and treatment. But there is more to be done as the brief review below indicates.[96]

The investigative inquiries to compile this study have confirmed that torture was and is pervasively practiced both by police, paramilitary and army forces. Captives have been brutally beaten, or otherwise tortured, till they collapsed. Quite a few cases of torture have not been reported owing to news being censored, especially under emergency rule. People taken to custody are, if not available, recorded as "missing" or "disappeared", euphemistically; really they were victims of fatal torture. Some of the tortured were not charged

with any crime but, as there was a conflict and emergency rule, arrests were at times made on mere suspicion of being involved with militant Tamil rebels in the armed conflict. Rape and ill treatment of arrested women suspects were also frequently noted. Sri Lanka has for nearly over two decades been notorious for torture, custodial rape and molestation and deaths of alleged suspects in custody.

The use of third degree methods by Sri Lankan police and armed forces had become ingrained in oft futile attempts at law enforcement and unrewarding interrogation of suspects. Nevertheless, clearly the practice of torture and terror during law enforcement violated a fundamental right recognized by the Sri Lankan Constitution and international instruments on human rights to which Sri Lanka is a party. The island's government has adopted the Commonwealth Declaration in Harare (Zimbabwe) in October 1991 reaffirming the basic guiding principles of the Commonwealth stressing the dedication to honour human rights.

Sri Lanka has witnessed some progressive judgments by court but otherwise there has been hardly any useful contribution to discourage practise of torture or cruelty. Monitoring bodies set up in the island to deal with abuses of the police or the army had proved ineffective. The National Human Rights Commission had been of little help to restrain the commission of torture almost with impunity by officials. Allegedly, the officers of the National Human Rights Commission have been violating principles of international and national law in handling torture cases, as perpetrators are allowed to escape criminal punishment by disbursing small amounts of money as compensation. Moreover, victims of torture are coaxed or even coerced to accept such ineffective paltry settlements. This practice mocks the rationale underlying the Torture Act 22 of 1994 which makes torture a crime punishable by a mandatory prison sentence of seven years and a fine. Such settlements also impede victims pursuing criminal cases.

The National Human rights Commission takes a soft attitude towards police officers who have violated human rights. There lurks a reasonable suspicion that close links prevail between officers of the Commission and offenders, the police. Additionally, proactive investigation is not undertaken by the National Human Rights Commission. Hence complaints get belittled, violating international norms and pronouncements of the Supreme Court when evidence of physical harm do not attend acts of torture. It would be legitimate and correct to conclude that, in Sri Lanka, the Human Rights Commission, in seven years, has failed in setting standards in regard to physical life and liberty rights if one compares it with the exposition that had accompanied the ***Basu case*** in India.

The judiciary is the other institution that can ensure that the police and security personnel act only according to the law, and respect abstention from torture, as it is in addition a constitutionally entrenched human right to be free from torture, with no room for derogation even under emergency rule. Supreme Court Judges, who alone in terms of Constitutional Article 126 can adjudicate when violation of the human right to be free from torture is alleged, have helped to censure torturers and impose responsibility to pay compensation to victims by errant police and security officers. Yet, taken as a remedy, Sri Lanka's Supreme Court has endeavoured to intervene in violations of human rights lodged before the judiciary. This became a popular type of litigation. A number of cases have been filed and the respondents, mostly the police have been found guilty of violating citizens' rights and ordered to pay compensation as earlier observed. There are difficulties however in gaining this legal redress such as the limited time within which cases need to be filed. The security or armed forces cannot be easily brought to trial nevertheless, owing to the secrecy that shrouds their misdeeds, and at one time even an indemnity was allowed to them. The right to freedom from torture is a universally accepted tenet. The police and other security forces should be forbidden from using torture absolutely and heavy penalties on offenders inflicted. Presently, People's

Organizations and international agencies have canvassed the right of citizens to be safeguarded from torture or cruel, degrading inhuman treatment and donors are not pleased to assist a State that is accused of practicing or tolerating torture.

Torture is often committed with the acquiescence of a public officer. Defendants in torture trials invariably are State employees. The substance of most of the international instruments and agreements is reflected largely in national laws The Covenant against Torture requires domestic courts to be authorized to adjudicate internationally whenever necessary in torture cases as it is a universally recognized crime. [97] Furthermore, since no State legally allows torture it is clear that officials cannot plead "State needs" and escape liability after committing or abetting perpetration of torture. Many countries have built into law that victims of torture should gain redress or compensation. Sri Lanka honours this obligation except that guilty officials have not been penalized and sometimes compensation has been borne by the State. Officials discovered to be guilty of causing torture need to receive condign castigation and be removed from service if necessary. Civil action to recover redress and compensation in torture cases also could serve as an additional deterrent to torture. On the issue of a court of one country punishing one who committed torture in another land one can note advantages and disadvantages.

The assertion of jurisdiction over an individual of another country for committing torture can undermine the authority of domestic courts or affect functioning of truth and reconciliation commissions that address same transgressions. On the other hand, trial of one in another land for the guilt of practicing torture reinforces the contention that torture is universally intolerable. It is also argued that trial in another court for an offence committed elsewhere undermine multilateral anti torture regimes like that envisaged by the European Convention on Torture. There will grow a reluctance to persuade a State to venture on inspection visits since consequential evidence of

torture may be used to sustain cases in courts of foreign countries. This procedure by placing emphasis on oral argument and written submissions, need reappraisal in the light of the very findings made by court in respect of factual matters; The view posited is that the present procedure has not been always conducive to an effective dispensation of justice in all circumstances as exemplified by decided authorities. Pleadings of parties in fundamental rights applications often consist of a brief outline of factual matters on which sometimes oral evidence may be necessary. Written statements and submissions are normally critical of each party's case and stance, and are confined to facts. Therefore arguments based on oral testimony in regard to factual matters or any issues of law arising out of the application are bound to influence materially the judgment of the court. The Court normally allows parties the time they need at the hearing to develop their argument on questions of law and facts, but only if it is based on oral evidence of witnesses would it be conducive to a fairer attainment of justice. This is because there have been marginal cases where the court has found it difficult to make a determination in regard to factual matters particularly whether torture really had taken place in a given situation.

A pragmatic approach of this nature could be considered as a step towards promotion and protection of fundamental rights guaranteed under Article 4 of the Constitution by the judiciary as an organ of government The Indian Supreme Court made a great advance on the issue of prison reforms and of arrest and custodial detention in ***Sunil Batra v. Delhi Administration***[98] and ***D.K. Basu v. State of West Bengal,***[99] almost trespassing on the domain of policy making, in the interests of the oppressed and weaker segment of society. ***Saman v. Leeladasa***[100] afforded an opportunity for the Court to develop humane jurisprudence in regard to torture and other ill treatment committed on a person in official custody in consonance with international norms, but it failed to do so in an effective and positive manner.

The stance taken by the Indian Supreme Court in a comparable situation is more worthy of emulation by the Court in Sri Lanka. The judges should exercise their power of constitutional interpretation in the interest of social change. For this purpose it should play a constructive rather than conservative role. In a democracy, judicial conservatism and passivism cannot be lightly prized. Therefore it is suggested that the reasoning adopted by Lord Stowell in the case of ***Loveden v. Loveden***[101] to which Lord Denning has referred in the case of ***Bater v. Bater,***[102] and to which judgment Justice Wanasundera had recourse in the case of ***Velmurugu v. A.G.***[103] could also be more profitably and more justifiably made use of in torture cases. The court should change their outlook and attitude particularly in cases of torture and allied ill treatment and should exhibit a realistic understanding than a narrow technical approach.

It is meet and just as the Supreme Court of Sri Lanka according to Article 126 of the Constitution is bound to safeguard the fundamental rights and liberties of people by granting speedy and efficacious remedy. The citizen's rights to the remedy should not be constricted by niceties in distinctions as regards the precise scope of the state officers and incidental liability of the state. Article 11 wherein the right to freedom from torture, cruel and inhuman degrading treatment is ensured expects the court to give it full play and to assure that its provisions enjoy total application. In observing procedure in conducting cases of infringement of the right to freedom from torture and allied prohibitions, to prevent ill treatment from measures the courts directions in the Irish case. Apart from regulations enjoining humane treatment there should be directives on interrogation prohibiting use of coercion. Medical examinations, maintenance of comprehensive records and immediate reporting of complaints were made compulsory. Satisfactory proof that directives were executed, diffused and enforced at all levels, and practically implemented and obeyed was required. Also after a report by a Special Commission complaints against army and police personnel were to be examined by

an external authority for investigative purposes. Disciplinary action has followed in many cases and in many, compensation was paid.

> Clearly the substance of a fundamental right lies in its enforceability against the organs of the state for, else, freedoms and rights remain meaningless and can be transgressed with impunity without incurring sanction. Judicial review and its procedure must imperatively guarantee the rights and freedoms spelt out in the Constitution. According to the aspirations of the Constitution a liberal procedure needs to be allied in terms of Article 126. None, because of public office, should abuse power or exceed authority at the cost of another's suffering. The constitutional provisions imply that no agency of the state or agents of the state shall deny to any within its jurisdiction equal protection of the law. Proper judicial procedure alone can guarantee justice to the aggrieved of denial of rights.

Therefore it would be necessary to have a fresh look at the rules of evidence governing admissibility of evidence in situations of this nature.

D. Euthanasia

Today most nations have accepted the right to health as a basic human right. It is also a social necessity and it is imperative on governments to cater to citizens' health.

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates the right to everyone to the enjoyment of the highest attainable standard of physical and mental health.[8] Similarly, Article 25 of the Universal Declaration of Human Rights recognizes the right of everyone to a standard of living adequate to maintain his health and well-being and also that of his family by providing such needs as food, clothing, housing and medical care.[105] To repeat a cliché, the right to health is a right from the cradle to the grave. The basic right to health is a peremptory norm of general

international law from which no derogation is permissible, whether by treaties or agreements between nations or by provisions in national constitutions or any legislation. The state is therefore duly required to take appropriate measures to preserve life. Although the right to life is not specifically recognized in the Sri Lankan Constitution, as it has been done in many other important major international and regional instruments and treaties, there has been recognition of this right by a process of judicial interpretation. Moreover, from 1936 onwards Sri Lankan ministers had provided free medical treatment to an extent to ensure health of citizens. Therefore any endeavour which violates or tends to violate the basic right to life would become likely to evoke Article 11 of the Constitution which guarantees freedom from torture, inhuman treatment and degrading punishment.

In the light of the recognition of this basic right to health, the question whether the deprivation of proper medical aid and attention in circumstances where a person is suffering from a serious illness is permissible needs some grave consideration. Obviously no such deprivation appears a matter that can be condoned.

In ***Hurtado v. Switzerland,***[106] it was held that degrading and inhuman treatment includes the situation of a sick patient being deprived of the care and attention that he required. To allow one to languish untended when sick or ill is really a sort of torture. It is tolerance of another's trauma. Similarly in the case of ***Tanko v. Finland,***[107] the Commission observed that "a lack of proper medical care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3 of the European Human Rights Convention which guarantees freedom from torture, inhuman treatment and degrading punishment."

In the light of this interpretative jurisprudence expounded on the right to health it would be appropriate to consider how the judiciary would approach the question of a failure of hospital authorities to administer treatment and care in the event of an industrial action, in the

form of a strike resorted to by members of the medical profession. This is all the more important in view that strikes in the Health sector in the island have become quite frequent so much so that at any given moment one or more allied sectors in the Health Service is on strike and patients are not attended upon. Industrial action resorted to by the health sector causes enormous hardship to the patients, especially those in the low income brackets who form the bulk of the population. They are virtually deprived of medical treatment and their Karma practically turns into trauma.

In this connection, the recent case of ***Somapala v. G.M.O.A. and others,***[108] still pending in the Court, would be significantly illustrative. In this case, the petitioner, his wife and children while going on a pilgrimage in a tractor met with an accident on 15th June 2003. The petitioner's wife and two of his children sustained injuries in the said accident. Thereafter the wife was dispatched to the hospital in Polonnaruwa for treatment in a passing vehicle. There she was kept in the intensive care unit without any medication and treatment for some time. Since the doctors were on strike on this day all the attempts made by the hospital staff to get the assistance of a consultant failed. Thereafter the wife was transferred to the bigger General Hospital in Kandy by the available staff at the Polonnaruwa hospital, on 16th May 2003 at midnight. On hearing that his wife had been transferred to Kandy hospital on 17th May 2003, the petitioner made a hasty visit to the Kandy hospital. At the Kandy hospital the petitioner learnt that his wife had been transferred back to Polonnaruwa hospital, as the Kandy hospital was unable to provide any medical attention to the wife as the doctors there too happened to be on strike. Thereupon the petitioner had again left on return for Polonnaruwa with the objective of seeing his wife at the Polonnaruwa hospital. While he was on his way to Polonnaruwa he learnt that his wife had passed away.

It was the position of the petitioner that if his wife was treated in time, her life could have been saved and that the deprivation of medical

assistance to which she was entitled had led to the fatal deterioration of her condition. The petitioner also claimed that his wife was entitled to receive free medical treatment at a government hospital, and the right to free medical assistance cannot be denied or overridden by the right of the medical profession to resort to industrial action in a free and democratic society. The government has provided this free medical care and it is one's right. Denial of it has caused mental and physical pain or torture indeed.

The petitioner also urged that the respondents by resorting to strike had violated not only his fundamental right relating to equality of treatment under Article 120 of the Constitution but also the fundamental right relating to freedom from torture, inhuman treatment and degrading punishment under Article 11 of the Constitution.

Although the threshold question of leave to pursue this case has been decided in favour of the petitioner, the matter is still sub judice. However, the approach that the judiciary would adopt in a case of this nature would have far reaching consequences on the question of the basic right to health by the people.

It is expected that the Sri Lankan judiciary would adopt a vibrant and robust attitude and an innovative approach to the whole question of the basic right to health having regard to the fundamental right relating to inhuman treatment and degrading punishment, in conformity with the jurisprudence handed down by international judicial fora. It is only by liberal and flexible interpretation of the fundamental right relating to freedom from torture, inhuman treatment and degrading punishment that the really active spirit of fundamental rights could be realized by citizens.

Life is considered sacrosanct and no person can be deprived of his life arbitrarily. The sanctity of life is recognized by the preeminent position accorded to the right to life in every major international human rights instrument and in provisions of national constitutions. As noted

earlier, although the right to life has not been recognized in specific terms in the Sri Lankan Constitution, it has been implicitly recognized through judicial interpretations[109]. Article 21 of the Indian Constitution however guarantees the right to life specifically in the following terms:

> "No person shall be deprived of his life or personal liberty except according to procedure established by law."[110]

The dimension of this Article has been expanded and widened by the process of judicial interpretation as evident in the observations made by Justice Bhagwati in the case of ***Mullin v The Administrator, Union Territory of Delhi and others***.

> "We think that the right to life includes the right to live with human dignity and all that goes with it, namely bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms freely moving about and mixing and mingling with fellow human beings. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to life and it would have to be in accordance with reasonable fair and just procedures established by law which stands the test of other fundamental rights."[111]

Therefore it is seen that life guaranteed under Article 21 of the Indian Constitution is so positive and as such subject to well organized limitations apart from the obligation of the State not to deprive a person of his life except in accordance with a valid law.

Similarly, Article 3 of the Universal Declaration of Human rights adopted by the General Assembly on 10th December 1948 provides : "everyone has a right to life liberty and security of person."[112] The International Covenant on Civil and Political Rights too, by its Article 6, provides for the right to life in the following terms: "every human being has the inherent right to life. This right shall be protected by law and no one shall be arbitrarily deprived of his life."[113] The European Convention for the Protection of Human Rights and fundamental freedoms also stipulates that everyone's right to life shall be protected by law. It prohibits torture and inhuman and degrading treatment and

punishment.[114] Likewise, the Fifth Amendment to the Constitution of the United States too provides that no person shall be deprived of life, liberty or property without due process of law.[115]

Medical practitioners, in taking the Hippocratic Oath, swear by Apollo, the physician, by Aesculapius, Hygeia and Panacea, and take as witnesses the gods and goddesses among others to preserve the purity of a doctor's life and art. Furthermore, according to the terms of the Declaration of Geneva, as amended at Sydney in 1968, every medical practitioner is required freely, and on honour, to undertake solemnly, when being admitted as a member of the medical profession, to consecrate the practitioner's life to serve humanity. Additionally it is essential that every doctor practices his profession faithfully, conscientiously and with dignity. Also the medical practitioner has to maintain by all means within one's power the noble traditions of the medical profession and a doctor should not permit considerations of religion, nationality, race, party politics or social status to intervene between and patient and his art. The doctor furthermore is obliged to maintain the maximum respect for human life from the time of conception. No threat should compel a medical practitioner to utilize medical knowledge contrary to the laws of humanity.

The medical profession is bound by the Declaration of Tokyo in 1975 which was specific on torture and other cruel, inhuman or degrading treatment or punishment as being prohibited under any condition in the art of healing. Thus medical officers have to abide by the right to freedom from torture or other forms of cruel, inhuman or degrading procedures in handling patients and illnesses. There is no other choice under any conditions. Medical officers by their own actions and professions agree to provide to a sick or ill person due treatment so as to keep one alive.

In view of the preeminent position attached to the right to life, and the concomitant duty cast on the health authorities to preserve human life, could a doctor terminate or withdraw medical treatment and

care which a patient was currently receiving, and when withdrawal of that treatment would have serious consequences for the patient, without violating the fundamental right to freedom from torture, inhuman and degrading treatment? Similarly, could a doctor, whose primary duty is to preserve life, put an end to it, without an infraction of the right to freedom from torture, and inhuman treatment, even in circumstances when it is considered life could no longer be preserved?

In other words, can the preeminent position, accorded to the right to life by either the international or the regional human rights regime be overridden by outweighing circumstances such as when it is considered that the treatment a person who suffers from a catastrophically afflicted illness or severe brain injury, is receiving, achieves no medical benefit, and his attempt to obtain it proves futile. It would be a denial of a necessity and would relegate one to a state of trauma, really torture.

As Sri Lankan legal authorities covering situations mentioned above are hardly any or sparse, it would be useful for the Sri Lankan judiciary to draw inspiration from the principles laid down in foreign jurisprudence. In ***D v. United Kingdom,***[116] the petitioner was in an advanced stage of AIDS and had been provided with accommodation and care by the UK charity. Yet he was ordered by the immigration authorities to be dispatched to St. Kitts. When the petitioner applied to the European Court contending that his removal would be in breach of Article 3 of the European Convention governing freedom from inhuman treatment and degrading punishment, it was held that the order of removal was tantamount to a violation of the said Article, as he would not receive adequate medical treatment and care, and he had no family to care for him in St. Kitts.

A contrary conclusion was reached in the case of ***BenSaid v. UK***[117] on the ground that the risk to the health of the petitioner was largely theoretical. Moreover the fact that it would be more difficult for him to obtain medical treatment in the receiving state of Algeria than in

the UK was not conclusive for the Court for the purposes of Article 3 which guarantees freedom from torture, inhuman treatment and degrading punishment.

Another judgment distinguishing ***D. v. UK***[118] was handed down by the Court of Appeal in ***K v. Secretary of State for the Home Department.***[119] In this case the petitioner who was a citizen of Uganda and was suffering from AIDS sought permission to apply for a judicial review of the Secretary of State's refusal to grant him asylum. The Court held that it would not constitute inhuman treatment or degrading punishment to send the petitioner back to Uganda, on the ground that he might not be able to afford all the treatment he may require in the U.K. It was considered that in his interest the patient should return to his homeland. It is clear from this decision that the Court will not enter into a detailed comparative study of health facilities available in various states, when assessing whether there will be a violation of freedom from torture, inhuman treatment and degrading punishment, guaranteed by Article 3 of the European Convention.

It would be relevant in this connection to examine what attitude the Court would take in circumstances when the continued treatment is considered to be futile or non productive. Although the Sri Lankan Judiciary has not had an opportunity of determining in the exercise of fundamental rights jurisdiction, a relevant matter affecting fundamental freedom from inhuman or degrading treatment. The topic has been subject to intense and extensive moral and legal scrutiny and analysis in a number of cases that have come before foreign judicial bodies. Although it is difficult to appreciate the distinctions and reasons underlying various cases, the Sri Lankan judiciary perhaps is likely to be influenced by these decisions whenever it is called upon to pronounce on the lawfulness of terminating the treatment given to a patient in circumstances when it is proved futile and not useful in the best interests of the patient. Generally faced with a novel situation, the

Sri Lankan judiciary looks up to judicial handling in developed states mostly.

The concept of medical futility could be applied as a continuum across the whole range from the neonatal to the terminally ill. Although disability due to brain damage may be common to both infancy and adulthood, the non treatment of associated lethal diseases in the severely brain damaged has been accepted relatively easily in the case of children, while the legal attitude to the management of a brain damaged adult has been slow to evolve in English Law.[120] The basis for the founding of a concept of medical futility is not new. More than a quarter of a century ago it was said:

> "The whole resources of an advanced medical service are currently deployed in the pursuit of the preservation of life. It is becoming obvious that the costs of this policy are becoming insupportable. We must face an inescapable duty to let some patients die."[121]

As we note in English Law, the question of futility of medical treatment has come up in a number of cases concerning adults who have been in persisting vegetative states as a result of severe brain damage sustained in the course of an accident The first and most important case in which this question was considered in the UK was ***Airdale NHS Trust v. Bland.***[122] Bland was crushed in a football stadium in April 1989 and sustained severe anoxic brain damage and as a result he continually relapsed into a persistent vegetative state. There was no improvement in his condition even by September 1992, and the hospital sought a declaration to the effect that they might lawfully discontinue all the life supporting treatment and medical measures such as ventilation, nutrition and hydration by artificial means.

The Court of Appeal by its exceptionally well considered decisions declared :

> "This is not an area in which any difference can be allowed to exist between what is legal and what is morally right. The decision of the Court should be

> able to carry conviction with the ordinary person as being not merely on legal precedent but also upon acceptable ethical values. In my view the choice the law makes must reassure people that the Courts do have full respect for life, but that they do not pursue the principle to the point at which it has become almost empty of any real content and when it involves the sacrifice of other important values such as human dignity and freedom of choice, I think that such reassurance can be provided by a decision properly explained, to allow Anthony Bland to die."[123]

The House of Lords in the same case held that the duty of a doctor is to treat a patient as long as it is in his best interests to have the treatment. If however, it is no longer in his best interests to have the treatment the medical officer is not bound to continue it. Lord Goff of Chievely observed:

> "If the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interest, it must follow that the treatment may, and indeed ultimately should be discontinued where it is no longer in his best interests to provide it."[124]

In the same case Lord Browne Wilkinson observed, "Unless the doctor has reached the affirmative conclusion that it is in the patient's best interest to continue the invasive care, such care must cease."[125] Similarly in ***NHS Trust A v. M,*** a hospital trust sought a declaration that it was entitled to discontinue the administration of artificial hydration and nutrition to M, a patient in a persistent vegetative state, after having suffered anoxic brain damage. It was held by the Family Division that the continuation of treatment was no longer in the best interests of the patient and action to discontinue would not constitute an intentional deprivation of life, and discontinuance of the life support machine and treatment was not in breach of Article 3 which guarantees freedom from torture, inhuman treatment and degrading punishment under the European Convention. The Article will be inapplicable where a patient is insensate, unaware of the treatment and unaware of its withdrawal.

The principle emerging from these cases is that there was no absolute obligation cast on the State to treat a patient if that treatment

proves to be in vain or futile. Therefore it is evident from those authorities that when a patient has been in a severe persistent vegetative state and insensate, discontinuance of life support machine and other treatment would not constitute inhuman treatment, and withdrawal of such treatment cannot be described either as torture or as punishment. This topic which belongs to the domain of euthanasia or mercy killing has not specifically come up for decision in India or Sri Lanka. Perhaps it would not be long before an application would come up for determination on the specific issue of euthanasia or mercy killings and its lawfulness. Euthanasia or mercy killing is technically murder. Yet, in those rare cases in which charges have been made, the Courts have either been reluctant to convict or to impose the full rigours of the law on the convicts, and where the Courts have convicted persons involved in mercy killing, they have passed relatively light sentences on them.

Euthanasia is one of the topics which has been subjected to intensive legal and moral analysis all over the world. To permit or not to permit still remains a matter to be determined by India as well as by Sri Lanka. Man by basic instinct is endowed with the desire for self-preservation as every human being inherently dreads death. The case for expansion and development of human rights relating to the right to life and freedom from torture and inhuman treatment and degrading punishment is seen in the field of euthanasia. As far as the Indian Constitution is concerned there has been significant judicial activism on the scope of the right to life under Article 21 of the constitution.[126] The question arises as to the nature of existence as it is contemplated by the very notion of the right to life under Article 21. Is mere existence even as a vegetable sufficient? Is the right to life mere existence? Does the right to life encompass within its dimensions the right to live a decent life?

The chief argument against the recognition of euthanasia or mercy killing on the ground of medical futility is that there is always the

possibility of undue advantage being taken of such a provision. The futility of treatment given to a patient could also be confused with the issue of rationing of available resources to treat patients. It also presents the doctors the freedom to select their patients for mercy killing according to their own value judgment. It can then also conflict with the patient autonomy, and more dangerously, whim and carelessness can account for decisions. This danger needs to be averted. Moreover it would be difficult to identify a satisfactory definition of the persistent vegetative state for the purpose of mercy killing on the ground of futility of treatment. Persistent vegetative state also envisages a potential for recovery and justification of mercy killing depends on the certainty of definition and diagnosis.

These issues are bound to weigh with the Courts whenever they are called upon to pronounce upon the lawfulness of an act committed in the form of mercy killing. The decision to treat or not to treat on the ground of medical futility is one for the clinical judgment of responsible medical practitioners, and doctors vary in their intellectual abilities and moral application. It is important for the Court to guard against pitfalls whenever it is involved in adjudicating an issue relating to freedom from torture, inhuman treatment and degrading punishment arising out of an act of mercy killing. Euthanasia has been so designated as exception to the acts torture or degrading treatment in a country like the United States. Torture can, given the ingenuity of human beings achieve diverse forms in practice. In the United States of America as a form of abortion there developed a heinous practice. Those foetuses who survive abortion attempts were killed when they were born. If this is not torture what else could it be? The point being established is that killing of born alive infants in various ways, denying them a right to life is yet another form of torture, and deserves condemnation and prohibition.

According to statements gathered from the United States, the accounts narrated by eyewitnesses indicate that "live birth abortions"

are performed on healthy infants who survive 23 weeks of pregnancy and even beyond. This is done if such infants suffer from non fatal deformities. Premature infants are simply allowed to die, sometimes by denial of either warmth or nutrition, or both. Living infants were found in a soiled utility closet or naked on the edge of a sink. Infants also were discovered horribly wrapped in a disposal towel and thrown in the trash. Later the infant was noticed falling out of the towel and onto the floor.

Every infant born alive, including infants who survive abortion procedures should be considered a person. They should not be allowed to die or be killed following botched abortions. Today through sonograms and other technological devices one can clearly discern that unborn children as belonging to the human family. They reflect the human image and are considered humans. Abortion is generally executed in the second or third trimester when a foetus is partially delivered before being killed, usually by puncturing its skull, called also a partial birth abortion. It literally means that partly born babies will die at the point of seven inch scissors. This is inhuman and degrading, and definitely torture of one who is helpless. Everyone born alive, inclusive of those who survived attempts at abortion, or accidents suffered owing to an abortion procedure that fails and cannot be killed or deliberately left to die, as it will then become torture and murder.

Present day scientific findings make it possible through sonograms, and other technological devices and measures, to establish that unborn children are members of the human family. A person, human being, a child or individual would include every member of humanity who is delivered alive *at any stage* of development. Born alive denotes either complete expulsion or extraction from a mother human being of one at any stage of development, who after such expulsion or extraction breathes, bears a beating heart, has pulsation of the umbilical cord or definite movement of voluntary muscles whether the umbilical cord is cut or not, and irrespective of whether

expulsion or extraction is a result of natural or induced labour, caesarean or induced abortion. Such beings if left to die owing to neglect or exposure and starvation or are put to death through deliberate means do suffer torture. The right to life is denied and it is beyond doubt that torture, degrading treatment and inhuman cruelty have been perpetrated. It is not euthanasia and the judge has to so decide as it is expected in the law of the United States, whether torture and murder occurred.

The right to health and life has to be understood in a broader way so as even to include the right to life of offspring of botched abortions. This issue has not been judicially canvassed in Sri Lanka but the example of the United States should be informative and guiding when necessary to judges or doctors equally.

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