Chapter - IX

Conclusion

Sri Lanka enumerated the fundamental human rights to which the people were legally entitled to in an autocthonous constitution enacted in 1972. But the means by which the entitled rights could be claimed if any transgressions or infringement, occur were not prescribed or defined. Only by another new constitution enacted in 1978 were the fundamental rights delineated, coupled with provisions to deal with infringements whenever committed specifically outlined. Since then the right to freedom from torture, inhuman or degrading punishment was provided as a non derogable fundamental right and enshrined in the Constitution, and since then violations have become a subject of litigation and adjudication in the highest court of Sri Lanka. Both fundamental rights, as well as how to deal with infringements of them, are constitutionally enshrined in articles.

The present research dissertation deals with torture in a near exhaustive account, and does so in an incisive and critical manner. The material and content undertaken for definition and analysis have been arranged in a rational order so that information and understanding could be provided. Where deemed necessary appropriate cases tested before the judiciary are cited.

Torture, the incidence of it, some insight into methods of torture and/or degrading inhuman treatment have been focused upon. The ingenuity of the law and order enforcement authorities to be away from the police or the armed services gain recourse to practise torture, offers a frightening picture indeed when one examines the methods, and the manner of torture employed in handling alleged offences against the law, and often innocent people are in custody for interrogation. The armed forces, paramilitary personnel, the special task force were all involved in committing torture because of the peculiar situation that prevailed in Sri Lanka, especially with anti

government uprisings and conflict, and in the name of maintaining law and order.

There were two uprisings of Sinhalese youths in 1971 and 1986-89 respectively which, on both occasions, offered a formidable challenge to the government. From the late 1970s, and even earlier, occasional violence was experienced from the Tamil youth in the north and east part of the island's population and, worse still, there had been a protracted ethnic conflict plaguing the country from the eighties. An uneasy peace now prevails but a stable settlement is yet due. Additionally, anti Tamil riots, the worst being in 1983, challenged the state of law and order and created a mayhem in Sri Lanka. Consequently, owing to these disturbances caused to peace, the police force had to be increased, the armed services had to be enhanced and better armed and trained and new units like the Special Task Forces and commandos created overnight. Naturally, training and education of, and the quality of the newly inducted defence and armed forces, police, paramilitary and other auxiliaries had in the process, suffered in efficiency and above all in behaviour. Their flagrant violations of discipline in turn deteriorated, and torture appeared to be a ready and easy way of discovering the guilt of criminals and of unraveling culpability and offences. Torture replaced intelligent detection of crime and of offenders or criminals.

Nevertheless, torture and degrading inhuman treatment and cruelty nevertheless however never ever became a surer or foolproof way of grappling with crime or culpability. Easy resort to torture in order to obtain confessions rather than using intelligence to discover the truth in regard to the offences committed accounted for worsening abuse in employing more and more torture and cruelty in dealing with alleged accused or suspects. No wonder that cases against violation of the right to freedom from torture grew substantially, and proliferated, and offences of torture, degrading and inhuman cruel punishment during interrogations of suspects abysmally multiplied in incidence.

Sri Lanka's commitment to ensure that there would be freedom from torture or cruel, inhuman degrading treatment arose not merely from the entrenched provisions in the Constitution of 1978. The island also subscribed to diverse international Conventions and international Treaties that eschewed and outlawed the resort to use torture. The dedication to rid the land of torture and inhuman, cruel treatment thereby got reinforced. Moreover, as discussed in this account, by Conventions and Treaties, Sri Lanka pledged also to treat torture as a crime even if it had been committed by a non citizen and to consider and treat as criminals even strangers to the land who were wanted as allegedly being guilty of torture elsewhere.

A pertinent fact related to torture is that most of those victims painfully affected by it sought relief and redress on the grounds of violation of human rights rather than as victims of horrible traumas perpetrated illegally by state security personnel. The infliction of torture was to be more reckoned to be an infringement of a right than as an inherent crime against humanity and the law. According to the Constitution not only has the right to freedom from torture been so declared, the manner of moving court on account of transgressions too has been adumbrated in Article 126. A person has to obtain leave of appeal to lodge a case in the highest court of the island, the Supreme Court of the country, that alone could try accusations of torture and subjection of one to inhuman, cruel and degrading treatment contrary to guaranteed rights to the people.

This measure is certainly for good governance and indeed laudable. Nevertheless, as already demonstrated, for one to reach the highest court located solely in the island's metropolis, entails an expenditure and effort which is at times forbiddingly onerous. To seek acquaintance with remarkably competent members of the legal fraternity to appear in cases is not easy to the average citizen, and can be a formidable task. Moreover, the court has to be moved within thirty days of the commission of an offence of a violation of a human right..

This constraint on the time for suing has proved to be an impediment to would be suitors particularly from areas remote or distant from the metropolitan venue of the highest court as we have already noticed. Although the highest court adjudicates in cases of torture, there is no provision for appeal. No doubt, the buck has to stop somewhere. But can infallibility be presumed however eminent a body is, and should not the maximum steps be taken to mete out justice on commission of a gruesome crime as torture ? Even if it may entail to an international judicial forum, like an Asian court for those of the South Asian Association of Regional Countries, it would be desirable.

In the case of anti-torture measures adopted by the Sri Lankan Government it would be an addition to such prohibitory legal steps. By Sri Lanka's declaration of freedom from torture as a non-derogable, entrenched right, and then contributing to International Conventions and Treaties that disallow torture, the government provided in the Constitution also for an Ombudsman who can receive, inter-alia complaints against torture, and violations of human rights, examine them and arrive at judicious decisions. Yet, the Ombudsman has, unfortunately in practice proved to be ineffectual in action. After examining complaints he makes determinations to rectify wrongs and compensate for iniquities, but they are only recommendatory and not mandatory. Officers who are found derelict can ignore the Ombudsman's decisions and recommendations with impunity. The contribution of the Ombudsman to deter practice of torture has been more often ineffectual than it could have been owing to lack of "teeth".

Similarly, after much deliberation and study, a Human Rights Organization or Commission with a Director and a Board and other auxiliary staff was set up. Assistance in the form of legally knowledgeable and other helpful ancillary staff was provided. Complaints were received, inquiries and hearings were conducted into violations of rights including a few cases of the commission of torture. Despite the elaborate organization and its reach even unto outstation

areas from the metropolis this machinery is not spoken of in satisfactory terms by the victims of violation of rights, inclusive of the right to be free from torture because of its weak operations. Again, as a deterrent to torture, the Human Rights Commission too has not been adequately effective. So the highest court alone offers a reliable remedy, and whatever the cost and endeavour be, it has to be solicited.

Clearly the anti torture nature of measures in the society in Sri Lanka is not so much useful a protection against the commission of the crime and its incidence in the island. The country furthermore has been governed under emergency rule owing to troubles for a fair length of time. Although the right to freedom from torture is non derogable the creation of draconian laws such as the Prevention of Terrorism Act (PTA), and laws allowing detention for long before inquiry, and the failure to maintain strict discipline among the police and other armed security forces have accounted for the prevalence of torture, degrading, inhuman and cruel treatment often being undetected or rather difficult or impossible to track. Detention of a person taken into custody for longer periods than twenty four hours without production of the person before a judicial officer coupled with callous unsupervised attitudes among officers have provided ample opportunities to practice torture or cruel and degrading inhuman treatment on victims. Sri Lanka has often come in for adverse comment by bodies vigilant about the observance of human rights and concerned about preventing commission of torture such as Amnesty International and Asia Human Rights Watch.

Furthermore, owing to stress and strain occasioned by the violent ethnic conflict and youth uprisings, the police and armed forces have been hastily expanded recruiting sub-quality officers and using inadequately or poorly trained personnel. Education of these hurriedly drafted personnel meant to maintain law and order in society proved to be severely wanting in quality and bereft of instruction relating to laws,

correct procedure and relevant propriety and above all almost ignorant wholly of human rights and their legal significance. Poorly trained personnel unaware of proper due processes and lacking the needed intelligence to investigate or interrogate allegations resorted to misuse of force and employed torture to elicit information through terror and intimidation, backed by a free recourse to unbridled cruelty. No doubt censorship too stifled news about torture taking place. Additionally in an ethnic conflict the majority showed neither compunction or circumspection in exercising torture in order to investigate allegations.

Of course, nonetheless, the legal attitude to use of torture remains one of unqualified intolerance of the practice of it or perpetration of cruel, inhuman, degrading treatment. While judgments and accompanying observations naturally vary with the thinking and outlook of the judges of the Supreme Court there often have been an encouraging attitude of unqualified critical condemnation of the utilization of torture. Judgments have, at times, referred to the special position that the right to freedom from torture occupies, its non derogable nature, and deplored the resort to the use of torture and inhuman, cruel and degrading treatment and emphasized that Sri Lanka is bound to abjure and avoid the despicable practice.

Yet, at the same time surprisingly there were some rare occasions when encouragement was unabashedly afforded to the use of torture. On one occasion, a police officer found guilty of torture was promoted to a senior grade. There also were occasions that compensation which had to be paid to victims by the torturers instead were paid out of government or public departmental funds. Now, however, judges sometimes make it clear in the verdict that the guilty party, police or army officer, should bear the cost of compensation. In any case it is not so evident that those guilty of committing torture have suffered loss of promotional prospects or their official positions. Such severe deterrents will be more salutary and positively serve as definite

discouragement to the use of torture by officials in the police or armed services.

It was necessary to have included in this study a concise review or summary account of the laws of war and how torture should be treated in such a context because a protracted civil conflict or war had raged in Sri Lanka since the eighties. Now there prevails an uneasy truce. Unfortunately, both parties, the rebel militants and the governmental forces seem to have not paid attention to decisions reached in the Geneva Conventions and the Hague Conventions governing conduct in war in dealing with "prisoners" or "captives" during the conflict. Both parties often took the easy way out and killed such "captives" or "prisoners" using the terms "missing" or "disappeared" to account for their absence. The rebel militants engaged in guerilla warfare and on the run would have found it cumbersome and difficult to incarcerate, guard and maintain captives. The government forces too would not have found it easy to capture and tend prisoners and arraign them for trial. Worse, the rebel militants swallowed cyanide capsules and committed suicide at times when arrested. But a few prisoners were exchanged by both sides on a few occasions using the good offices of the International Committee of the Red Cross as intermediaries. Some exchanges were of the dead. It is however boldly hazarded as a plausible guess that torture of prisoners had taken place irrespective of the rules of war as one can garner from the little evidence available. Conflict proved to be congenial to commit torture with impunity and lent ample opportunity and ease to commit torture or cruel inhuman treatment because places of confining alleged persons were secret and hidden.

An interesting but baffling question related to the crimes of torture and cruel, inhuman and degrading treatment had arisen out of this research scrutiny. It is the question of how and why judges arrive at the amount of compensation that is awarded to victims of torture or cruel, inhuman and degrading treatment. It is not clear to citizens how

the sum of compensation awarded is calculated or computed. One wonders what are the criteria or norms on which compensation to be awarded is worked out and pronounced. A loss of limb under torture can incapacitate one for life but what would be commensurate to what he has consequently suffered. In another case of sexual torture the loss of virginity and worse, the social shame and humiliation and ostracism in a community needs to be compensated for, but how could all this be reckoned in arithmetical awards of compensation. Yet there may be another instance of a respected person being taken into custody and tortured. The very incarceration in itself of one honoured in society is torture to such a person, as he has to suffer so much humiliation and shame. Then what would be the condign compensation?

To leave one who had suffered torture or degrading treatment without anything, although one is innocent and without redress, is wrong and the sufferer needs to be compensated. But it is perplexing, if not baffling and bewildering, to calculate in such cases suitable or condign recompense. As one knows from Nathaniel Hawthorne's Scarlet Letter, it is no easy task to punish or reward, and there is no terminal cure for degrading treatment. Perhaps judges may gain some idea of compensating fairly from examining institutions like Insurance Companies and other similar bodies and how they compute compensation to suit any suffering that was borne. Nevertheless, even then mental agony and humiliation cannot be appropriately compensated. However, the compensation payable must at least be sufficiently painfully burdensome to the torturer and not to any other. The torturer should be made to realize that torture should not be resorted to under any circumstances, and torture never pays. There is no doubt a need for some uniformity and rationale to underline decisions governing the award of compensation and not mere subjectivity or arbitrariness. This would be a `must' in relation to punishment for inflicting torture.

Flayed bodies tethered to poles, and the tortuous positions in which victims are tied, are not uncommon among the clandestine and closed habitations of the police or security forces. The tortured often remain victims of persisting incurable trauma and so do their immediate family members too. In the world, 132 United Nations' member states have up to 1987 ratified the Convention Against Torture but this leaves out about 62 countries which have still to agree that violation of the right to be free of torture is definitely ensured. Sri Lanka has signed the Convention but apparently in practice pays only a formal service to rid the island of torture. Sri Lanka signed the Convention seventeen years after it was formulated, but it may take more years to transfer intention into serious action and actuality. It is incongruous that Sri Lanka being democratic seems still to tolerate, nay even foster, at times, the use of torture which undermines democracy itself, and good governance. The island's government is somewhat responsible for not resisting atrocities. Confessions and information are forced out with violence. But this conduct is to no avail because victims plead in court more often than not that the confessions were extracted under force. They retract in court what was painfully forced out under torture and cruel, inhuman and degrading treatment.

Force and torture appear easier methods than intelligent inquiry to extract a confession, but not a sincere one. The forced confession often is entirely unreliable because it is not done to seek the truth, but to record `success' at solving crime. Moreover, police and other security officers force out confessions through torture as this helps them to obtain promotions. No surprise, that officers who torture use new and reprehensible measures such as plastic bags earlier filled with diesel or faeces and tied over the head of victims, throttling, constant electric shocks, submersion from time to time into water, allowing dogs to snap, inserting objects into the rectum or vagina and similar painful and revolting practices. Muscles of victims get impaired, suffer haemorrhage and shock ; the tortured suffer post traumatic stress and other cruel inflictions that cause insufferable misery to victims.

Physical and mental damage occur. Fortunately in recent times judgments in torture cases and publicity in the media have been salutary in reducing somewhat the use of torture. But more public interest in condemning torture will be helpful to better police and other service officials' conduct. Nonetheless today Sri Lanka is somewhat notorious for use of torture.

The practice of torture also was facilitated by the abuse of the Prevention of Terrorism Act. Some of the worst acts of torture were perpetrated by the Special Task Forces of the police. On 18 December 2002 the United Nations General Assembly created a new instrument designed to prevent torture, the Optional Protocol to the Convention Against Torture. This Protocol can permit independent international experts to regularly visit places of detention in states that ratify the Protocol. They can examine conditions of detention and the treatment of those who are confined and recommend improvements. A national body for monitoring detention could also be provided. This new provision will positively assist the endeavour to eradicate torture. It is a means to use an international mechanism to avert incidence of torture than to react later to the abuse of torture in society. At present, the War Special Rapporteur on Torture, the Committee against Torture and Human Rights Committee can recommend the means of preventing torture in states but cannot regularly visit countries. Such visits have a special impact because prison conditions can be examined and bettered and prisoners or detainees can have chances to lodge independent complaints and also ensure cautious inspection procedures. Sri Lanka certainly should sign up and support the UN's campaign against torture through this mechanism. It is imperative that Sri Lanka grows to be pro-active on preventing the use of torture.

Recently, Sri Lanka submitted to the United Nations Human Rights Committee her fourth and fifth reports on implementing provisions in the International Covenant on Civil and Political Rights (SCCPR) during the period 1991 to 2002. This is Sri Lanka's official

submission to the UN on the human rights position in the country. It has glossed over the prevalence of torture by cleverly diverting attention only to emphasizing the legal provisions for combating the crime of torture instead. Reference is made to only "10 (ten) individuals .... convicted for transgressing the CAT (Convention Against Terrorism) Act". This blurs the true state that torture is almost routine in Sri Lanka's police stations, army camps, detention centres and prisons. The courts have strongly and in no uncertain terms condemned the police and military for using torture on detainees to force or extract confessions. But the UN is unfortunately not officially made aware of these facts.

The paucity of convictions underlines officials ignoring the common occurrence of torture despite the preventive measures such as the Prosecution of Torture Perpetrators (PTP) Unit in the Attorney General's Office, the circular by the Inspector General of Police to officers to monitor incidence of torture in police stations, "new" provisions under emergency regulations empowering magistrates to visit and monitor detention centres, and "so called" human rights education to members of armed forces, prisons and police. What is flaunted by the government in its report to the UN is more a façade and farce than real fact. This conclusion is unavoidable considering the evidence of torture often concealed in Sri Lanka, and censorship, quite strictly, which often prevents the release of information, especially in regard to torture by armed forces or the police.

Euthanasia vis a vis the right to life, and of babies born after "botched" abortions have been helpful to make one look at the right to life more meaningfully. They reflect light on the viciousness of torture and degrading and inhuman treatment.

Torture, cruel and degrading punishment of any human being cannot be becoming of any civilized society. Whilst Sri Lanka has made certain advances in proscribing and making freedom from torture, degrading and inhuman treatment a matter of serious concern,

much more, as the research shows, needs to be done. The judges and the government have to be much more sensitive and insightful when dealing with torture or degrading treatment.

Corporal punishment, be it judiciary imposed, or in the school by teachers, needs to be eliminated as a form of penalty. Even in homes excessive or severe punishment of children or domestic employees would amount to torture and should be dealt with severely, judicially and legally.

In addition to exploring the regular and usual matters relating to torture, cruel and inhuman treatment, this research study has uncovered fresh issues which have, in recent times, provoked questions on what could be torture and inhuman, cruel, degrading treatment. Good governance, civilized society and humane living cannot co-exist with torture, or degradation in punishment or treatment. Nor can cruelty or inhuman punishment any more be borne. It is suggested that the truth and credibility of evidence given in open court should be the criteria governing admissibility of statements made to the police in these circumstances. It is desirable that the court should make bold to exclude strictly technically admissible evidence on the ground that it might cause substantial and manifest injustice that it might cause to a victim.

An unenlightened judicial system is bound to pose a grave threat to the peace, security and stability of a country, when people are confronted with utterly helpless situations, and attended with a high degree of despair. When the law enforcement agencies such as the police and armed forces become the cause of intense fear and trauma, effective and substantive procedural changes to the existing laws would be imperative to sustain the faith in the law.

The review of judicial handling of a few cases concerning the right to be free of torture, cruel, inhuman or degrading treatment demonstrate that the Sri Lankan judiciary has to take a more

constructive attitude towards adjudication of such cases. Otherwise a constitutionally entrenched fundamental right will be rendered meaningless in practice. A more pro-active and circumspect study of cases that concentrate on violation of rights is required of both the higher and the lower judiciary. Else miscarriages or travesties of justice and human rights can occur.

It is not suggested that whenever an application is made by a victim for redress the Court should also embark on a dissection of the phraseology in Article 11 of the Constitution and determine whether the gravity of an act would amount to torture or other ill treatment. All that is suggested is that if the Court merely comes to a finding that a given act is in violation of Article 11 it should not exhibit marked disparities and discrepancies in assessment of the quantum of compensation awarded to victims. If compensation is awarded on mere establishment of the violation of Article 11 of the Constitution, and not on the gravity of the offence committed, whether the act complained of be torture, inhuman treatment or degrading punishment, victims should be awarded equal or almost equal compensational amounts. The present practice of awarding different sums of money as compensation and cost to different victims who suffered the same or similar type of ill treatment from the law enforcing authorities smacks of discrimination which may lead to an infraction of another constitutional right of equal treatment guaranteed under the Constitution. Therefore, uniformity in assessment of compensation would bring in coherence and predictability which is an important element in assessing compensation.

It is submitted that if the finding is on the basis of the violation of Article 11 of the Constitution regardless of the limb under which the conduct is brought under judicial scrutiny, there ought to be uniformity and consistence, in the assessment and award of compensation.

Assessment of a minimum level of severity in a given situation may be problematic as it is essentially relative and depending on all

circumstances of the case, and elements of subjectivity and relativity will enter into the determination. All that is suggested here is that the specification that a questioned conduct amounts to torture, inhuman treatment or degrading punishment, would make the current practice of the Court awarding vastly different, disparate, amounts as compensation defensible. But the practice of the Court has been to refer to the violation of Article 11 generally without distinguishing between the different limbs of the terminology set out in Article 11. If the Court resorts to distinguishing the different links, it would be in a position to display some uniformity and consistency in assessment of compensation, than it does at present.

The time has come for the Court to bring the full rigours of the law into play against law enforcement officers who pay scant respect and regard for the fundamental rights of ordinary people.

It is time that the Court steered away from the beaten track and focused attention on the punitive aspect of compensation consciously, so that the compensation ordered against wrongdoers would have an impact on society, potential wrongdoers and on violations of fundamental rights. The punitive element should have a more effective role as deterrence in the context of happenings in the country. If the law enforcing authorities do not pay heed to established law, the judiciary should evolve suitable measures to meet societal needs. In a democratic society, fundamental human rights and freedoms guaranteed by constitutional safeguards should not be confined to be merely aspirations on paper. They form part of the law of the country. In a society ruled by law, public institutions, officials and law enforcing authorities must act in accordance with the established law. It is a primary task of judges to ensure that all branches of government conformed to established legal principles of a free society so that fundamental rights guaranteed by the Constitution will mean a reality. It is time the Court changed its outlook and attitude, particularly in cases involving basic fundamental rights of the people and display sensitivity

and adopted a realistic stand without allowing technicalities to frustrate its objectives. It is suggested that the Court should focus greater attention on actual wrongdoers than on the state in ordering compensation. If violation of a fundamental right is established, the Court should hold the wrongdoer mainly responsible for the violation and make the actual wrongdoer pay the whole of the compensation rather than making the state also contribute a part of it, as the Court has hitherto done. Making the actual wrongdoer alone liable is defensible in that the liability of the state in this instance is purely conceptual as exemplified by the observations made by Justice Kulatunga in the case of ***Jayathiran v. A.G.***

Wrongful acts of individuals are regarded as committed by the state. The state should not be made to bear the substantial or greater part of the compensation awarded. It is also pertinent to note that in recent decades, the plight of the victim has received increased international attention and the law demands that he be treated with understanding and respect, and his concerns be addressed in an effective way. In the Police Department's inquiry if it surfaces that a prima facie case can be established against any officer, that individual should be removed from functioning as a law and order enforcement officer, and further action follow against him. The force needs a professionally oriented education and training. Instead of the police depending on torture and brute force, it must rely on expertise and knowledge in conducting inquiries into crimes. People's organizations and the media should stress the necessity to transform the Sri Lankan Police not only into an intelligent, people-concerned body, but also into a capable investigative body. However complicated a crime may seem, penalties on those guilty of using force and torture in the police is a desideratum. Simultaneously, commensurate compensation should be made to victims of torture so that they could rehabilitate themselves and justice would be seem to have been done. Any errant police officer should bear a good part of the costs of compensation.

This is essential in order to turn the police into a healthy force, from a derelict one.

In deploring use of torture by the Sri Lankan police it is pertinent to recall that torture leaves an adverse impact on victims. This is all the more strong a reason for human rights organizations, non governmental bodies, community service establishments and religious bodies to take an active part in preventing practices of torture.[i] The evil of torture by police should also be countered by transforming the police into an honest, effective service.

It is suggested that a strong case can be made out for our Sri Lankan Supreme Court to assume universal civil jurisdiction in respect of acts of torture committed even abroad in the context of the CAT provisions, if the need for such assumption of jurisdiction were to arise. Such an innovative, vibrant approach on the part of the judiciary to the plague of torture would not only accord with the internally recognized human rights norms and standards but would also infuse life and blood to the law by creating an appropriate organ to meet the needs of the society. The legitimacy of the court assuming such universal civil jurisdiction in respect of torture would stand justified and strengthened by the status of the prohibition accorded to the offence of torture under International Law.

Availability and assumption of such universal civil jurisdiction in respect of acts of torture committed abroad would undoubtedly **accrue** to the benefit of a victim of torture who cannot expect to be adequately compensated by having recourse to criminal proceedings where the main objective is the punishment of the offender. That such assumption of universal civil jurisdiction is likely to pose problems should not discourage the effort to resort to it.

Faced with an escalation of egregious violation of basic human rights, if the international community has brought those suspected of outrages against humanity to justice at an international level before an

international body such as in the case of ***Rwanda and Yugoslavia*** with the objective of meting out condign punishment, no cogent reasons can be advanced against universal assertion of civil jurisdiction in respect of acts of torture committed abroad. If the basic rationale behind the creation of an international tribunal for Rwanda and Yugoslavia is the abhorrence of violence at international level, there cannot be any justification for denial of civil remedies for commission of torture by the assumption of universal jurisdiction. Therefore, it is suggested that the principles of international law which justify the assertion of universal jurisdiction in respect of horrendous violation of basic human rights could also be used to reinforce and bolster an argument for the exercise of universal civil jurisdiction against torture particularly in a scenario of persistent and systematic violation of basic human rights.

Security forces in Sri Lanka have to know and abide by the aspects of the law of armed conflict on land and sea as defined by laws, and they prohibit torture, as do the provisions of the Geneva Conventions which gained force in 1954. These have been accepted by almost all states and form a conventional base for the modern law of armed conflict. Sri Lanka seems, in practice, to have not paid much attention to observe the laws of governing armed conflict requiring States to avoid recourse to torture or cruel inhuman and degrading treatment.

The extent to which human rights had been, or are respected, and protected, within the context of criminal proceedings particularly during investigations into crime, is an index to a society's civilization and judicial governance. It is important that the violations of fundamental rights protecting an accused person are judged with this honourable objective apart and separately from strictly adhering to the law governing evidence which is gained by witness testimony and oral evidence and thereby decide whether the state authorities have

secured the fundamental rights of an accused person, or violated them by merely using other means.

As detention always gives victims or others grounds for fearing serious threat to physical and mental integrity, if all forms of detention and other measures affecting liberty of persons are brought under effective control of judicial authority, it would afford the strongest possible guarantee against infliction of torture and other ill-treatment.

In torture cases, an exaggerated adherence to, and heavy insistence upon, a large degree of proof almost equivalent to the standard of proof beyond reasonable doubt, oblivious to realities and peculiar circumstances of a given case could create a miscarriage of justice, denying due relief to helpless victims. This would only encourage perpetrators of torture to act with impunity and without fear. It would, therefore be important for the court to take cognizance of peculiar circumstances, if any, associated with cases of torture.

It is in the nature of torture and allied malpractices that they occur away from independent witnesses. Even if there are witnesses, they are often terrified to testify to the incident. The torturer also ensures generally that there remains no tell-tale physical or other recognizable marks of injuries. Torture moreover is usually committed while the victim is excluded from contact with the outside world. In such contexts it is unrealistic to expect direct evidence necessitated to establish a high degree of proof akin to proof beyond reasonable doubt as enunciated in authorities.

The Court should be alive to difficulties a victim of torture has to face in establishing the violation of the right to be free from torture. No doubt the Courts have, in cases, pronounced that the civil standard of proof, or proof on a balance of probabilities is applicable in cases of torture, still the reasoning adopted in the case of ***Thadchanamoorthy v. A.G.***[ii], ***Velmurugu v. A.G.***[iii] and ***Saman v. Leeladasa***[iv], discussed above and other cases analyzed for the burden of proof to establish torture gives the impression that a very high degree of proof, almost

akin to proof beyond reasonable doubt, is being insisted upon. All that is suggested is that a degree of proof as low as 51 percent would constitute sufficient proof in view of the difficulties inherent in proving an allegation of torture. But how the 51% is unerringly counted is perplexing indeed.

Rules of evidence, which take varied forms determine what issues or facts should be proved, who should prove them and the standard of proof by which they should be established. The rules particularly in regard to technically admissible evidence, need a judicial reappraisal in the context of the prosecution of offenders who are accused of mass scale horrendous violation of fundamental rights, such as torture. This would be all the more important in the context of violation of fundamental rights committed by state officers Including mass torture, brutality, inhuman treatment, extra judicial killings associated with the mass disappearances and forcible removals.

It would be conducive to the attainment of justice, in situations of this nature, for the court to act solely on the oral evidence given by witnesses in court without placing reliance on the statements, or contradictions obtained on the basis of these statements. The constructing rationale for the exclusion of technically admissible evidence in these circumstances should be whether the circumstances in which the witnesses placed were conducive to permitting reliable statements. Sri Lanka's judicial system stands overburdened. On the face of this situation, an enlightened system of justice may become a dire need.

With a view to increasing the rate of successful prosecution of perpetrators of torture, and eliminate the sense of impunity that prevails among the police and other security forces, particularly in the context of domestic Act No. 22 of 1994, which ratified the International Convention against Torture many initiatives on the part of the state may be necessary. Judicial mechanism is often seen as the paradigmatic modality for providing the victims and their families an

effective means by which perpetrators could be held accountable for their actions. Apart from holding the individuals accountable for their actions, judicial mechanism can provide a powerful signal against impunity. Its ability to hold the perpetrators responsible for their actions would demonstrate the state's commitment to judicial redress in cases of human rights violations. If the judicial mechanism is hamstrung by procedural and substantive rules in the process of successful prosecution of perpetrators of violence, the whole system is bound to lose the confidence of the people. Therefore, removal of all the procedural obstacles in the forms of rules of evidence that lie in the path of successful prosecution of torture cases, particularly in the circumstances of crisis, as described above, should be one of the initiatives to be considered by the state as well as the judiciary.

Going beyond the literal interpretation the strong dissenting judgment of His Lordship Justice Kulatunga in Jayathiran's case recognized the right of dependents and heirs to seek relief in situations where torture resulting in personal injury is alleged to have occurred. This decision which takes a liberal view, taking into consideration the spirit of the Constitutional norms, needs to be preferred in adjudicating constitutional issues.

Although it would be difficult to achieve uniformity in the interpretation of basic fundamental rights guaranteed under the Constitution in conformity with the basic concepts and principles of international human rights, as the provisions in major human rights instruments are not similar or identical, Sri Lanka's Supreme Court should not consider that the jurisprudence developed in other jurisdictions are wholly irrelevant. If the provisions of major human rights instruments are similar or identical, the jurisprudence of other jurisdictions in relation to comparable rights or freedoms guaranteed under our Constitution could be referred to and applied to accord fullest measures for freedom.

Prevention of torture is the imperative.[v] Education of soldiers and the police on human rights would need to be compulsory, and among them should be cultivated a respect for and a duty to honour human rights. Additionally, monitoring carefully the places of detention, and quite immediately, so that the police and the army would be more unlikely to torture detainees or arrestees, is essential. Task Force tried to do this. Deterrent punishment of torturers will discourage torturing. Dismissal, not promotion, of torturing officials, would be essential requirement if torture is to lessen. Also, easy and economical access to courts for those tortured will contribute to decrease inhuman treatment. High Courts in provinces, and an extension of the time-bar on moving courts, will also usefully prevent or lessen frequency of torture. Epistolary procedure in courts will help victims better. Instead of an adversarial procedure adoption of an inquisitional process will aid easier unraveling of torture cases. Judges then could probe and uncover facts. Publicity to torture cases will alert public opinion against it.[vi] The civil society may then vigorously campaign against commission of torture. The Human Rights Task Force, despite a strong effort, gained little having better resources at its command it did better than the office of the Ombudsman.

Incommunicado detention and exclusion of the media from operation between combatants have largely helped Sri Lanka to avoid being exposed for commission of torture during conflict. However Amnesty International and other similar organizations have brought to light the grievous dereliction of the Sri Lankan armed forces and cases of human rights violations brought to trial have also demonstrated that torture was not uncommon in the days of conflict.[vii]

It is believed that only by dismantling the patriarchal social order and by increasing women's autonomy that the issue of violence against women can be effectively confronted. Seeking redress by way of fundamental rights procedures for violence suffered by women at the hands of private actors on the basis that the state has violated

fundamental principles relating to non discrimination, and equal protection law, by its failure to take effective measures to prevent the phenomenon of violence against women, would be possible only if the judiciary is prepared to give an innovative and expansive interpretation to fundamental procedure. For this purpose the judiciary would have to constantly evolve new and realistic methods of interpreting the law and devise appropriate techniques. The judges would have to be constantly responsive to the needs and claims of the social order in this respect. As the approach to violence committed on women in the private sphere would require far more documentary and other evidence than would be sufficient to establish a case of violence committed by the state or by its agents, a constitutional amendment to bring within the protective umbrella of the Constitution violence in the form of torture or other ill treatment committed on women in the private sphere, shall have to be considered. The judiciary can play a constructive role in this regard by suggesting necessary amendments to the Constitution whenever the occasion arises. Ineffectiveness of the justice system in addressing the violence committed on women in the domestic sphere has contributed towards the abject subordination and helplessness of the victims. [viii]

It would seem obvious that death penalty is rather causing torture to humanity than diverting human beings from indulging in homicides and desisting from murders. If one is to avert this sort of torture the best way would be to abolish capital punishment. To reintroduce the death penalty now, it would be really a short term panacea offered by expedient politicians. The law and order machinery has been polluted by politicization, and the morale in the police service is low as promotions go by political favour. Training of the present day police is inadequate and ineffective. The purpose of punishing those who are presently serving commuted life sentences is likely to be more effectively served than by killing wrongdoers or murderers. It would be a retrograde step to revise the suspended death penalty if judicial murder stands equated with torture.

The fear that crime escalated over the years when penalty of death by hanging was suspended is merely founded on emotional than real reasons.[ix] Before the country revives the outdated, barbarous, torture of execution, cautious study of crime, of investigation and of law and order maintenance in Sri Lanka would be a prerequisite, especially as studies in Sri Lanka and abroad has demonstrated that abolition of capital punishment does not increase mortal crime. Other causes that affect the crime rate should be removed.[x] ."[xi] Clearly the torture of the death penalty is contrary to the fundamental right to life. There is no reason for a democracy like Sri Lanka to allow capital punishment to remain in its books. Therefore, it is desirable that Sri Lankan authorities looked beyond the case law of their own legal system and drew on the international experiences in this field of corporal punishment and the law, and bring about suitable changes in their law.

All evidence available confirms that Sri Lanka needs to be more energetic, alert and active in adopting steps to enhance the safeguarding of human rights, and reducing the practice of torture. She has to set up an effective institutional framework for the prevention of torture and allied cruel, degrading treatment. An official policy of protecting human rights and freedom from torture should be popularized, and political parties and people must be committed to ensure that it happens. Judicial inquiry should be mandatory in allegations of torture, and rape, and death in custody. Reports of torture, rape and death in custody in the civil media, and civil liberties observations should be immediately investigated, impartially and independently. Judges should be provided the necessary resources and power to carry out their inquiries effectively. Powers to compel witnesses to attend and supply documentary evidence would be absolutely needed.

All concerned authorities should be directed that torture stands forbidden. There should be a system created whereby the police and security forces can be held accountable for acts of torture. Those who

wish to sue any on account of torture suffered, and even their kith and kin who want to, should have a legally protected right of access to documentary evidence inclusive of police and official records. Even special prosecutors to supervise and, if necessary initiate, prosecutions of police and security officers would need be appointed so as to discourage perpetration of the crime of torture.

The government would have to ensure that the prevailing legal safeguards against torture are respected in all cases. Detainees should be produced before a magistrate without delay and women and children need not be taken to police stations for investigation or to security camps for interrogation. Detainees should be formally informed of their rights by officers in charge of police stations. Lists of such rights could be exhibited in cells and police stations. Police and security forces should be trained to uphold human rights. The police and armed service officers should be educated in rights and tested.

Apart from paying condign compensation to victims who suffered cruel and inhuman, degrading treatment and torture, victims of brutality police from or armed forces should be provided also with medical treatment and rehabilitation. The causes for, and patterns of, torture or cruel treatment should be examined and measures to prevent the commission of such acts should be prepared and implemented after scientific study.

As this study demonstrates police and armed forces have shown in Sri Lanka a ready predilection and an immediate propensity to resort to torture. This weakness has to be removed from the law and order machinery as quickly and as far as possible as this scrutiny indicates as necessary after examination and analysis of conditions in the island. If prosecutors like those in the Attorney General's service are enabled to exercise greater control over police prosecutions it would help to reduce the use of torture, degrading cruel treatment and illegal questionable long detention. The police should be held accountable to legally set up institutions if they are to be deterred from

using torture to try and prove cases against irregularly arrested persons.

The effective implementation of fundamental rights would depend on the extent and manner of their enforcement by the judiciary of the country. Therefore, provision for, and availability of easy access to justice, and redress for violations, should be of the utmost importance, and indeed strongly needed. The obtaining of redress by an aggrieved party should not be hindered or inhibited by technicalities and legal concepts. The judiciary through liberal interpretation and fair application of fundamental rights should lend substance and dimension to the norms and principles adumbrated by the constitutional guarantees. It is the judiciary which alone can translate the aspirations of the people embodied in the fundamental rights into reality by providing access to justice and remedies for violations of their rights. As Justice Kulatunga in the case of ***Somawathie v Weerasinghe*** in his dissenting judgment, which can be considered a forerunner to the decision in ***Sriyani Silva's*** case observed "if fundamental rights are to have any meaning particularly to the weak and helpless persons whose freedom to have prompt recourse to this Court by himself or by an attorney at law is impeded due to circumstances beyond his control, it is the duty of this Court to construe Article 126(2) purposively and not literally". Fundamental rights would prove to be of no avail, if they are not secured from arbitrary interference by the executive, legislative and administrative arms of the government. It is therefore the duty of every judge to protect and defend every fundamental right to the fullest possible extent with a view to ensuring that fundamental rights are always kept fundamental, as they are intended to be by the Constitution.

In this connection what the Indian Judiciary has persistently endeavoured to achieve by dismantling the complex court procedure which impeded access to justice would be worthy of emulation by the judiciary of this country. Although Sri Lankan Court could greatly

benefit by high degree of cross fertilization by relying on the jurisprudence of other jurisdictions in interpreting constitutional provisions, it should guard itself from wholesale importation of material from other jurisdictions, particularly when those materials apply to different contexts.

All cases which involve police torture need to be examined according to Act No.22 so as to file criminal action. Serious action is imperative if public resentment of police is to abate.

Departmental disciplinary inquiries too would be required as they could help to dissuade other police personnel from indulging in a perverse manner of investigation. Such action, speedily and impartially, will help to instill confidence in the police force as a State organization to safeguard the people.

The Human Rights Commission can aid in the initial stages of investigations into alleged torture by collecting information that would assist in filing of cases. Moreover, the Human Rights Commission should educate the public of their rights and make citizens aware of Act No. 22 of 1994 showing that torture is strictly a punishable offence. Law enforcement officers particularly need such education and training that within their premises or outside, torture is prohibited, and is a punishable offence carrying a mandatory seven-year prison sentence. It is unavoidable to arrive at the conclusion that Sri Lanka requires more imaginative, better endowed and strongly empowered machinery to which infringements of the human right to be secure from torture, cruel, inhuman and degrading treatment could be reported by victims, and condign redress sought. Cosmetic institutions, more to satisfy aid donors, demonstrating that Sri Lanka respects human rights, do not help. They only provide the means to dole out patronage often.

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibits in absolute terms torture or inhuman or degrading treatment or punishment. It is one of

the absolutely categoric of Convention guarantees, and provides a minimum standard to which a state must conform. Sri Lanka has to acknowledge this fact and act in terms of this human right to prevent it getting infringed. Quite firmly, it is asserted that "Self evidently every human being has a natural right not to be subjected to inhuman treatment."[xii] Moreover, it is "a right inherent in the concept of civilization, it is recognized rather than created by international human rights instruments such as the Universal Declaration of Human Rights 1948, the International Convention on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms..."[xiii] "Breaches of the right to be free of torture or degrading treatment cannot be justified by lack of resources."[xiv] Sri Lanka should accept this point.

Unlike most of the substantive clauses of the Convention and of Protocols I and IV, Article 3 makes no provision for exceptions and derogations, be they expressed or implied. The extreme gravity and cardinal character of the human right to be free from torture, inhuman and degrading treatment makes it important and compulsory for Sri Lanka to fortify its measures and organizations to thwart the commission of torture and inhuman, degrading treatment or punishment.

It is not other state institutions but an expansion of the Supreme Court that could help in clearing cases of infringements of the right to be free from torture and cruel, inhuman degrading treatment. Sri Lanka could appoint some Commissioners of Assizes to sit in outstations and hear and adjudicate in cases of violations of human rights. These Commissioners of Assizes should be of equal status with the Justices of the Supreme Court and senior competent legal personalities. This arrangement may be for a period of time, as once Sri Lanka did, to clear backlog of cases in the Appeal Courts.

Another useful step to grapple with the problem posed by the crime of infringing the fundamental right to freedom from torture, cruel inhuman and degrading treatment is the creation of a special trained branch of the police. The recruits into this special cadre of security officers should be well educated in human rights and trained in detective and investigative methods that abjure recourse to violence. These officers may be granted special incentives and increments as rewards to motivate them in order to perform dedicated services. The suggestions outlined above if executed, may better help alleviate the evil of torture and degrading punishment or treatment more than national institutions to protect and promote rights. It is time that the Sri Lankan judiciary did not remain inert and insensitive to better ways of ensuring equity to citizens to grow meaningful.

Ready acceptance of police versions invariably lead to violation of fundamental rights such as freedom from torture, inhuman and degrading treatment against which all are entitled to protection. The Constitution is jealous of any infringement of fundamental rights. The care is not to be exercised lethargically, because the subject whose human dignity is in question may not be an important one.

It is evident that states are vested with universal jurisdiction in matters of universal concern to the international community. Every state has an interest and duty under international law in ensuring that violations of basic human right norms are not committed by another state. Keeping this objective in view, as already noted, the states would stand obliged to assume universal criminal jurisdiction in respect of egregious violations of basic human rights norms such as crimes against humanity, genocide and torture. What is contended here is that the argument advanced in the context of universal criminal jurisdiction can also be used in the assumption of universal civil jurisdiction in respect of acts of torture. If extraterritorial assertion of criminal jurisdiction can be justified by having regard to the gravity and the enormity of the human rights violations, there is no reason why

torture which is condemned by the international community, should not provide the ground for an extra territorial action for a civil claim. That violation of basic human rights such as torture or slavery is not regarded as a civil wrong by international law should not deter states from asserting universal jurisdiction in respect of acts of torture committed abroad. If the prevention of torture is the concern of the international community, and has led to the adoption of many specific multi-lateral international and regional instruments and conventions dealing with the subject, there is sufficient justification for the assertion of universal civil jurisdiction in respect of acts of torture. If the question of assertion of universal civil jurisdiction by reference to international norms in the absence of international treaty and enabling legislation would be problematic to states, the feasibility of asserting universal civil jurisdiction, at least in the context of the CAT would need some consideration. When provisions of the CAT are examined, it would become evident, although it permits states to assume universal criminal jurisdiction in respect of acts of torture committed abroad, it does not cast such express and explicit obligation on states for the assumption of universal civil jurisdiction in respect of acts of torture. The only Article which makes provision for civil jurisdiction is Article 14 of the CAT.

In terms of this provision the state parties are required only to ensure that victims of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible, an objective which the ICCPR also has by its Article 2(3). This could be regarded as providing for an effective civil remedy. There is nothing in the CAT or in the ICCPR which would suggest that a court could take cognizance of only acts of torture which have taken place in its own state.

The judiciary of Sri Lanka too could exhibit a vibrant and robust attitude by entertaining civil actions in respect of torture committed abroad against the perpetrators of systemic violations of human rights whenever occasion demands.

[i] For an idea of the horrible situation see Civil Rights Movement, CRM Catalogues Complaints of Thuggery, Civil Rights Movement, Colombo, E/05/10/81.

[ii] Thadchanamoorthy v AG, Note 15

[iii] See Note 1

[iv] Saman v. Leeladasa (1989) 1 SLR 1

[v] ibid. p 32

[vi] ibid. p. 32

[vii] See Asian Human Rights Commission, Monitoring – The Right for an Effective Remedy for Human Rights Violations, Implementation of Article 2 of ICCPR (Asian Human Rights Commission, Hong Kong – March 2001) see pp 7 – 22; 31 – 44; also Elizabeth Nissan. Sri Lanka: A Bitter Harvest (Amnesty International, London, January 1996) for more of similar information and practices.

[viii] Ibid. p. 163.

[ix] Fr. Dalston Forbes, "The death Penalty – points to ponder", Daily News Monday March 10, 2003 (Colombo) p. 9.

[x] T.S. Rajapakse, Is Gallows the Answer? See commentary in The Island, Friday April 11, 2003.

[xi] Henry J. Steiner and Philip Alston: International Human Rights in Context: Law, Politics, Morals" (Oxford University Press, Oxford, 2000) p. 41.

[xii] John Cooper: Cruelty – an analysis of Article 3, Sweet and Maxwell, London, 2003. See Chapter I, p 7

[xiii] ibid.

[xiv] ibid.